COURT OF APPEALS
DECISION
DATED AND RELEASED

November 14, 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.

No. 95-0910

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES W. DAWN
a/k/a CHARLES COLE,

Defendant-Appellant.

APPEAL from an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed*.

Before Eich, C.J., Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

PER CURIAM. Charles W. Dawn, also known as Charles Cole, appeals from an order denying postconviction relief. The issues are whether Dawn provided a sufficient reason for failing to raise these postconviction issues on direct appeal and, if not, whether the bar of ***State v. Escalona-Naranjo ("Escalona")***, 185 Wis.2d 168, 181-82, 517 N.W.2d 157, 163-64 (1994), applies

retroactively. Because Dawn failed to provide the postconviction court with a sufficient reason for failing to raise these issues previously, we conclude that his motion is barred under ***Escalona***. Therefore, we affirm.

In l982, a jury found Dawn guilty of burglary, as a party to the crime. Because he escaped, the imposition of sentence and the entry of judgment were delayed until 1989, when the trial court imposed a ten-year sentence consecutive to a sentence Dawn was serving in another state. Dawn unsuccessfully moved for postconviction relief. He then appealed from the judgment of conviction and the postconviction order, and we affirmed. ***State v. Dawn***, No. 89-2194-CR (Wis. Ct. App. Jan. 24, 1991) ("***Dawn I***").[1] The Wisconsin Supreme Court denied Dawn's petition for review.

On October 14, 1993, Dawn sought relief by habeas corpus in federal court and in this court. The federal district court denied Dawn's petitions for failure to exhaust his state law remedies under § 974.06, STATS.[2] We also denied Dawn's petition and directed his attention to ***Escalona,*** which held that a defendant is precluded from raising any issue in a postconviction motion under § 974.06, STATS., which could have been raised on direct appeal or under § 974.02, STATS., without providing a sufficient reason for having failed to do so. ***Escalona***, 185 Wis.2d at 185, 517 N.W.2d at 164.

Dawn moved the trial court for postconviction relief and raised a variety of issues, some of which we had rejected on his direct appeal, and others, couched in constitutional terms, which he had not previously raised. Although Dawn had been warned repeatedly of ***Escalona***'s requirements, he failed to provide any reason why he had not previously raised these issues. Consequently, the trial court concluded that ***Escalona*** barred his claims and denied his postconviction motion.

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[1] Unpublished cases are of no precedential value and may not be cited as precedent or authority, except to support a claim of res judicata, collateral estoppel or law of the case. RULE 809.23(3), STATS.

[2] In its order denying Dawn's reconsideration petition, the federal court warned that Dawn must show sufficient cause for not having raised the unexhausted claims on direct appeal.

Dawn raises six issues in his most recent postconviction motion. He claims that he was denied due process of law because: (1) he did not have adequate time to prepare for trial; (2) the opening statements and closing arguments were not recorded; and (3) evidence was erroneously admitted at sentencing. He also claims that (4) certain trial testimony was perjured; (5) the trial court erroneously exercised its sentencing discretion; and (6) he received ineffective assistance of trial counsel.

We expressly or implicitly rejected three of these issues on direct appeal. We concluded that the trial court did not erroneously exercise its sentencing discretion, which decided issues three and five.[3] *See* ***Dawn I***, unpublished slip op. at 6-7. We also rejected Dawn's ineffective assistance of counsel claim, which decided issue six. ***Id***. at 7-8. We will not reconsider these issues. *See* ***State v. Witkowski,*** 163 Wis.2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

The question remains whether Dawn has provided a sufficient reason for his failure to raise issues one, two and four on direct appeal, or in his 1989 postconviction motion. He first claims generally that he did not have various transcripts, motions and "other materials" from the cases of his accomplices during the trial of his burglary action.[4] Dawn's first substantive

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[3] Dawn has not provided a sufficient reason for failing to raise issue three, which we implicitly rejected on direct appeal.

