COURT OF APPEALS
DECISION
DATED AND RELEASED

May 15, 1996

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

NOTICE

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

Nos. 94-1170
95-1199

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANK MACHADO,

Defendant-Appellant.

APPEALS from orders of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Frank Machado appeals pro se from orders denying his § 974.06, STATS., postconviction motion and his motion for sentence modification. We conclude that the majority of the issues raised by Machado are barred by ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 517 N.W.2d 157 (1994). We further conclude that trial counsel was not ineffective as a consequence of his substance abuse problem at or about the time of trial.

Machado was convicted in 1987 of second-degree murder with a dangerous weapon and possession of a firearm as a felon. He received consecutive prison terms of twenty-five years and two years respectively. On direct appeal after a postconviction motion, Machado argued that trial counsel was ineffective with respect to jury instructions on self-defense and accident. We also considered issues raised by Machado pro se regarding alleged ***Miranda*** violations, an error in impaneling the jury and a misstatement of the law by the trial court in the proposed jury instructions. We affirmed the convictions in ***State v. Machado,*** No. 88-2203-CR (Wis. Ct. App. Aug. 2, 1989) (per curiam).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

We recite the procedural history of this case because it is the underpinning for our holding that the majority of Machado's claims are barred. In February 1994, Machado filed a motion deemed brought under § 974.06, STATS., alleging that his sentence was unlawful and excessive and that the jury should have been instructed on other lesser-included offenses. In his supporting brief, Machado argued that trial counsel was ineffective because he failed to: (1) call witnesses at trial, (2) request certain jury instructions, (3) object to the joinder of the firearm charge, and (4) choose a proper theory of defense. Machado also alleged that trial counsel suffered from substance abuse at the time of trial which affected his performance. The trial court denied Machado's motion in an order entered May 4, 1994.[1]

Machado then filed a supplement to his § 974.06, STATS., motion alleging that trial counsel suffered from alcohol and drug problems at the time of the 1987 trial and that these difficulties affected counsel's judgment and performance. Machado also claimed that trial counsel failed to advise him of these difficulties at the time of trial. An evidentiary hearing was held on October 26, 1994.[2] At that hearing, trial counsel testified that although he had a drug and alcohol problem in 1987, he did not use drugs or alcohol while

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[1] The record on appeal does not contain a transcript of the argument heard by the court on April 22, 1994.

[2] The trial court characterized the proceedings as a "re-hearing" of Machado's previously filed motion.

working on the trial. Machado also questioned counsel regarding certain strategic decisions he made regarding witnesses, use of evidence and jury instructions.

In its findings after the hearing, the trial court acknowledged counsel's admissions regarding drug and alcohol problems in 1987. The court found that counsel "did a very excellent job for [Machado] at the trial" and that counsel did not perform deficiently. In its written order denying the motion, the court found that counsel's representation was not affected by his drug and alcohol problems. On the question of the jury instructions, the court found that the issue was addressed on direct appeal and rejected. The court also found that the sentence was appropriate and that joinder of the firearm charge was appropriate.

With the exception of Machado's claim that trial counsel was ineffective due to alcohol and drug problems, we do not reach the merits of his challenge to the order denying his § 974.06, STATS., motion because we conclude that § 974.06(4) as construed in ***Escalona-Naranjo*** precludes Machado from pursuing these issues. Under ***Escalona-Naranjo,*** an issue which could have been raised in a postconviction motion under § 974.02, STATS., and on direct appeal may not be raised in a motion under § 974.06 unless the trial court ascertains that a sufficient reason exists for the defendant's failure to raise the issue in his or her original motion. ***Escalona-Naranjo,*** 185 Wis.2d at 185-86, 517 N.W.2d at 163-64.[3]

Machado's motion and supplemental motion did not offer any reason for not having raised all of his ineffective assistance of trial counsel claims in his direct appeal. *See* ***id.*** at 185, 517 N.W.2d at 163. The question of the assistance rendered by trial counsel was presented on direct appeal and no reason is offered for not having presented all grounds as part of the direct

[3] We recognize that the issue of whether Machado's motion should be denied based on ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 517 N.W.2d 157 (1994), and § 974.06(4), STATS., was not raised in the trial court or relied on by the trial court in denying the motion. However, it is well-established that this court may sustain a trial court's ruling on grounds which were not presented in the trial court. ***State v. Holt,*** 128 Wis.2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985).

appeal. The ***Escalona-Naranjo*** bar is particularly appropriate where, as here, this court took the unusual step of considering arguments made by Machado pro se on appeal.

