STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No 2023AP000543-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

Vs

NICHOLAS J. NERO,

Defendant-Appellant.

On Appeal from the Final Orders Entered in the Circuit Court

For Dunn County,

The Honorable Christina Mayer and the Honorable James M. Peterson presiding

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REPLY BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED FOR REVIEW

1. Are Mr. Nero's claims barred by Escalona-Naranjo?
   The circuit court answered no. (202:4-5)

2. Should Mr. Nero's blood test results be suppressed as a violation of his Fifth Amendment rights?
   The circuit court answered no. (202:6-7)

3. Did the Trial Counsel perform deficiently because he failed to present evidence corroborating Nero's account of events?
   The circuit court answered no. (202:10; App.38)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. The issues can be decided based upon existing law.

ARGUMENT

1. Mr. Nero's claims are barred by Escalona-Naranjo.

The State argued in the post-conviction motion that the defendant's claims are barred by *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994) because he could have raised them in a prior post-conviction motion or on direct appeal. The history of his post-conviction proceedings where described by the Trial Court in its decision on these claims (202:4-5). After Nero was convicted, his Trial Counsel filed a Notice of Intent to Seek Post-Conviction Relief. (80). The Court

of Appeals opened the case as Case Number 2019AP26. Mr. Nero's original Appellate Counsel withdrew because he was retiring. Mr. Nero was then appointed 2nd Appellate Counsel. The 2nd Appellate Counsel filed a No-Merit Notice of Appeal. The Court of Appeals then dismissed the appeal as premature because Mr. Nero was found guilty by a jury and the jury had been given jury instruction Wis JI—Criminal 140. The issue of whether jury instruction Wis. JI—Criminal 140 reduces the State's burden of proof—is sound or should be overruled was pending before the Wisconsin Supreme Court in State v. Trammell, No. 2107AP1206-CR. The Court of Appeals ordered that the time to file a postconviction motion or notice of appeal was extended to sixty days after a decision by the Wisconsin Supreme Court in *State v. Trammell*. A subsequent Notice of appeal was filed and the Court of Appeals opened the case as Case No. 2019AP1120. 2nd Appellate Counsel filed a No-Merit Notice of Appeal. The Court of Appeals Sua sponte raised the issue of whether the Trial Court had properly sentenced Mr. Nero. The Court of Appeals ordered the 2nd Appellate Counsel to consult with Nero and either:"(1) submit a written statement from Nero indicating that he wishes to waive any challenge to the court's exercise of

discretion on sentencing and that he understands the consequences of his waiver; or (2) request that we dismiss this appeal in favor of an extension of time to file a postconviction motion in the circuit court." The Court of Appeals rejected the No-Merit Report and dismissed the appeal.

2nd Appellate Counsel filed Defendant's motion for Resentencing on the grounds that the circuit court did not articulate its sentencing goals, nor did it explain the reasons for the particular sentence imposed. That motion was granted, and the defendant was granted a resentencing. (182:3) Mr. Nero was resentenced on February 7, 0222. (177) On that same date, 2nd Appellate Counsel filed another Notice of Intent to Pursue Postconviction or Post-disposition Relief. (175)

Mr. Nero was then appointed 3rd Appellate Counsel. 3rd Appellate Counsel filed another post-conviction motion, Nero's Motion for Reconsideration and a New Trial Pursuant to Wis. Stat. §809.30, which raised for the 1st time Mr. Nero's current claims. The trial court denied those motions, but did not find that they were barred by *Escalona-Naranjo Id.* (202:4-5)

The defendant could have raised these issues in his prior post-conviction motion for a resentencing. Mr.

Nero also did not raise ineffective assistance of post-conviction counsel in his Motion for Reconsideration and a New Trial Pursuant to Wis. Stat. §809.30. (196)

The parameters of the bar of *State v. Escalona-Naranjo*, 185 Wis.2d 168, 178, 181-2, 517 N.W.2d 157 (1994) are vast. The bar holds that any claim for relief that could have been raised in a prior post-conviction motion or on direct appeal, but was not, is procedurally barred absent a sufficient reason for failing to previously raise it. *Escalona-Naranjo*, at 181-82.

