COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1542 **Cir. Ct. No. 1990CF902787**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARNELL CURTIS STEVENS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Darnell Curtis Stevens appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] postconviction motion seeking

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

relief. Stevens claims that: (1) his constitutional rights to due process were violated because the State suppressed favorable evidence; (2) he should be afforded a new trial based on the destruction of exculpatory evidence; and (3) he received ineffective assistance from both his trial and postconviction counsel. Because Stevens's claims are procedurally barred pursuant to ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we affirm.

BACKGROUND

¶2 On September 23, 1992, Stevens was convicted of first-degree sexual assault and kidnapping. The basis for the charges arose when the victim, A.R., was leaving a tavern with a girlfriend and discovered her car had been broken into. Stevens approached the two women and offered to help. He then insisted that the women drive him home. When he got out of the car, he attempted to jump into the driver's seat and drive away with A.R.'s friend. A struggle ensued and the friend ran for help. Stevens dragged A.R. down an alley, into the loft of a nearby garage. He beat, choked, and kicked her and then sexually assaulted her.

¶3 The police began searching for A.R. and located the garage where Stevens was with A.R. They saw a man jump from a garage window and began chasing him. They located Stevens, who was sweating profusely. He had a long rip in the inner thigh of his pant leg, through which his penis was protruding. Stevens, who had been wearing a red hat, told police that he was chasing a man with a red hat. A.R. and her friend both identified Stevens as the attacker.

¶4 After a jury convicted Stevens, his appointed appellate counsel filed a no-merit notice of appeal, pursuant to WIS. STAT. § 809.32 (1995-96).

Subsequently, a no-merit report was filed and Stevens filed a response to the report. On June 27, 1995, this court issued a decision on Stevens's no-merit appeal and affirmed his sentence and conviction. *See* ***State v. Stevens***, No. 95-0104-CRNM, unpublished slip op. (Wis. Ct. App. June 27, 1995). We concluded:

> Based on an independent review of the record, we find no basis for reversing the judgment of conviction. Any further appellate proceedings would be without arguable merit within the meaning of ***Anders*** and RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and Attorney Michael J. Edmonds is relieved of any further presentation of Stevens in this matter.

Id., unpublished slip op. at 7. Nine years later, Stevens filed a *pro se* postconviction motion seeking discovery and deoxyribonucleic acid testing. Stevens argued that the court had ordered him, before trial, to submit physical samples for testing, but he had not done so, and the State did not make sure he did so. He also claimed that the State had collected semen samples from the victim, but had not had them tested. The State responded to the motion by advising the court that there was no material to test under WIS. STAT. § 974.07 because the evidence had been destroyed in 1994 and 1998.

¶5 The trial court denied the motion, ruling that it could not order the State to test something that no longer existed. Stevens moved for reconsideration, claiming the State broke the law by prematurely destroying evidence under WIS. STAT. § 165.81(3)(b). The State responded that the statute Stevens relied on does not apply because it was enacted on August 30, 2001, and therefore it was not in existence at the time the evidence was destroyed. The State also argued that Stevens's due process rights had not been violated and that his claim was procedurally barred by ***Escalona***. The trial court affirmed its earlier order, ruling

that Stevens failed to raise any meritorious claims and that his claim of ineffective assistance of counsel was procedurally barred under ***Escalona***.

¶6 On May 16, 2005, Stevens filed *pro se* the postconviction motion, which formed the basis for this appeal. Stevens, citing WIS. STAT. § 974.06, requested that his conviction be vacated. He claimed that his trial counsel and postconviction counsel were ineffective, and that the State violated his due process rights by failing to make him submit physical samples. The trial court denied the motion for the same reasons stated in the earlier orders. Stevens now appeals.

DISCUSSION

¶7 All of Stevens's claims are procedurally barred. After his conviction, his appellate counsel filed a no-merit appeal. Stevens filed a response. We conducted an independent review of the record and affirmed the judgment. Stevens is now raising claims that were either already raised and rejected in the no-merit procedure, or new claims that were never raised. Case law prohibits him from doing so, without a sufficient reason for failing to raise the claims in the earlier appeal. Stevens fails to provide a sufficient reason for this failure.

