

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 05, 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. 2005AP2459

Cir. Ct. No. 2002CF6979

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM EDWARDS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Defendant-Appellant William Edwards appeals *pro se* from an order denying his motion for post-conviction relief under WIS. STAT.

§ 974.06 (2003-04).¹ Edwards claims the trial court erred in ruling that his claims are procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) and *State v. Tillman*, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. Because Edwards brings these issues to the court’s attention for the first time in his motion for post-conviction relief under § 974.06, and provides no reason in his motion for his failure to raise these issues earlier, either in a post-conviction motion under WIS. STAT. § 974.02 or on direct appeal, including no reason for his failure to provide a response to his appellate counsel’s no-merit report, we conclude that the trial court did not err in ruling that Edwards is procedurally barred from raising the claims in this appeal. Accordingly, we affirm.

BACKGROUND

¶2 On December 16, 2002, Edwards was charged with five counts of armed robbery, reasonable belief-threat of force, concealed identity, party to a crime, pursuant to WIS. STAT. §§ 943.32(1)(b) and (2), 939.05 and 939.641 (2001-02). On December 26, 2002, he waived his right to a preliminary hearing, confirming, by his signature on the Preliminary Hearing Questionnaire & Waiver form, that “I understand that by waiving the preliminary hearing, I am conceding that the State can establish probable cause, and that I will be ordered to stand trial.” On that same date, the State filed the Information containing the above five counts.

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

¶3 On June 17, 2003, Edwards pled guilty to all five counts as stated in the Information. As part of Edwards' plea agreement, Edwards acknowledged that the State would recommend a sentence of "[s]ignificant prison with a length to [the trial court's] discretion." During his plea colloquy with the trial court, Edwards acknowledged that he had read, along with his trial counsel, the Plea Questionnaire/Waiver of Rights form and that he had signed the form. Also, during the plea colloquy, Edwards expressed confusion as to the date on which the State indicated the robbery constituting count 5 occurred. The trial court adjourned the hearing to give the State and Edwards and his trial counsel an opportunity to review the date of the robbery and to verify that Edwards had committed this robbery. Upon the plea hearing being recalled later the same day, Edwards admitted that he had committed the robbery as set forth in count 5 and stated that he had only been confused regarding the date of the offense. Based upon Edwards' admission of guilt to all five counts, the trial court accepted Edwards' guilty pleas on all five counts.

¶4 On July 31, 2003, the trial court sentenced Edwards to twenty-three years of imprisonment on each of the five counts, to be served concurrently with each other, but consecutively to any prior sentences he was currently serving. The trial court also ordered restitution.

¶5 On August 12, 2003, Edwards filed a notice of intent to pursue postconviction relief. Edwards' appellate counsel filed a No-Merit Notice of Appeal on October 28, 2004 and on November 3, 2004, filed a Statement on the Transcript, certifying that on January 22, 2004, appellate counsel had served "defendant's copy of the transcripts upon the defendant." Edwards' appellate counsel filed a no-merit report. Edwards did not file a response to this report. By order dated January 31, 2005, this court summarily affirmed the judgment of

conviction, determining that, based upon the no-merit report, the lack of response to the report by Edwards, and this court's independent review of the record, "there [wa]s no basis for reversing the judgment of conviction ... [and a]ny further proceedings would be without arguable merit within the meaning of *Anders* [*v. California*, 386 U.S. 738 (1967)] and WIS. STAT. RULE 809.32."

¶6 On September 6, 2005, Edwards filed Defendant's Postconviction Motion Seeking Withdrawal of His Five Guilty Pleas, or in the Alternative, He Will Request Modification of the Sentences. By order dated September 9, 2005, the trial court² denied Edwards' motion. Edwards appealed.

DISCUSSION

¶7 In Edwards' postconviction motion, he contends that he should be allowed to withdraw his guilty pleas because: (1) at the time he waived his right to a preliminary hearing, the court commissioner failed to make a finding of probable cause on the record before binding Edwards over for trial, thereby denying the court personal and subject matter jurisdiction over Edwards; (2) Edwards' trial counsel was ineffective for (a) failing to object to this alleged lack of jurisdiction, and (b) failing to negotiate a better deal for Edwards in exchange for his guilty pleas; (3) Edwards was prejudiced by this ineffective assistance of trial counsel; (4) Edwards' guilty pleas were not "voluntarily, intelligently, and willingly entered"; (5) the plea questionnaire and waiver of rights form which he signed did not conform to the requirements of *State v.*

² The Honorable Elsa C. Lamelas reviewed and decided Edwards' postconviction motion as the Honorable Mary M. Kuhnmuensch was no longer assigned to the felony division of the Milwaukee County Circuit Court.