To properly appreciate the scope of Escalona-Naranjo, some discussion of what it replaced is helpful. The evolution of finality of criminal convictions in Wisconsin can be traced to the 1969 revision of the criminal code that created Wis. Stats § 974.06. The purpose of Wis. Stats §974.06 was to establish finality in litigation – to clarify and consolidate the procedure for defendants appealing criminal convictions. Fernholz, M., Collateral Damage: A Guide to Criminal Appellate, Postconviction, and Habeas Corpus Litigation in Wisconsin, Marquette law Review, Volume 98, p.1357, 2015.

It took almost 25 years for the Wisconsin Supreme Court to declare how 'consolidated and final' this process is supposed to be. In *Peterson v. State*, 54 Wis.2d 370, 195 N.W.2d 837 (1972) the Supreme Court held

that the 974.06 procedure limited successive challenges, but not where the defendant's complaints were of jurisdictional or constitutional dimensions. Two years later the Supreme Court expanded this concept, holding that even defects in the acceptance of a plea were of a type that implicated constitutional protections, and could also be viewed as 'matters of a constitutional dimension' that could be raised in such a motion. *Loop v. State*, 65 Wis.2d 499, 501, 222 N.W.2d 694 (1974). This concept was synthesized two years later in *Bergenthal v. State,* 72 Wis.2d 740, 242 N.W.2d 199 (1976). The Bergenthal standard stood for the next twenty years:

> ..This court has stated on several occasions that a petition for postconviction cannot be used as a substitute for an appeal. *Vara v. State* (1972),56 Wis.2d 390,392,202 N.W.2d 10; *Sass v. State* (1974),63 Wis.2d 92, 95, 216 N.W.2d 22. The motion must normally be limited to matters of jurisdiction or matters of constitutional dimensions. *Hebel v. State* (1973), 60 Wis.2d 325, 332, 210 N.W.2d 695. Questions such as sufficiency of the evidence and allegations of trial court error in matters such as propriety of instructions and admission of certain evidence cannot be raised in motions for postconviction relief, *State v. Langston* (1971), 53 Wis.2d 228, 231, 232, 191 N.W.2d 713. Merely because a

defendant alleges that certain trial errors resulted in violation of constitutional rights, this does not necessarily raise the issue to one of constitutional dimensions. *State v. Langston, supra*, p. 232, 191 N.W.2d 713.

… Where defendant is denied access to requested materials, the issue of their relevance as to guilt or punishment presents a constitutional question, irrespective of whether that denial resulted from prosecutorial suppression or trial court ruling. Even though the issue might properly have been raised on appeal, it presents an issue of significant constitutional proportions and, therefore, must be considered in this motion for postconviction relief. *Bergenthal*, 747-8. *Bergenthal* interpreted Wis. Stats § 974.06 in a way that allowed a defendant to attack a criminal conviction after the appellate process had concluded so long as they could claim that some error in the proceedings resulted in a jurisdictional or constitutional defect. *Escalona-Naranjo* completely changed that proposition, rejecting *Bergenthal*, and establishing a presumption that any post-conviction motion outside the process for a direct appeal was barred absent some compelling reason. *Escalona-Naranjo* rejected the reasoning of *Bergenthal* that offered exceptions to

what it interpreted as a bar to successive litigation that Wis. Stats § 974.06 was intended to create.

¶ 7. *Escalona-Naranjo* held that WIS. STAT. § 974.06(4) bars defendants from bringing claims, including constitutional claims, under § 974.06 if they could have raised them in a previous post-conviction motion or on direct appeal — unless they have a "sufficient reason" for failing to do so. Id. at 181, 184.