We will, however, review whether trial counsel was ineffective because he was experiencing problems with drugs and alcohol at or about the time of trial because evidence of counsel's alleged impairment apparently surfaced subsequent to the direct appeal in this case.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove: (1) that his or her counsel's action constituted deficient performance, and (2) that the deficiency prejudiced his or her defense. ***State v. Brewer***, 195 Wis.2d 295, 300, 536 N.W.2d 406, 408 (Ct. App. 1995). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Smith***, 170 Wis.2d 701, 714, 490 N.W.2d 40, 46 (Ct. App. 1992), *cert. denied,* 507 U.S. 1035 (1993). "The trial court's findings of what the attorney did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. However, whether the attorney's conduct amounted to ineffective assistance is a question of law which we review *de novo*." ***Id.*** (citation omitted).

When we address whether counsel's performance was deficient, we determine whether trial counsel's performance fell below objective standards of reasonableness. ***State v. McMahon***, 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. ***Id.*** "We do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." ***Id.*** The defendant has the burden to prove that counsel was deficient; counsel is presumed to have provided adequate assistance. ***Brewer***, 195 Wis.2d at 300, 536 N.W.2d at 409.

We turn first to the trial court's findings regarding whether counsel was impaired during trial as a result of his drug and alcohol problems. Assessing the credibility of trial counsel's testimony at the postconviction motion hearing was the trial court's responsibility. *See* ***Village of Big Bend v. Anderson,*** 103 Wis.2d 403, 410, 308 N.W.2d 887, 891 (Ct. App. 1981). The court

found that counsel's drug and alcohol problems did not manifest themselves during trial. The trial court's finding is not clearly erroneous. In light of this finding, we conclude that Machado has not sustained his burden to prove that counsel performed deficiently.

SENTENCE MODIFICATION

In October 1994, Machado moved the trial court to modify his sentence on the ground that the five-year enhancement of his second-degree murder sentence was invalid or, in the alternative, that his sentence should be modified because the time he had already served in prison was sufficient. Machado also claimed that his trial counsel was ineffective at sentencing. The trial court denied the motion on the grounds that no new factor existed requiring resentencing and the length of the sentence was not excessive.[4]

Although the trial court found no new factors warranting sentence modification, we conclude that Machado's claim that his twenty-five-year sentence was unlawful was the type of claim which had to have been brought under § 974.06, STATS., and did not require application of the new factor test. *See* ***State v. Coolidge,*** 173 Wis.2d 783, 788, 496 N.W.2d 701, 704-05 (Ct. App. 1993). Because this claim should have been raised in a § 974.06 motion, it is subject to the ***Escalona-Naranjo*** bar.

Machado's February 1994 § 974.06, STATS., motion alleged that his sentence was unlawful. The trial court denied the motion in May 1994. The record on appeal does not contain a transcript of proceedings apparently held on April 22, 1994, on the February 1994 motion. Accordingly, this court must assume that the trial court considered Machado's challenge to his sentence and rejected it. *See* ***State v. Smith,*** 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972) (appellant is responsible for presenting complete record on appeal and material omission will be construed against appellant); *see also* ***Suburban State Bank v. Squires,*** 145 Wis.2d 445, 451, 427 N.W.2d 393, 395 (Ct. App. 1988) (when appeal

[4] The record does not contain a transcript of the proceedings held on February 25, 1995.

brought on incomplete record, we assume facts essential to sustain trial court's ruling are supported by the record).

We conclude that Machado challenged his sentence in his original February 1994 § 974.06, STATS., motion, and he has not offered a sufficient reason for raising it again in October 1994. Successive postconviction motions under § 974.06 are prohibited unless there is a finding of a sufficient reason for the subsequent motion. ***State ex rel. Dismuke v. Kolb,*** 149 Wis.2d 270, 273, 441 N.W.2d 253, 254 (Ct. App. 1989). The record does not reveal a sufficient reason.

By the Court.—Orders affirmed.

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