

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP828

Cir. Ct. No. 1995CF954770A

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY GILMORE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cory Gilmore appeals from an order denying his WIS. STAT. § 974.06 (2003-04)¹ motion. Gilmore claims the trial court erred in

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

finding his claim was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). He states that his postconviction counsel failed to argue that he was denied due process relating to false evidence not corrected by the State and that the trial court erroneously exercised its sentencing discretion. Because the claims Gilmore raises here were raised in a previous appeal, the trial court did not err in ruling that Gilmore is procedurally barred from re-raising these issues in this appeal and we affirm.

BACKGROUND

¶2 In February 1996, Gilmore was convicted of two counts of armed robbery, one count of aggravated battery, and one count of substantial battery stemming from two liquor store robberies. The trial court sentenced Gilmore to fifty-four years in prison. Gilmore proceeded *pro se* on his first direct appeal because his postconviction counsel advised him that he did not have any meritorious claims. His *pro se* postconviction motion was affirmed in the trial court. He filed an appeal with this court, but later sought dismissal of the appeal.

¶3 In October 2001, Gilmore's appeal rights were reinstated and he was appointed new postconviction counsel. Counsel filed a no-merit report and Gilmore filed a response to that report. In the no-merit appeal, both the false evidence and sentencing issues were raised and were rejected by this court in a September 16, 2003 decision affirming the judgment of conviction.

¶4 In February 2005, Gilmore filed another *pro se* postconviction motion pursuant to WIS. STAT. § 974.06, again raising the false evidence and sentencing issues. The trial court denied the motion, ruling that Gilmore's claims were procedurally barred under *Escalona-Naranjo*. Gilmore appeals from the trial court order.

DISCUSSION

¶5 Gilmore argues in this appeal that his case is not barred by *Escalona-Naranjo* because he has a sufficient reason to justify an exception to the procedural bar—namely, his postconviction counsel provided ineffective assistance during the no-merit appeal. We reject his argument.

¶6 *Escalona-Naranjo* 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 *State v. Tillman*, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, 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-Naranjo* 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 demonstrates a sufficient degree of confidence in the result.

¶7 Here, Gilmore'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 Gilmore'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 Gilmore 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 raising additional issues, which he could have raised then, via his WIS. STAT. § 974.06 appeal. See *Tillman*, 281 Wis. 2d 157, ¶20.

¶8 Gilmore's attempt to avoid the *Escalona-Naranjo* bar by claiming that his postconviction counsel provided ineffective assistance cannot succeed. In order to succeed on an ineffective assistance claim, Gilmore 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.

¶9 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.*

¶10 Here, Gilmore's claim cannot be sustained 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 Gilmore's assertion that his counsel provided ineffective assistance by failing to argue that he was denied due process when the State failed to correct the "false evidence." The "false evidence" was testimony that the victim received 210 stitches from injuries received during one of the robberies. Gilmore alleges that the medical records reference "150" stitches. Accordingly, Gilmore argues that the State should have corrected the "false testimony" and that his counsel should have challenged the State's failure to do so on the basis that Gilmore was denied due process.

¶11 The record does not conclusively establish that the victim's testimony about the 210 stitches was erroneous. Rather, the record suggests that such testimony was true. The medical report Gilmore references indicates that the victim received *greater than* 150 stitches, not *exactly* 150 stitches. Thus, Gilmore has failed to demonstrate that any false testimony needed to be corrected to preserve his due process rights. The record demonstrates that Gilmore's actions caused the victim to need a substantial amount of stitches. Raising the discrepancy between the victim's testimony about the specific number of stitches and the medical record reference about the amount of stitches would not have been meritorious. Therefore, postconviction counsel's failure to raise this issue cannot constitute ineffective assistance.

By the Court.—Order affirmed.

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

