COURT OF APPEALS
DECISION
DATED AND RELEASED

April 2, 1997

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. 95-3157
96-0703-W

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

No. 95-3157

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD WAITES,

Defendant-Appellant.

No. 96-0703-W

STATE OF WISCONSIN
EX REL. RONALD WAITES,

Petitioner,

v.

MARIANNE COOKE, WARDEN,
KETTLE MORAINE
CORRECTIONAL INSTITUTION,

Respondent.

APPEAL from an order of the circuit court for Kenosha County: BRUCE SCHROEDER, Judge. *Affirmed.*

HABEAS CORPUS original proceeding. *Writ denied.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Ronald Waites appeals pro se from a circuit court order denying his motions for postconviction relief pursuant to § 974.06, STATS. On our own motion, we consolidate this appeal for disposition with a petition for a writ of habeas corpus Waites filed pursuant to ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992).[1] *See* RULE 809.10(3), STATS. We affirm the order and deny the ***Knight*** petition ex parte. *See* RULE 809.51(2), STATS.

Waites was convicted in February 1988 of two counts of delivering cocaine. We affirmed the conviction in ***State v. Waites***, No. 89-0520-CR (Wis. Ct. App. Oct. 18, 1989), and the supreme court affirmed. *See* ***State v. Waites***, 158 Wis.2d 376, 462 N.W.2d 206 (1990). In October 1995, Waites filed two motions pursuant to § 974.06, STATS. In his motions, Waites argued that his trial counsel was ineffective for failing to challenge both the State's peremptory strike of an African-American from the jury venire and the prosecutor's improper reference to an undercover officer's use of a body wire. The State opposed the motions on the grounds that Waites' claims were either previously litigated or barred under ***State v. Escalona-Naranjo,*** 185 Wis.2d 168, 517 N.W.2d 157 (1994). The trial court agreed with the State and denied the motions.

[1] In a May 8, 1996 order entered in court of appeals case No. 96-0703-W, we held in abeyance the petition for a writ of habeas corpus pending resolution of this appeal.

Pursuant to ***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 § 974.06, STATS., motion unless the trial court ascertains that a sufficient reason exists for the defendant's failure to allege or adequately raise the issue in his or her original motion. *See* ***Escalona-Naranjo,*** 185 Wis.2d at 181-82, 517 N.W.2d at 162. Furthermore, a defendant is barred from relitigating issues already addressed in a previous appellate proceeding. *See* ***State v. Witkowski***, 163 Wis.2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991); *see also* § 974.06.

We hold that Waites' claim relating to the State's preemptory strike of an African-American from the jury venire is barred because the supreme court addressed it in ***Waites***. Waites asked the supreme court to remand the matter for further proceedings on the ground that the State used one of its peremptory challenges to remove the lone African-American from the jury venire. *See* ***Waites***, 158 Wis.2d at 380, 462 N.W.2d at 207. Waites alleged that his trial counsel was ineffective because he did not object to the removal of this venireperson. *See* ***id.*** at 392, 462 N.W.2d at 213. The supreme court declined to decide the issue under ***Batson v. Kentucky,*** 476 U.S. 79 (1986),[2] because there was no objection to the peremptory strike. However, the court noted that the record did not suggest a ***Batson*** violation because "the State had adequate and legitimate reasons for striking the lone black individual from the jury panel" because the venireperson admitted knowing Waites from junior high school and his brother may have had contact with Waites' counsel. *See* ***Waites,*** 158 Wis.2d at 394, 462 N.W.2d at 213 (footnote omitted).

[2] In ***Batson v. Kentucky,*** 476 U.S. 79, 86-88 (1986), the Supreme Court held that a defendant has an equal protection right to be free from a prosecutor's use of peremptory challenges in a racially discriminatory manner.

Waites' ***Batson*** claim was sufficiently addressed by the supreme court as to be subject to the ***Witkowski*** bar. In light of this supreme court analysis, Waites also cannot sustain his burden under ***Knight*** to prove prejudice arising from appellate counsel's failure to challenge trial counsel's effectiveness in jury selection.

A claim of ineffective assistance of appellate counsel is properly raised by a petition for a writ of habeas corpus in the appellate court which heard the defendant's direct appeal. *See* ***Knight,*** 168 Wis.2d at 512-13, 484 N.W.2d at 541. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was both deficient and prejudicial. *See* ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 620, 516 N.W.2d 362, 373 (1994).