State v. Crockett, 2001 WI App 235, ¶¶6-7, 248 Wis.2d 120, 635 N.W.2d 673. *Escalona-Naranjo* held that the purpose of Wis. Stats § 974.06(4) was to require criminal defendants to consolidate all their post-conviction claims into one single motion or appeal. *Id*. at 181; *State v. Kletzien*, 2011 WI App 22, ¶12, 331 Wis.2d 640, 647, 794 N.W.2d 920 review denied, 2011 WI 86, 335 Wis.2d 148, 803 N.W.2d 850. Today, Wis. Stats. § 974.06 is now interpreted to presume that any successive petition or post-conviction motion is barred unless the defendant can provide a sufficient reason for failing to assert the claim earlier. Crockett, footnote 4. See also, *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. Stated otherwise, if the defendant has already filed a motion under § 974.02, a direct appeal, or a previous motion under § 974.06, he is barred from pursuing any future post-conviction motions unless he shows a

sufficient reason for not making the claim earlier. *Lo*, 264 Wis.2d 1, ¶ 44, 665 N.W.2d 756; *State v. Romero-Georgana*, 2014 WI 83, 360 Wis. 2d 522, 849 N.W.2d 668 (2014).

The same reasoning in *Escalona-Naranjo* applies to our case where Mr. Nero already had a post-conviction motion, didn't raise any issue other than that the sentencing Judge inadequately addressed the sentencing factors, and was granted a new sentencing. He is barred from raising new issues in his 2nd post conviction motion that could have been raised in his first absent a sufficient reason. If his issue about the suppression motion, or his issue about ineffective assistance of trial counsel was meritorious, then remanding for a new sentencing hearing would have been pointless; why go through a resentencing if you're entitled to a whole new trial. That is the whole point of *Escalona-Naranjo*, to avoid having the circuit courts and court of appeals having to review things multiple times when a single proceeding could have resolved all of the issues. "Successive motions and appeals, which all could have been brought at the same time," like this one, "run counter to the purpose and design of the legislation." *Escalona-Naranjo*, 185 Wis.2d at 185-86.

However, *Escalona-Naranjo* stopped short of telling us what a 'sufficient reason' to avoid the bar might be, and since then no Wisconsin case has really offered an answer. When this question was squarely presented to the Supreme Court in *State v. Lo*, 2003 WI 107, ¶57, 264 Wis. 2d 1, 27, 665 N.W.2d 756, they responded by stating that the answer would have to wait for another day. After 20 years, we're still waiting. That said, we have been told what aren't sufficient reasons to avoid the bar of Escalona-Naranjo:

> Claims of ineffective assistance by trial counsel are generally insufficient to avoid the bar when brought to the trial court unless they are supported with sufficient facts that demonstrate that post-conviction counsel was ineffective for failing to bring a claim that should have been previously raised. This proof of deficiency requires that the defendant demonstrate that the claim that was missed was "clearly stronger" than the claims counsel actually raised. See *Romero-Georgana*, 360 Wis. 2d 522, ¶¶43-46. Lo, ¶51; *State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Claims of this nature must be brought with specificity. Romero-Georgana, ¶¶36-7.

In our case, Mr. Nero did allege ineffective assistance of trial counsel, but did not allege ineffective assistance of appellate counsel. Therefore, his motion for a new trial was insufficient to avoid the bar. He has not alleged any reason, much less a sufficient reason why he should be allowed to avoid the bar for successive post-conviction motions or appeals that could have been raised previously. Therefore, his claims should be denied.

2. The UA obtained by probation was not a fruit of his compelled statement.

The request for the urinalysis (UA) from Mr. Nero by probation was not a fruit of his compelled statement. In his statement to probation Mr. Nero denied recent drug use. (146) The defendant's statement that he had "not used methamphetamine since the last time he saw his agent which was 6 days ago" is not an admission of recent drug use. It is a denial of recent drug use. The same is true of his statement that "the last time he used Heroin was the last time he got out of jail." Therefore, the taking of the UA by probation was not derivative of his statement. The exclusionary rule applies to both tangible and intangible evidence and also excludes derivative evidence under certain circumstances, via the