¶8 ***Escalona*** bars defendants from raising issues in successive postconviction motions when the defendant has already raised them or could have raised them in his or her direct appeal, unless he or she sets forth a sufficient reason for having failed to previously assert the claims. ***Id.***, 185 Wis. 2d at 181-82. In ***Tillman***, we applied the procedural bar to a case which was the subject of the no-merit procedure under WIS. STAT. § 809.32. ***Tillman***, 281 Wis. 2d 157, ¶19; *see also* ***State v. Fortier***, 2006 WI App 11, ¶19, ___ Wis. 2d ___, 709 N.W.2d 893 (recognizing that when applying ***Escalona*** in a no-merit context, courts must make sure that no-merit procedures were followed, and that the

procedures carried sufficient degrees of confidence to conclude that the outcome was correct). Accordingly, the procedural bar applies to defendants whose direct appeal was via the no-merit procedure, as long as the no-merit procedures were in fact followed and the record demonstrated a sufficient degree of confidence in the result.

¶9 Here, Stevens's direct appeal proceeded via the no-merit procedure. His attorney filed a no-merit report and he filed a response, raising issues he thought should be addressed. This court reviewed all of the issues raised and conducted an independent review of the record. After such, we concluded that Stevens's judgment should be affirmed because the record did not contain any meritorious issues. Based on this review, we conclude that the no-merit procedures were in fact followed in this case and that the record demonstrates a sufficient degree of confidence in the result. Because Stevens had the opportunity to raise the issues he now asserts during the no-merit appeal, he is barred from attempting to raise the same issues again or from raising additional issues, which he could have raised then, via his WIS. STAT. § 974.06 appeal. *See* ***Tillman***, 281 Wis. 2d 157, ¶20.

¶10 With the exception of his claim that appellate counsel provided ineffective assistance, Stevens fails to assert sufficient reasons for not raising the issues during the no-merit procedure. Accordingly, those issues are procedurally barred and will not be addressed further.

¶11 We do address briefly his claim that appellate counsel provided him with ineffective assistance. He claims his appellate counsel provided ineffective assistance for failing to raise claims related to the State's and trial counsel's

alleged failure to ensure that he submitted blood and other physical samples. We disagree.

¶12 In order to succeed on an ineffective assistance claim, Stevens must prove that counsel's performance constituted deficient conduct, and that such conduct prejudiced the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶13 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "'The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous.'" ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987) (citation omitted). The ultimate conclusion, however, of whether the conduct resulted in a violation of the defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. ***Id.***

¶14 We reject Stevens's claims for two reasons. First, we already concluded during the no-merit appeal, that there were no meritorious issues of error which could be raised to challenge the conviction. Second, the record simply does not support Stevens's assertion that he should have been forced to provide blood and physical samples. As pointed out by the State:

> The record does indicate that, before trial, the state moved for an order requiring Stevens to submit for the purpose of obtaining blood, saliva, and head and pubic hair samples … and that the circuit court granted that motion …. The record does not indicate, however, what happened next. The trial testimony suggests that the state may have forgone obtaining samples from Stevens because the semen

> samples recovered from the victim were so tiny that no further testing was possible … and the pubic hairs recovered were so similar to the victim's own that they were unlikely to be "matched" to any other person ….

¶15 Whatever the reason to forgo soliciting the physical samples, there is no indication that either the State or defense counsel were in someway obligated to ensure that physical samples were taken. In fact, it appears that defense counsel used the fact that samples were not taken to attempt to discredit the strength of the State's case at trial.

¶16 Moreover, we are not persuaded that the failure to obtain the physical samples somehow violated Stevens's due process rights. The case Stevens cites for this proposition, ***State v. Greenwold***, 189 Wis. 2d 59, 525 N.W.2d 294 (Ct. App. 1994), pertains to preservation of evidence which has been collected, *not* to requiring the collection of potentially exculpatory evidence. ***Id.*** at 69. Because Stevens's case involves the failure to collect physical samples from him, there was no violation of his due process rights.[2]

By the Court.—Order affirmed.

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

[2] In a related argument, Stevens contends his due process rights were violated when the State destroyed evidence, after trial, in 1994 and 1998. The evidence consisted of the victim's clothing from the night of the assault and physical samples taken from the victim at the hospital. We reject this contention as well. This evidence was not introduced at trial and was therefore never made a part of the evidentiary record. Evidence cannot be considered exculpatory when the defendant has declined to introduce it at trial. *See* ***State v. Parker***, 2002 WI App 159, ¶15, 256 Wis. 2d 154, 647 N.W.2d 430. Likewise, this issue is procedurally barred from consideration because Stevens failed to raise it during his no-merit appeal.