[4] His verbatim reason is:

> The Transcripts of the Sentencing and other Motions of Sargent, Forrester, and Henderson, were obtained in a Discovery Motion in the United States District Court for the Western District of Wisconsin in Case 82-CR-5, and 83-CR-7 in 1989.
>
> Other materials that are used in this Motion were given to the Petitioner by his Court appointed Attorney Thomas H. Brush in the Federal Case 82-CR-5 and 83-CR-7.
>
> None of this Information, or Discovery was provided to the Petitioner in his Original Trial in La Crosse County in Case 81-CR-790.

issue is that he did not have adequate time to prepare for trial. However, he provides no reason why this issue could not have been raised on direct appeal.

Dawn's second issue claims reversible error because the opening statements and closing arguments were not recorded. We decline to consider it for two reasons. First, § 974.06, STATS., reaches only errors of jurisdictional or constitutuional magnitude. ***Peterson v. State,*** 54 Wis.2d 370, 381, 195 N.W.2d 837, 845 (1972). This issue is not one of jurisdictional or constitutional magnitude. Second, if Dawn was unaware that these statements were not recorded, certainly appellate counsel knew and Dawn has not provided a reason why the issue was not raised on direct appeal.[5]

Dawn's fourth issue raises alleged improprieties by the trial court, most notably the admission of perjured testimony. Dawn claims that he was unable to demonstrate that this testimony was perjured without the materials he belatedly received. We disagree because Dawn received this material in 1989 and did not file his supplemental pro se brief until May 15, 1990.

Dawn also claims that the trial court was biased and committed numerous improprieties that led to his conviction. He contends that the trial court improperly allowed his accomplices to testify when it knew that they had received consideration for their cooperation with the State.[6] Dawn also claims that a witness, Stephen Henderson, was transferred to Missouri to avoid testifying because he could impeach Dawn's accomplices.[7] Dawn does not provide a reason for failing to raise these issues on direct appeal.

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[5] We take judicial notice of our May 15, 1990, order in ***Dawn I,*** accepting Dawn's supplemental pro se brief, even though he was represented by counsel who filed a brief-in-chief and a reply brief. We assume that Dawn raised any issues in his supplemental pro se brief which he did not believe were adequately addressed by his appellate counsel.

[6] Not only was this not improper, but this consideration was emphasized during their testimony.

[7] Henderson moved to modify his probation and to transfer to Missouri because he was unable to obtain employment. In support of his motion, he provided verification that he had legitimately, although unsuccessfully, sought employment in the La Crosse area

Dawn also contends that the trial court demonstrated its bias against him because it prejudged him. At the sentencing of his accomplices, the trial court indicated that they "cooperated with the State in apprehending and hopefully convicting the individual who has [a] much more serious and lengthy criminal history than you [the accomplices] do." The defendant's cooperativeness is an appropriate sentencing factor. ***State v. Harris,*** 119 Wis.2d 612, 624, 350 N.W.2d 633, 639 (1984). The court also stated, in ordering restitution, that "Mr. Dawn from what I know might well go to prison." The court also referred to Dawn's involvement as it related to the accomplices' degree of culpability, which is an appropriate sentencing factor. ***Id.*** at 623-24, 350 N.W.2d at 639. This was not improper. Dawn had these transcripts in 1989 and does not explain why he could not have raised these issues in his supplemental pro se brief filed in May 1990.

Dawn's alternative claim is that ***Escalona*** cannot retroactively preclude his second postconviction motion. However, a decision that overrules or repudiates an earlier decision generally applies retroactively. ***Fitzgerald v. Meissner & Hicks, Inc.,*** 38 Wis.2d 571, 575, 157 N.W.2d 595, 596 (1968). Had the ***Escalona*** court declined to follow the general rule of retroactive application, it would have so held. *Cf.* ***State v. Braun,*** 185 Wis.2d 152, 166, 516 N.W.2d 740, 745 (1994) (applying ***Escalona's*** procedural bar, even though ***Braun*** and ***Escalona*** were decided on the same date).

By the Court.—Order affirmed.

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

(..continued)
and that Missouri would accept parole supervision.