fruit of the poisonous tree doctrine, if such evidence is obtained by exploitation of that illegality. *State v. Knapp* 285 Wis.2d 86 (2005). In Knapp, the Wisconsin Supreme Court suppressed a sweatshirt that contained human blood on one of the arm cuffs. The detective had obtained a statement from the defendant in violation of his Miranda rights. During that questioning the detective asked the defendant about the clothes that he had been wearing the prior evening. The defendant pointed to a pile of clothes on the floor that contained the sweatshirt with the blood. The Supreme Court held that because the evidence was obtained by the defendants illegal statement, it was derivative, or the fruit of the poisonous tree and also needed to be suppressed. In our case, Mr. Nero's UA was not derivative of his probation statement, therefore, it properly was not suppressed by the trial court. Further, because the State did not offer the UA obtained by probation as evidence at trial, it's admissibility is mute. A probationary search is not transferred into a police search due to the existence of a concurrent investigation. State v. Hajicek 240 Wis.2d 349, 620 N.W.2d 781. Similarly, the transfer of the items seized by probation to law enforcement following the search

does not change the nature of the search itself. *State v. Jones* 314 Wis.2d 408, 762 N.W.2d 106 (Ct of App. 2008). The probation agent wasn't prevented from using the defendant's compelled statement to request a UA. Once she had it she could share that with law enforcement. *Id.*

3. Even without the UA obtained by probation, Sergeant Kurtzhals had sufficient evidence to request the blood test.

There was an independent, legitimate source for the probable cause for Sergeant Kurtzhals to request the blood test. If the evidence proposed to be used is derived from a legitimate source wholly independent of the compelled testimony, it should not be suppressed. *Kastigar v. U.S.* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Even without the probation UA Sergeant Kurtzhals had sufficient probable cause to request a blood test and the trial court so found. (105:6). Kurtzhals had his review of what Deputy Spenle observed about Mr. Nero being disoriented at Monarch Paving, and the completely bizarre and inexplicable operation of the vehicle in the township where it was in the early morning on October 14, 2015. When Deputy Spenle had contact with Mr. Nero, they were unable to locate Mr. Nero's vehicle. Spenle did observe that Mr. Nero was

disoriented, but didn't find that sufficient to arrest for OWI. Once the defendant's vehicle was located the next morning and the extent of his impaired driving became obvious, there was sufficient probable cause to request a blood test. The vehicle was driving around the yard of the plant amongst piles of rock and dirt. The tracks left by the vehicle showed that Mr. Nero drove out of the parking lot onto a grass yard. (109:72) He drove onto the berm in between two retaining ponds and over a PVC pipe between the two ponds breaking the pipe. The vehicle traveled back toward the parking lot over a little wall made of concrete paver bricks, knocking bricks out of place. (109:75-76). His vehicle left Monarch Paving and went out onto the roadway, 628th Avenue. The defendant then made a turn where there was no road or field driveway and drove his vehicle off the road into a farmer's field where crops were growing that were quite tall. (109:159-160) The vehicle drove quite a distance out into the field where the nose of the vehicle went into a dip and got stuck. (109:160 and 192:6). A law enforcement officer needs probable cause to justify a blood test. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Even without the positive UA taken by probation, the evidence that Sergeant Kurtzhals had was sufficient to request the blood test.

Deputy Spenle did not know the extent of this bizarre driving in the early morning hours of October 14, 2015. It was dark, and Nero did not know where his vehicle was located. Spenle did know that there was damage to the property at Monarch Paving which included a broken large PVC pipe and a knocked over retaining wall. However, the next day when there was daylight the evidence showed the extent of the bizarre driving. On October 14 Spenle did not know that Nero's vehicle and turned into a farmer's field where no road or field driveway existed and drove through a tall crop for quite a distance until driving the nose of the vehicle into a dip and becoming stuck. The evidence which Sergeant Kurtzhals had when he requested the blood test was sufficient probable cause. Unlike *State v. Quigley*, 2016 WI App 53, 370 Wis.2d 702, 883 N.W.2d 139, Sergeant Kurtzhals had sufficient additional information for requesting a blood test when he did so, even without the probation UA.

