COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3098 **Cir. Ct. No. 1997CF975408**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY JARMON,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Jerry Jarmon appeals from an order summarily denying his postconviction motion. The issues are whether the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), applies to decisions reviewed pursuant to the no-merit procedure of WIS. STAT.

RULE 809.32 (2003-04) ("no-merit decisions"), and whether the allegations of ineffective assistance of counsel constitute a sufficient reason for failing to raise (or adequately raise) issues on direct appeal.[1] ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574, extends ***Escalona***'s procedural bar to a no-merit decision, and the allegations of ineffective assistance of trial and postconviction counsel, without specifying how counsel's alleged ineffectiveness precluded Jarmon from raising (or adequately raising) these issues on direct appeal, are not sufficient to overcome ***Escalona***'s procedural bar. Therefore, we affirm.

¶2 A jury found Jarmon guilty of the first-degree intentional homicide of his girlfriend. The trial court imposed a sentence of life imprisonment with a parole eligibility date in sixty years. Jarmon's appellate counsel filed a no-merit report to which Jarmon filed a response. *See* WIS. STAT. RULE 809. 32 (1999-2000); ***Anders v. California***, 386 U.S. 738 (1967). This court considered the report, the response, and independently reviewed the appellate record, expressly analyzing Jarmon's fluctuating mental condition, including the entry and withdrawal of his plea of not guilty by reason of mental disease or defect, whether the victim's conduct immediately prior to the shooting constituted adequate provocation, the sufficiency of the evidence supporting the guilty verdict, the trial court's exercise of sentencing discretion, and several instances of trial counsel's potential ineffectiveness. We ultimately concluded that there were no arguably meritorious appellate issues and affirmed the judgment of conviction. *See* ***State v.***

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

Jarmon, No. 2000AP3179-CRNM, unpublished slip op. at 1-2 (WI App Jan. 24, 2002) ("***Jarmon I***").

¶3 Jarmon then filed a postconviction motion, pursuant to WIS. STAT. § 974.06, alleging one trial court error and four instances of ineffective assistance of counsel: two of trial counsel and two of postconviction counsel. Jarmon alleged that the trial court erred when it did not automatically recalculate his parole eligibility date to accommodate its award of 779 days of sentence credit. Jarmon also alleged that his trial counsel was ineffective for: (1) failing to object to an "improper and misleading" jury instruction relating to the provocation defense; and (2) stipulating (without Jarmon's consent) that a particular gun was returned to a Michael Green on November 20, 1997. Jarmon alleges that his postconviction counsel was ineffective for: (1) failing to raise the two foregoing instances of trial counsel's alleged ineffectiveness; and (2) failing to challenge the sentence credit issue by postconviction motion or on appeal.

¶4 Jarmon acknowledged ***Escalona***'s requirement that the postconviction movant must allege a sufficient reason for failing to raise (or adequately raise) issues on direct appeal, but contends that ***Escalona***'s procedural bar only applies to adversary appeals, and that its application should not be extended to no-merit appeals. We rejected that contention in ***Tillman***, holding that "a prior no merit appeal may serve as a procedural bar to a subsequent postconviction motion and ensuing appeal which raises the same issues or other issues that could have been previously raised." *See* ***id.***, 281 Wis. 2d 157, ¶27.

¶5 In his postconviction motion, Jarmon attempts to overcome ***Escalona***'s procedural bar by alleging that:

> [t]he court has not yet had much occasion to give an explication of the circumstances which constitute a "sufficient reason." It may be in some circumstances that ineffective postconviction counsel constitute[s] a sufficient reason as to … why an issue which could have been raised on direct appeal was not. See [***State ex rel.***] Rothering [***v. McCaughtry***, 205 Wis. 2d 675,] … 556 N.W.2d [136,] 139 [Ct. App. 1996].

We independently review the reason alleged to determine whether it is sufficient to overcome ***Escalona***'s procedural bar. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Notwithstanding this court's failure to explicitly delineate the circumstances that constitute a sufficient reason to overcome ***Escalona***'s procedural bar, it does not absolve Jarmon from alleging his reason for failing to raise (or adequately raise) his postconviction issues on direct appeal. *See* ***Tolefree***, 209 Wis. 2d at 424-26; ***Escalona***, 185 Wis. 2d at 181-82. We independently conclude that Jarmon's positing of this issue, without alleging with some specificity his reason for failing to previously raise (or adequately raise) these issues, does not constitute a sufficient reason to overcome ***Escalona***'s procedural bar. *See* ***Tolefree***, 209 Wis. 2d at 424.

¶6 Jarmon does not allege why he did not raise his sentence credit and ineffective assistance of trial counsel claims in his no-merit response despite he and appellate counsel identifying other areas of potential ineffectiveness in his no-merit appeal. Jarmon should have known of each instance of alleged ineffectiveness by the time he filed his no-merit response since one involved the jury instruction on provocation, another involved counsel's stipulation at trial to the return of the gun, and the remaining issue involved sentence credit, which was addressed by the trial court at sentencing. Moreover, Jarmon's current challenge to the jury instruction was partially addressed directly (not in the context of ineffectiveness) in ***Jarmon I***, when we addressed the legal definition and the

concept of adequate provocation, relying on the same law Jarmon cited in his current postconviction motion. *See* ***id.*** at 2-3 (quoting ***State v. Williford***, 103 Wis. 2d 98, 113, 307 N.W.2d 277 (1981) and ***State v. Lee***, 108 Wis. 2d 1, 12, 321 N.W.2d 108 (1982)).[2] *See* ***Jarmon I***, unpublished slip op. at 2-4. Jarmon does not explain why he did not challenge counsel's effectiveness in stipulating to the return of a gun to Michael Green on November 20, 1997.[3] Jarmon also fails to explain why he did not identify the sentence credit issue in his response to the no-merit report.

¶7 Jarmon's two ineffective assistance of postconviction counsel challenges also do not warrant belated review. His first claim merely recasts his two ineffective assistance of trial counsel claims as postconviction counsel's ineffectiveness for failing to challenge trial counsel's effectiveness as previously alleged. His second claim directly implicates postconviction counsel's effectiveness for failing to directly raise the same sentence credit issue he attempts to now raise. He does not explain, however, why he failed to identify this issue in his no-merit response. *See* ***Tillman***, 281 Wis. 2d 157, ¶27.

By the Court.—Order affirmed.

[2] In his postconviction motion, Jarmon also cited ***Johnson v. State***, 129 Wis. 146, 160, 108 N.W. 55 (1906) and ***State v. Lowe***, 151 Wis. 2d 786, 447 N.W.2d 395 (Ct. App. 1989). In ***Jarmon I***, we did not cite ***Johnson***, a 1906 case; however, we cited ***State v. Williford***, 103 Wis. 2d 98, 113, 307 N.W.2d 277 (1981), in which the court extensively addressed and relied on ***Johnson***. ***Lowe*** may not be cited because it is an unpublished opinion. *See* WIS. STAT. RULE 809.23(3).

[3] Jarmon cannot demonstrate prejudice from that stipulation considering the same evidence was established at trial by Milwaukee Police Lieutenant Leroy Shaw.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).