Moederndorfer, 141 Wis. 2d 823, 416 N.W.2d 627 (Ct. App. 1987); and (6) the trial abused its discretion when it gave Edwards a longer sentence than it gave to any of his co-defendants. In addition to the above, Edwards also argues on appeal that: (1) the trial court erred when it denied Edwards’ motion (a) because Edwards had failed to raise the issues in a response to appellate counsel’s no-merit report, and (b) “on the grounds that there is no reason why defendant did not raise claim of ineffective assistance of appellate counsel in response to counsel’s no-merit report”; (2) “[a]ppellate counsel was deficient where Edwards presents nonfrivolous issues appellate counsel should have discovered”; and (3) Edwards’ “was prejudiced by appellate counsel’s failure to raise the present issues on direct appeal.” Because Edwards first raises issues of ineffective assistance of appellate counsel in his briefing to this court on appeal, we will not consider these arguments. See *Evjen v. Evjen*, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (An appellate court will not consider arguments raised for the first time on appeal.).

¶8 The State argues that Edwards’ motion is barred in its entirety by *Escalona-Naranjo* and *Tillman*.

¶9 In a WIS. STAT. § 974.06 motion, a defendant may only raise constitutional or jurisdictional issues and cannot challenge the sufficiency of the evidence, jury instructions, evidentiary rulings or procedural matters. *State v. Evans*, 2004 WI 84, ¶33, 273 Wis. 2d 192, 682 N.W.2d 784, *overruled on other grounds*, *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. It is well-established that a defendant must raise all grounds for relief in his or her original, supplemental or amended motion for postconviction

relief. Sec. 974.06(4)³; *Escalona-Naranjo*, 185 Wis. 2d at 181. Defendants are not permitted to pursue an endless succession of postconviction remedies:

We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185. Thus, claims which could have been, but were not, raised in a prior postconviction motion or on direct appeal, are procedurally barred unless a sufficient reason for failing to raise the issue is presented. *Id.*

¶10 The *Escalona-Naranjo* rules apply with equal force where the direct appeal was conducted pursuant to the no-merit process of WIS. STAT. RULE 809.32. See *Tillman*, 281 Wis. 2d 157, ¶¶19-20 (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.). The *Tillman* court, in reviewing the

³ WISCONSIN STAT. § 974.06(4) provides:

All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

process undertaken by counsel and the court in evaluating an appeal under the no-merit procedures, noted:

We conclude that 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.

Tillman, 281 Wis. 2d 157, ¶19 (citation omitted).

¶11 Here, the record demonstrates that the no-merit procedures were followed. Appellate counsel filed a notice of no-merit appeal and no-merit report. Appellate counsel certified that he timely provided the transcripts to Edwards. Edwards did not file a response to the no-merit report. This court reviewed the issues raised in the no-merit report, independently reviewed the record, and concluded that there were no meritorious issues. Upon this analysis, this court specifically determined that: (1) there existed no meritorious challenge to the validity of the guilty plea, analyzing the plea colloquy and plea questionnaire and waiver of rights form; and (2) a postconviction challenge to the sentence was without merit. Accordingly, the court met the requirements of the no-merit procedures outlined in WIS. STAT. RULE 809.32 and *Tillman* is, therefore, applicable.

¶12 Additionally, a number of the facts that Edwards now raises in his WIS. STAT. § 974.06 motion were known to Edwards either prior to his sentencing, prior to the filing of the no-merit report, or prior to the time Edwards could have responded to that no-merit report (*e.g.*, that he was coerced into pleading guilty; that the plea questionnaire and waiver of rights form were never explained to him; and his assertion of innocence relating to some of the counts). In his motion to the

trial court, Edwards gives no reason for his failure to timely raise any of the issues or for his failure to provide a response to his counsel's no-merit report. On appeal, Edwards argues that he should not be faulted for failing to respond to the no-merit report because "to require a defendant who has no skill in law at all, to argue against his own counsel who has the skill of years of legal practice, makes appointment of counsel and direct appeal a meaningless ritual." However, Edwards still provides no reason as to why he failed to file *any* response to the no-merit report if, as he argues, he was aware of a number of these issues at the time the no-merit report was filed. Accordingly, under these circumstances, Edwards has failed to demonstrate that any "sufficient reason" exists for his failing to raise the issues he raises now during his earlier appeal. *See* § 974.06(4). Thus, Edwards is procedurally barred from pursuing the claims in his motion under *Escalona-Naranjo* and *Tillman*.

¶13 Edwards further argues that under the decision of United States Court of Appeals for the Seventh Circuit in *Page v. Frank*, 343 F.3d 901 (7th Cir. 2003), his motion is not barred by *Escalona-Naranjo* and *Tillman*. He is mistaken. The federal court in *Page* held only that the *Escalona-Naranjo* bar to successive postconviction claims set forth in WIS. STAT. § 974.06(4) and *Escalona-Naranjo* did not affect the availability of federal habeas corpus relief to a state prisoner under 28 U.S.C. § 2254 (2003) in federal court. *Page*, 343 F.3d at 908-09. *Page* did not address nor affect Wisconsin courts' interpretation and application of § 974.06(4) and *Escalona-Naranjo* (or *Tillman*) to prisoners' litigation seeking collateral review of state court judgments of conviction.

¶14 Based on the foregoing, we conclude that the trial court did not err in summarily denying Edwards' postconviction motion based on the procedural bar of *Escalona-Naranjo* and *Tillman*.

By the Court.—Order affirmed.

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