We need not consider whether appellate counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). Whether appellate counsel's performance prejudiced the defendant is a question of law which we review de novo. *See* ***id.*** To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***State v. Johnson,*** 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome of Waites' first appeal as of right. *See* ***id.***

Had appellate counsel alleged that trial counsel was ineffective because he did not challenge the black venireperson's removal from the jury panel, it is reasonably probable that the claim would not have succeeded on appeal. Therefore, Waites was not prejudiced.

We turn to Waites' claim that evidence that an undercover officer wore a body wire during the cocaine transactions was erroneously admitted at trial. This claim

was presented for the first time in Waites' pro se § 974.06, STATS., motion. We agree with the trial court that this claim is barred because it could have been raised in Waites' appeal from his conviction.

This court took the somewhat extraordinary step of accepting a pro se brief from Waites in addition to the brief filed by appellate counsel.[3] Waites has not demonstrated that he was incapable of briefing a challenge to the body wire evidence. Other than claiming appellate counsel was ineffective for not challenging the evidence, which we shall address in the context of Waites' ***Knight*** petition, Waites has not shown a sufficient reason for not presenting the issue on direct appeal. Accordingly, under ***Escalona-Naranjo,*** the body wire issue is barred.. *See* ***Escalona-Naranjo,*** 185 Wis.2d at 181-82, 517 N.W.2d at 162.

Waites argues that because he was convicted prior to the supreme court's decision in ***Escalona-Naranjo***, the ***Escalona-Naranjo*** bar should not apply to him. We disagree. While ***Escalona-Naranjo*** was decided after Waites was convicted and after his direct appeal was decided, the prohibition on successive postconviction motions contained in § 974.06(4), STATS., was in effect at the time of Waites' conviction. The ***Escalona-Naranjo*** court construed § 974.06(4), which was in effect at the time Waites was convicted, and applied the prohibition found therein to hold that a defendant cannot raise issues which he or she had not raised in the original postconviction motion and direct appeal. *See* ***Escalona-Naranjo,*** 185 Wis.2d at 181-82, 517 N.W.2d at 162. We merely do the same thing here.

Alternatively, we agree with the State that motions under § 974.06, STATS., are confined to matters of jurisdictional and constitutional dimension. *See* ***State***

[3] In his pro se brief, Waites challenged the single photographic identification of him.

v. Carter, 131 Wis.2d 69, 77, 389 N.W.2d 1, 4 (1986). Even if there was an evidentiary error at trial, merely alleging that such rendered the trial unfair does not raise the error to the level of a constitutional violation cognizable under § 974.06. *See* ***Bergenthal v. State,*** 72 Wis.2d 740, 747, 242 N.W.2d 199, 203 (1976), *overruled on other grounds by* ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 181, 517 N.W.2d 157, 162 (1994).

Because the body wire evidence claim is not cognizable under § 974.06, STATS., and is barred under ***Escalona-Naranjo,*** we turn to Waites' ***Knight*** petition which attempts to hold appellate counsel responsible for not challenging the effectiveness of trial counsel and/or the fairness of the trial due to the admission of the body wire evidence. We conclude that Waites cannot meet the prejudice prong of the ineffective assistance of counsel analysis.

Waites alleges that there were improper references at trial to the fact that the undercover officer who participated in the cocaine purchases was wearing a "body mike" or "body wire." Waites contends that these references violated § 968.30(8) and (9), STATS., 1987-88, and denied him a fair trial.

Sections 968.29 and 968.30, STATS., 1987-88, address the admissibility of "the contents" of intercepted communications and preclude their use in evidence unless pretrial notice was given to permit the opponent to test the lawfulness of the interception before its contents are admitted into evidence. *See* §§ 968.29(5) and 968.30(8) and (9).

The record indicates that references to Officer Schrandt's use of a body wire during the cocaine transactions were limited to the fact that he donned the equipment. There was no testimony regarding the contents of the communications intercepted via the body wire. In fact, Schrandt testified that the body wire produced a garbled transmission and the officers monitoring the transmission were unable to discern

anything. Because the contents of the communications were never disclosed at trial, there was no statutory violation.

Waites defended at trial on the theory that Schrandt mistakenly identified him. Given that the officer did not rely upon the results of the body wire in identifying Waites, references to the body wire, if error, were harmless. *See* ***State v. Burton,*** 112 Wis.2d 560, 570-71, 334 N.W.2d 263, 268 (1983) (harmless error if no reasonable probability the error might have contributed to conviction). Therefore, Waites cannot meet his burden to show that appellate counsel's failure to raise this issue on appeal prejudiced him.

By the Court.—Order affirmed; petition for a writ of habeas corpus denied.

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