COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3239 **Cir. Ct. No. 99CF003251**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD D. TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Gerald D. Taylor appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2001-02)[1] motion. Taylor claims the trial court

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

erred when it denied his motion. Because Taylor's claims are procedurally barred pursuant to ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and are non-meritorious, we affirm.

BACKGROUND

¶2 On June 30, 1999, Taylor was charged with two counts of first-degree sexual assault of a child. On September 30, 1999, he entered no contest pleas to both charges pursuant to a negotiated plea agreement. On November 12, 1999, he was sentenced to thirty years on each count, consecutive. Taylor filed a postconviction motion seeking resentencing, which was denied. Taylor then filed a direct appeal to this court, again raising sentencing issues. We affirmed the judgment of conviction on July 19, 2002, ruling that the trial court did not erroneously exercise its discretion with respect to Taylor's sentences. Taylor's petition for review to the supreme court was denied.

¶3 On September 12, 2003, Taylor filed a *pro se* motion pursuant to WIS. STAT. § 974.06. In it, he raised numerous claims: (1) that his plea was invalid because counsel promised him a short prison term if he agreed to the plea; (2) counsel pressured him into accepting the plea agreement, and misled him with regard to the plea; (3) counsel told him to answer "yes" to all the questions asked by the court at the plea hearing; (4) the State misrepresented the facts to the defense by claiming it had DNA proof and this information was used against him at sentencing; (5) the sentencing court was biased because the victim's grandfather was a deputy sheriff and his grandmother was a probation officer; (6) the bail he received at the initial appearance was higher because the victim's grandfather appeared at the hearing in uniform; (7) the trial court focused on the grandparents'

employment when imposing sentence; and (8) the prosecutor violated the plea agreement.

¶4 The trial court denied the motion ruling that these claims were all procedurally barred by ***Escalona-Naranjo***. The trial court also concluded that each of Taylor's claims was without merit. Taylor now appeals from that order.

DISCUSSION

¶5 As set forth above, Taylor had an opportunity to raise all of these issues in his direct appeal. According to ***Escalona-Naranjo***, a defendant must raise *all* grounds for postconviction relief in his or her original motion or appeal. The reason for this is that we need finality in our litigation. ***Id.***, 185 Wis. 2d at 185. Accordingly, if a defendant raises issues in a subsequent postconviction motion, which could have been raised in the earlier motion or appeal, we hold that the claims are procedurally barred absent a sufficient reason for failing to raise the claims previously. ***Id.***

¶6 All of Taylor's claims could have been raised in his direct appeal. The reason Taylor offers for failing to raise these issues in the earlier appeal is ineffective assistance of counsel. Thus, we examine whether Taylor's claim of ineffective assistance of counsel constitutes "sufficient reason" for failing to raise the claims in the earlier appeal.

¶7 In order to determine whether an ineffective assistance claim constitutes "sufficient reason," we must examine whether Taylor satisfies his burden of alleging facts which, if true, would prove that counsel was both deficient and that the deficiency prejudiced the outcome of this case. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***Nelson v. State***, 54 Wis. 2d 489, 497-98,

195 N.W.2d 629 (1972). Our review demonstrates that Taylor fails to satisfy the requisite standards.

¶8 We lump all of Taylor's "plea-related claims" together. Although Taylor raises numerous complaints about counsel regarding his pleas—including that counsel pressured him, counsel misled him, counsel instructed him to answer "yes" to all questions, and counsel promised him he would receive a short sentence if he entered pleas—his claims are nothing more than conclusory allegations that are not supported by the record. For example, the record reflects that during the plea colloquy Taylor understood the trial court was not bound to follow the sentence recommendations made by the State, he told the court he was not pressured or coerced and there is no indication to support Taylor's claims to the contrary after the fact. He simply makes the assertions. This is insufficient to satisfy his burden of proving that counsel's actions constituted deficient performance. Accordingly, if he cannot sufficiently prove his allegations of ineffective assistance, then it logically follows that ineffective assistance is not a sufficient reason to raise these issues in a subsequent postconviction motion. These claims, therefore, are procedurally barred.

¶9 The next group of Taylor's complaints relate to judicial bias/conflict based on the fact that the trial court knew the victim's grandparents and that the victim's grandparents worked for the court system. Taylor alleges that this adversely affected his sentence. Sentencing issues were raised and rejected in Taylor's direct appeal. Taylor's attempts to tie the lengthy sentence to the victim's grandparents' employment status is simply another attempt to re-argue that his sentence was unduly harsh and excessive. We rejected this sentencing argument when it was raised on direct appeal and see no reason to allow Taylor to re-raise it under the guise of judicial bias. Taylor has failed to present this court

with any credible evidence to suggest that the trial court was biased against him because of the victim's grandparents. Accordingly, we hold his claim is procedurally barred.[2]

¶10 Taylor also claims that the State misrepresented to defense counsel that DNA proof and medical evidence matched Taylor and that a plea was his best option. He suggests that the trial court relied on this erroneous information in determining his sentence. The claims relating to this issue are wholly without merit. Taylor has presented nothing, except his contentions, that the DNA and medical evidence did not link him to these crimes. He has not shown how this information was erroneous. Accordingly, we reject this claim.

¶11 Finally, Taylor contends the prosecutor breached the plea agreement at sentencing by making statements that the victim's family wanted Taylor to receive the maximum sentence, that the maximum sentence was appropriate and that if his daughter was the victim, he would not offer a plea agreement, but would recommend the maximum sentence.

¶12 In reviewing this issue our standard is mixed; we review historical facts under the clearly erroneous standard. ***State v. Williams***, 2002 WI 1, ¶2, 249 Wis. 2d 492, 637 N.W.2d 733. However, whether the State's conduct constituted a material and substantial breach of the plea agreement is a question of law, reviewed independently. ***Id.***

[2] We also reject Taylor's claim that bias affected his bail amount at the initial appearance. By entering pleas to the crimes charged, he waived his right to raise this issue.

¶13 The plea agreement in this case was that the State would recommend a prison sentence of fifteen years on count 1 and an imposed and stayed sentence of twenty-five years on count 2, with twelve years of probation to run consecutive to count 1. At the sentencing hearing, the prosecutor accurately recounted the plea agreement to the court. When he was expressing the wishes of the family, however, the prosecutor advised the court that the victim's family is asking for the maximum sentence of eighty years and that "the maximum is appropriate." The prosecutor also stated that if the victim was his daughter, he would not make the recommendation he agreed to in the plea agreement here, but would recommend the maximum.

¶14 Taylor argues this constitutes a breach. We disagree. It is clear from the context of the sentencing hearing that what the prosecutor was conveying to the court was the victim's family's feelings that the maximum sentence was appropriate. As the State points out, the prosecutor goes on to explain to the court that maximum sentences are reserved for the worst offenders and that Taylor does not fall into that category. He advised the court that he felt a fifteen-year sentence was fair for Taylor and recited the remainder of the terms of the plea agreement.

¶15 We disagree with Taylor that the prosecutor's statements constituted a material and substantial breach. The prosecutor clearly complied with the agreement by recommending the terms to which Taylor agreed. When the prosecutor was conveying the victim's family's feelings to the court, that information was separate and distinct from the prosecutor's recommendation, and although the prosecutor certainly could have left his personal comment regarding his daughter out of the explanation, this was at worst a technical breach. *See* ***id.***, ¶¶37-38.

¶16 Based on the foregoing, we conclude that the claims Taylor raised in his WIS. STAT. § 974.06 motion are either procedurally barred or nonmeritorious. Accordingly, the trial court did not err in denying his motion. We affirm.

By the Court.—Order affirmed.

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