4. The record does not support Mr. Nero's claim that trial counsel performed deficiently by not presenting corroborating testimony to validate Mr. Nero's version of events.

The trial court correctly denied Nero's claim of ineffective assistance without a Machner hearing. To

sufficiently allege such a claim a defendant must point to Trial Counsel's specific action or inaction which fell "outside the wide range of professionally competent assistance," to satisfy the deficiency prong. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). All counsel benefit from a presumption that their conduct fell within a reasonable range. See *Strickland*, 446 U. S. at 689. The presumption excludes from this protection actions or omissions which resulted from a lack of diligence in preparation and investigation. *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Next, to demonstrate prejudice, Mr. Nero "must show that there is a reasonable probability that, but for counsel's unprofessional errors (deficiency), the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694.

The circuit court must hold an evidentiary hearing when a motion alleges facts on its face which would entitle the defendant to relief, *State v. Bentley*, 201 Wis.2d 303, 310, 548 N.W.2dd 50 (1996). A court may only deny the motion without a hearing in three instances: (1) failing to allege sufficient facts to raise a question of fact, (2) presenting only conclusory allegations, or (3) if the record

conclusively demonstrates the defendant is not entitled to relief. *Nelson*, 54 Wis.2d at 497-98.

Nero's post-conviction presented only conclusory allegations. Nero claimed that his trial counsel was ineffective for failing to contact or call other witnesses. Nero did not allege the names of any witnesses who he believes that trial counsel should have called, what they would say, how they know it, or why it is relevant to his defense. In *State v. Allen* 274 Wis.2d 568, 682 N.W..2d 433 (2004) the Wisconsin Supreme Court upheld the Trial Court's denial of an ineffective assistance claim without a Machner hearing where the allegation was insufficient for only presenting conclusory allegations which were similar to Nero's. The Supreme Court in *State v. Brown* 2006 WI 100, 293 Wis.2d 594, 716 N.W.2d 906 found a postconviction claim adequate without an affidavit. The Supreme Court stated that a defendant is not required to submit a sworn affidavit to the court, but he is required to adequately plead his motion. *Id.* 293 Wis.2d at 629. Again, Nero did not adequately plead his motion. (196:20-22)

Nero's other claim of ineffective assistance was that his attorney was ineffective for failing to emphasize that Mr. Nero's car still had fuel in it when authorities found it. This claim was insufficient because there was not a

reasonable probability that the result of the trial would have been different absent the deficient act or omission. The fact that Mr. Nero could have remained in his car until the gas ran out, doesn't change the fact that he was stuck in the middle of a farmer's field and needed to seek help. This is a very small fact that would have made no difference in the trial. It doesn't outweigh the very strong evidence that Mr. Nero was operating with a detectible amount of restricted controlled substance in his blood based upon Mr. Nero's bizarre driving of the vehicle and the results of his blood test. Based upon the record it the Trial Court correctly denied a Machner hearing on that issue because Mr. Nero did not show that Trial Counsel's performance fell outside the wide range of professionally competent assistance, and even if Trial Counsel's performance was deficient there is no showing that this alleged failure caused Mr. Nero to suffer prejudice. The record conclusively demonstrates that Nero was not entitled to relief with regard to that claim.

CONCLUSION

For the reasons given above, the defendant's claims should have been barred by *State v. Escalona-Naranjo*, id. The State asks this court to deny them on those grounds. If not, the circuit court's order denying Mr. Nero's motion for reconsideration and a new trial should be upheld.

Respectfully submitted this 21st day of September, 2023.

Electronically signed by Andrew J. Maki

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CERTIFICATION

I certify that this brief conforms to the rules contained in s.809.19 (8) (b)&(c) for a brief produced using the following font:

Monospaced font: 10 characters per inch; double-spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 22 ___ pages.

Dated this 22nd day of September, 2023.

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