

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 5, 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. 2004AP2968

STATE OF WISCONSIN

Cir. Ct. No. 1995CF954508

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CARDELL CLANCY MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JOHN SIEFERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cardell Clancy Mitchell appeals from an order denying his motion to compel production of the transcript of his initial appearance, and from the order denying his related reconsideration motion. The issues are whether postconviction counsel had a duty to order a transcript of Mitchell's initial

appearance, whether postconviction counsel's failure to order that transcript constituted ineffective assistance, and whether the refusal to order that transcript for appellate review constituted a denial of Mitchell's due process rights. We conclude that the trial court properly exercised its discretion in denying Mitchell's motion to compel production of the transcript of his initial appearance; this transcript issue is also procedurally barred by *State v. Tillman*, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574. Therefore, we affirm.

¶2 In 1996, a jury found Mitchell guilty of first-degree reckless homicide while armed, in violation of WIS. STAT. §§ 940.02(1) and 939.63, and three counts of first-degree recklessly endangering safety while armed, in violation of WIS. STAT. §§ 941.30(1) and 939.63 (1993-94).¹ The trial court imposed a fifty-two-year aggregate sentence.²

¶3 Appointed counsel filed a no-merit report. Mitchell moved this court to compel appointed counsel to order a transcript of his initial appearance. We denied the motion, although we offered Mitchell two choices: (1) persuade us of the necessity of obtaining that transcript; or (2) order that particular transcript himself, seeking an extension of his response deadline to allow him to respond to the no-merit report with the benefit of that transcript. Mitchell elected neither option. Despite this court extending his response deadline, Mitchell instead failed to respond to the no-merit report altogether. This court affirmed the judgment of

¹ All references to the Wisconsin Statutes are to the 1993-94 version unless otherwise noted.

² For the reckless homicide, the trial court imposed a twenty-five-year sentence. The trial court imposed three consecutive nine-year sentences for the three recklessly endangering safety convictions, to run consecutive to the twenty-five-year sentence.

conviction. See *State v. Mitchell*, No. 97-1273-CRNM, unpublished slip op. at 3 (Wis. Ct. App. July 10, 1998) (“*Mitchell I*”).

¶4 In 1999, Mitchell moved for postconviction relief pursuant to WIS. STAT. § 974.06 (1999-2000), although he did not raise the transcript issue. The trial court denied the motion. This court affirmed, holding that the postconviction motion was procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). See *State v. Mitchell*, No. 2000AP0057, unpublished slip op. at 3 (quoting *Escalona*, 185 Wis. 2d at 181) (WI App Apr. 10, 2001) (“*Mitchell II*”).

¶5 Mitchell then moved the trial court to compel production of the transcript of his initial appearance because “[he] was entitled to one copy of each and every hearing and proceeding ... at public expense,” and he “need[ed] this transcript to fulfill a legal obligation.” The trial court denied the motion, noting that Mitchell’s direct appeal rights “have long expired,” and that his attempts to obtain postconviction relief pursuant to WIS. STAT. § 974.06 (1999-2000) were unsuccessful. The trial court ruled that, “[w]here the time for appeal has expired, the court requires the assertion of an arguably meritorious claim for relief before it will consider ordering the production of transcripts at public expense.” It explained that Mitchell did not set forth a claim, and that it would not “look for an arguably meritorious claim” for him.

¶6 Mitchell moved for reconsideration from the denial of that order, allegedly at the direction of the federal court to exhaust his state remedies. The trial court denied the motion, ruling that

[b]ecause the time for appeal has expired, the defendant will be required to pay for a copy of the transcript and make payment arrangements with the court reporter for that

purpose. He has not shown that an arguably meritorious claim for relief exists in his case due to the non-production of the initial appearance transcript.

¶7 Mitchell did not allege why he needed that transcript, only that he was “entitled” to it. He did not identify the legal obligation that he was attempting to fulfill, although he may have believed that this transcript was necessary to exhaust his state remedies as a prerequisite to seeking habeas corpus relief in federal court.³

¶8 Mitchell’s unspecified allegations are insufficient. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Moreover, during his response time in *Mitchell I*, Mitchell moved to compel the production of this same initial appearance transcript. We offered him two choices:

[to] explain in his response to the no[-]merit report what legal issues he thinks may have been raised during the initial appearance even though a transcript of the proceedings is not before this court. Or, he may order the initial appearance transcripts from the court reporter himself, and request an extension of time from this court to file the response to the no[-]merit report.

He chose neither; although we extended his response deadline, he failed to file a response to the no-merit report.

¶9 We also affirm the trial court’s denials because “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 Tillman*, 281 Wis. 2d 157, ¶27. Mitchell identified this

³ We question whether Mitchell understands the legal significance of the initial appearance because we are unaware of how any potential error in that proceeding could benefit Mitchell at this juncture.

potential issue before the expiration of his *Mitchell I* response deadline. He chose not to pursue it. His attempts to do so years later are procedurally barred by *Tillman*.

By the Court.—Orders affirmed.

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

