COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1448 **Cir. Ct. No. 89CF890510**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES ROGERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Charles Rogers appeals from an order dismissing his motion for WIS. STAT. § 974.06 (2001-02)[1] relief from a criminal conviction.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Rogers raised various issues concerning his 1989 prosecution for first-degree intentional homicide and also alleged newly discovered evidence. The trial court held that previous opportunities for review of his conviction precluded any further review of the 1989 proceeding. The court also denied Rogers' claim based on the new evidence. We affirm those determinations.

¶2 Rogers was convicted on charges of first-degree intentional homicide and battery after a jury trial. One of the witnesses who testified against him was Kenneth McHenry of the Milwaukee Police Department. Rogers decided to seek postconviction relief and received appointed counsel. In 1991, after concluding that postconviction proceedings would be frivolous, counsel filed a no-merit appeal. Counsel's no-merit report identified a number of potential issues, including ineffective assistance of trial counsel. This court provided Rogers an opportunity to respond to the no-merit report, but he did not do so.

¶3 On independent review, this court affirmed Rogers' conviction, agreeing with counsel that Rogers could not meritoriously pursue postconviction relief. The independent review did not include trial counsel's performance because appellate counsel did not first raise the issue of trial counsel's performance in the trial court. That was an error in the opinion because the purpose of the no-merit review is to determine whether the potential exists to raise the issue in the first place. *See* ***Anders v. California***, 386 U.S. 738, 744 (appellate court must conduct full examination of all proceedings). Additionally, requiring postconviction motions prior to no-merit appeals puts appellate counsel in the untenable position of having to bring motions they consider frivolous in order to preserve the ***Anders*** review. *See* SCR 20:3.1 (2002) (lawyer may not knowingly advance a frivolous claim). However, despite this error, Rogers did not petition for review in the supreme court.

¶4 Rogers did seek subsequent relief by habeas corpus petitions filed in the supreme court and in federal court. He then returned to this court with a 1996 petition alleging that appellate counsel ineffectively failed to preserve the issue of trial counsel's performance in his no-merit appeal. This court denied the petition because it failed to identify the specific deficiencies in trial counsel's performance that might have supported an ineffective assistance of counsel claim. Without those specifics, we concluded that Rogers had not made a sufficient showing of prejudice at the appellate level.

¶5 Other petitions to this court, the supreme court and federal court followed. Finally, in April 2003, Rogers commenced the present action for WIS. STAT. § 974.06 relief. His petition presented claims of ineffective assistance of trial counsel, supported by extensive citations to the record; prosecutorial misconduct; improper joinder of charges; and error in allowing the jury to see "entrinsic [sic] material" during deliberation. He also submitted evidence that McHenry committed perjury while testifying in an unrelated homicide prosecution as newly discovered evidence entitling him to a retrial.

¶6 In the decision under appeal, the trial court determined that the holding in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), barred further review of the 1989 proceeding. The court further concluded that the evidence of McHenry's 1991 perjury did not create a reasonable probability of a different result on retrial.

¶7 Under ***Escalona-Naranjo***, as it interprets WIS. STAT. § 974.06(4), any claim that the defendant could have raised in a direct appeal or in a previous WIS. STAT. § 974.02 or § 974.06 postconviction proceeding is barred in a subsequent § 974.06 proceeding, absent a sufficient reason. ***Escalona-Naranjo***,

185 Wis. 2d at 184. This rule also applies to any issue actually litigated earlier in any proceeding. Section 974.06(4). Here, on all claims of error besides the ineffectiveness of trial counsel issue, Rogers could have raised them in the no-merit proceeding and therefore cannot do so now.[2] With regard to trial counsel's performance, even if the no-merit proceeding does not count against Rogers because of our error in refusing to consider the issue, the fact is Rogers received the opportunity to litigate it in the 1996 habeas proceeding. Under § 974.06(4), the habeas proceeding barred relitigating the issue in 2003. We conclude Rogers is barred from relitigating issues already resolved in previous proceedings or were otherwise waived by his failure to raise them previously.

¶8 We also conclude the trial court properly rejected Rogers' newly discovered evidence. To prevail on a claim of newly discovered evidence, the defendant must show a reasonable probability of a different result on retrial. ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). Here, the trial court reasonably concluded that McHenry's perjury, two years after the fact in a completely unrelated case, was not a fact that would result in an acquittal on retrial. McHenry was not by any means the State's most important witness and the prosecution's case was very strong even without McHenry's testimony. Furthermore, perjury in one case would not necessarily require an inference of perjury in another.

[2] Rogers contends that ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 174, 186, 517 N.W.2d 157 (1994), was not the law in 1991 and therefore cannot be applied to bar litigation of issues he did not raise then. However, the ruling in ***Escalona*** upheld dismissal of WIS. STAT. § 974.06 motions. Escalona-Naranjo filed his motions in 1990 and 1991. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 175. If the holding applied to Escalona-Naranjo's 1991 motion, it most certainly applied to Rogers' 1991 appeal.

¶9 Additionally, one seeking retrial on newly discovered evidence must also show diligence in discovering it. ***State v. Behnke***, 203 Wis. 2d 43, 53-54, 553 N.W.2d 265 (Ct. App. 1996). Rogers offered no explanation why he did not discover the 1991 perjury until 2003. This requirement of diligent discovery is comparable to the doctrine of laches, which bars claims that are unreasonably delayed to the other party's prejudice. *See* ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). Rogers' delay of twelve years in bringing this claim was unreasonable and prejudicial under any reasonable view.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.