COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2194 **Cir. Ct. No. 1996CF965903**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY L. PRALLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Randy L. Pralle appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion. The circuit court denied the motion as barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

BACKGROUND

¶2 Pralle pled guilty to attempted first-degree intentional homicide while armed. On April 24, 1997, the court sentenced Pralle to thirty-five years in prison. Pralle timely filed a notice of intent to pursue postconviction relief and counsel was appointed to represent Pralle on appeal. Appellate counsel filed a notice of appeal indicating that he intended to file a no-merit report. A no-merit report was subsequently filed with this court. Pralle filed a response. On March 25, 1999, this court relieved appellate counsel of further representation of Pralle and summarily affirmed the judgment of conviction. ***State v. Pralle***, 1997AP3042-CRNM, unpublished slip op. (Wis. Ct. App. Mar. 25, 1999).

¶3 On May 11, 2004, Pralle filed a *pro se* motion for postconviction relief under WIS. STAT. § 974.06. In that motion, Pralle sought to withdraw his guilty plea, arguing that he was not competent when he entered the plea because of the prescribed medication he was taking at the time. Pralle also raised several challenges to the effectiveness of trial counsel. As noted above, the circuit court denied Pralle's motion, without a hearing, holding that Pralle could have raised his claims in his response to the no-merit report. Because Pralle did not do so, the circuit court concluded that Pralle's claims were barred by ***Escalona-Naranjo***.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DISCUSSION

¶4 In his brief, Pralle focuses primarily on his substantive arguments, namely, that his guilty plea was not entered voluntarily, knowingly or intelligently because he "was on prescribed medication that altered [his] train of thought," and that his trial counsel was ineffective for not moving to suppress Pralle's custodial statements and for not arguing that police should have tested Pralle's hands for evidence of barium and antimony.[2] In addition, Pralle argues that ***Escalona-Naranjo*** should not bar his substantive claims because his appellate counsel filed a no-merit report.

¶5 WISCONSIN STAT. § 974.06 and ***Escalona-Naranjo*** require a defendant to raise all grounds for postconviction relief in his or her original motion on appeal. The reason for this is that we need finality in our litigation. ***Escalona-Naranjo***, 185 Wis. 2d at 185. Accordingly, when we are presented with § 974.06 motions raising issues either previously raised or which could have been raised in a previous motion or appeal, we hold that the claims are procedurally barred absent a sufficient reason for failing to raise them previously. *See* ***id.*** Moreover,

> when a defendant's postconviction issues have been addressed by the no merit procedure under WIS. STAT. RULE 809.32, the defendant may not thereafter again raise those issues or other issues that could have been raised in the previous motion, absent the defendant demonstrating a sufficient reason for failing to raise those issues previously.

[2] Pralle also argued to the circuit court that his trial counsel was ineffective for not requesting a competency hearing. Pralle does not pursue that argument on appeal.

State v. Tillman, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574 (citation omitted).

¶6 The procedural bar of ***Escalona-Naranjo*** "is not an ironclad rule" and in considering whether to apply it when the prior appeal was taken under WIS. STAT. RULE 809.32, we "pay close attention to whether the no merit procedures were in fact followed." ***Tillman***, 281 Wis. 2d 157, ¶20. Additionally, we "must consider whether that procedure, even if followed, carries a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case." ***Id.***

¶7 As we did in ***Tillman***, we next consider whether to apply the procedural bar of ***Escalona-Naranjo*** to the issues raised by Pralle.

¶8 Pralle's first issue involves his competency when he pled guilty. He contends that his taking of prescribed medication "made it difficult for him to comprehend the proceedings of the court." This issue has already been litigated in Pralle's direct appeal. In the order summarily affirming the judgment of conviction, we stated

> Pralle contends that he was not competent to plead guilty because he was severely depressed and medicated at the time. At the plea hearing, the circuit court asked Pralle if he had used any drugs, alcohol or medication that day, and Pralle responded that he had taken Ritalin earlier that morning, but confirmed that it did not affect his ability to understand the proceedings. Pralle's contention that he was not competent is belied by the record. Our independent review of the record persuades us that it would lack arguable merit to allow Pralle to seek withdrawal of his guilty plea.

¶9 Because we addressed the issue of Pralle's competency in his prior appeal, Pralle cannot relitigate it. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990,

473 N.W.2d 512 (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.").

¶10 We next consider Pralle's contention that his trial counsel was ineffective for not moving to suppress the statements that Pralle gave to the police and for not arguing that police should have tested Pralle's hands for evidence of barium and antimony.[3]

¶11 A defendant claiming the denial of effective assistance of counsel must establish both that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant who has pled guilty and later claims ineffective assistance of counsel must allege facts showing "'that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and he would have insisted on going to trial.'" ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (quoting ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)).

¶12 In order for a defendant to prove counsel was ineffective for failing to investigate or present defense evidence, the defendant must show with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Because counsel is not ineffective for failing to pursue a suppression motion if the motion would have been denied, the defendant is also

[3] In its brief, the State suggests that a test for barium and antimony would be relevant to whether Pralle fired a gun.

obligated to show that the suppression motion would have granted. *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999).

The circuit court may, in the exercise of its discretion, reject the defendant's contention without a hearing if a defendant fails to allege sufficient facts in this motion to raise a question of fact or presents only conclusory allegations or if the record conclusively demonstrates that the defendant is not entitled to relief. ***Bentley***, 201 Wis. 2d at 309-10. A defendant must allege more than self-serving conclusions. ***Id.*** at 316. Rather, a defendant must "allege facts which allow the court to meaningfully assess" his contention. ***Id.*** at 318.

¶13 In his postconviction motion, Pralle states that he told his trial counsel that "police tricked him" and that he was not given his ***Miranda***[4] warnings "until 48 minutes into the interview." However, Pralle does not allege any facts suggesting that any such delay compromised the admissibility of his statement. *Cf.* ***Oregon v. Elstad***, 470 U.S. 298, 309 (1985) (The "simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" does not render a subsequent statement inadmissible.). And, as is pointed out by the State, Pralle does not even allege that suppression motion would have been granted. Therefore, Pralle's claim that his trial counsel was ineffective for not moving to suppress fails.

¶14 In his postconviction motion, Pralle "states that no test was taken to see if any levels of barium and animony [sic] was on his hands." As noted above,

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Pralle must show "with specificity" what the test would have revealed. *See* ***Flynn***, 190 Wis. 2d at 48. Pralle does not do so, and therefore, his claim that trial counsel was ineffective fails.

By the Court.—Order affirmed.

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