COURT OF APPEALS DECISION DATED AND FILED

January 10, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2011AP336-CR **Cir. Ct. No. 1984CF9373**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILLIP WAYNE HARVEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Phillip Wayne Harvey, *pro se*, appeals from an order of the circuit court denying his motion for sentence modification. The circuit court concluded that Harvey's claims were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). We agree and affirm.

¶2 In 1985, Harvey was convicted of one count of kidnapping while armed as party to a crime; three counts of armed robbery as party to a crime; three counts of first-degree sexual assault as party to a crime; and four more counts of first-degree sexual assault. Harvey pled no contest to the kidnapping and armed robberies, and he entered ***Alford***[1] pleas to the sexual assault charges.[2] He was sentenced to a total of 100 years' imprisonment: ten years for the kidnapping and nine years on each of the remaining ten counts, all to be served consecutively. Harvey's convictions were ultimately affirmed on direct appeal. *See* ***State v. Harvey***, 139 Wis. 2d 353, 407 N.W.2d 235 (1987).

¶3 In 2004, Harvey filed a *pro se* postconviction motion for sentencing modification, raising issues relating to parole policy and perceived *ex post facto* violations. The circuit court denied the motion, and we affirmed. *See* ***State v. Harvey***, No. 2004AP2337-CR, unpublished slip op. (WI App July 6, 2005).

¶4 In January 2011, Harvey filed another motion, captioned as a motion for sentence modification and seeking to have his sentences run concurrently. He raised several issues, including multiplicity, disparity in sentencing with a co-actor, and the performance of counsel. He further asserted that ***Escalona*** should not bar his issues because he claimed counsel should have raised them in his first appeal. The circuit court rejected Harvey's motion because it offered no reason for failing to raise the issues in his 2004 motion. Harvey appeals.

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[1] *See* ***North Carolina v. Alford***, 400 U.S. 25, 37 (1970).

[2] For a detailed discussion of the facts underlying Harvey's convictions, see the procedural background set forth by the supreme court in ***State v. Harvey***, 139 Wis. 2d 353, 407 N.W.2d 235 (1987).

¶5 As an initial matter, we note that although Harvey attempted to categorize issues in his motion as "new factors," he actually alleges claims of the kind contemplated by WIS. STAT. § 974.06(1) (2009-10),[3] claims that his sentence "was imposed in violation of the U.S. constitution or the constitution or laws of this state[.]" Specifically, Harvey alleges due process and double jeopardy violations stemming from alleged multiplicity of charges; what amounts to an equal protection violation by claiming sentencing disparity compared to his co-actor; multiple instances of ineffective assistance of trial and postconviction/appellate counsel; and prosecutorial misconduct. Thus, because courts are not bound by the parties' labeling of documents, we conclude that Harvey's current motion was properly treated by the circuit court as a species of § 974.06 motion.[4]

¶6 WISCONSIN STAT. § 974.06 permits some claims for relief to be brought after the time for appeal or other postconviction remedies expired. *See* WIS. STAT. § 974.06(1). However, "[a]ll grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion." *See* WIS. STAT. § 974.06(4). The phrase "original, supplemental or amended motion" also encompasses a direct appeal, *see* ***State v. Lo***, 2003 WI 107, ¶32, 264 Wis. 2d 1, 665 N.W.2d 756, and the requirements of § 974.06 apply even to claims of constitutional magnitude, *see* ***Lo***, 264 Wis. 2d 1,¶31.

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[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[4] Harvey's "new factor" approach is, in any event, undeveloped on appeal. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶7 If a defendant's grounds for relief "have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a [WIS. STAT. §] 974.06 motion" except if, in the case of a failure to previously raise the issue, the court finds sufficient reason for the failure. ***Escalona***, 185 Wis. 2d at 181-82. It is not necessary for prior motions to have been brought under § 974.06 for there to be a preclusion of issues that were raised in a current motion and which were or which could have been raised in those prior motions. *See* ***Escalona***, 185 Wis. 2d at 181. Whether claims brought under § 974.06 are barred is a question of law we review *de novo*. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶8 Relying on ***Liegakos v. Cooke***, 928 F. Supp. 799 (E.D. Wis. 1996), Harvey asserts that ***Escalona*** cannot be retroactively applied as a bar against issues not raised in his original direct appeal.[5] Harvey is mistaken.

¶9 Liegakos was convicted in 1986 and had a direct appeal that raised fourteen claims of error, but not issues regarding his right to testify or the effective assistance of counsel. ***Liegakos***, 928 F. Supp. at 803. His conviction was affirmed in 1987. ***Id.*** In 1992, Liegakos filed a postconviction motion under WIS. STAT. § 974.06, raising issues regarding his right to testify and counsel's performance. ***Liegakos***, 928 F. Supp. at 803. The motion was denied by the circuit court. ***Id.*** On appeal, the State argued for the first time that the motion should be procedurally barred under a proper interpretation of § 974.06. ***Liegakos***, 928 F. Supp. at 803. ***Escalona*** was pending before our supreme court at

[5] Harvey calls it his "first right appeal," though he evidently means to refer to his first appeal as of right.

that time; Liegakos's appeal was placed on hold pending ***Escalona***'s resolution. ***Liegakos***, 928 F. Supp. at 803.

¶10 ***Escalona*** was released on June 22, 1994. Relying on its holding, the court of appeals summarily rejected Liegakos's direct appeal, invoking the procedural bar. ***Liegakos***, 928 F. Supp. at 803. The federal court, however, ruled:

> that the retroactive application of the new procedural rule announced in *Escalona-Naranjo* by the state of Wisconsin is not an adequate bar to federal review of Mr. Liegakos'[s] right to testify claim and effective assistance of counsel claim.… Retroactively applying the procedural rule of *Escalona-Naranjo* to bar collateral review of Mr. Liegakos's claims means that at the time he filed his direct appeal he was responsible for complying with a procedural rule which was announced approximately eight years ***after*** his direct appeal was commenced.

Liegakos, 928 F. Supp. at 805.[6]

¶11 Assuming without deciding that ***Liegakos*** applies, it means only that, at the time of Harvey's 2004 motion, it would not have been proper to invoke ***Escalona*** to bar him from raising issues that could have been raised in the 1987 appeal because the ***Escalona*** rule had not been announced in 1987.

¶12 ***Escalona*** does, however, apply now; in 2004, it had been the rule for a decade. The purpose of WIS. STAT. § 974.06(4) "is clear: to require criminal defendants to consolidate all their postconviction claims into *one* motion or appeal." ***Escalona***, 185 Wis. 2d at 178. While Harvey has attempted to show why certain issues were not raised in 1987, he has not shown why the current

[6] The federal court ultimately *denied* Liegakos's *habeas corpus* petition. ***Liegakos v. Cooke***, 928 F. Supp 799, 810 (E.D. Wis. 1996).

issues were not raised in the 2004 motion. Accordingly, the circuit court properly invoked ***Escalona*** as a procedural bar against the 2011 motion.

By the Court.—Order affirmed.

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