

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 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. 2005AP1435

Cir. Ct. No. 1991CF910217A

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTON JAMES WISNIEWSKI, III,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Anton James Wisniewski, III, appeals from an order denying his motion for postconviction relief pursuant to WIS. STAT. § 974.06

(2003-04).¹ The issue is whether the alleged ineffective assistance of postconviction counsel for failing to challenge defense counsel's effectiveness constitutes a sufficient reason to overcome the procedural bar of *State v. Tillman*, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574. We conclude that the issues Wisniewski now attempts to raise under the guise of ineffective assistance could have been raised and were necessarily rejected by this court during its independent review of the record incident to Wisniewski's no-merit appeal. Therefore, we affirm.

¶2 Incident to a plea bargain, the State amended the charges of first-degree intentional homicide as a party to the crime, and armed robbery, in exchange for Wisniewski's guilty plea to the reduced charge of felony murder (with armed robbery as the predicate offense). Wisniewski also pled guilty to receiving stolen property. The State recommended and the trial court imposed the maximum forty- and five-year consecutive sentences. Appellate counsel filed a no-merit report; Wisniewski failed to file a response. This court affirmed the judgment of conviction and postconviction order. *See State v. Wisniewski*, No. 97-1285-CRNM, unpublished slip op. at 2 (Wis. Ct. App. July 29, 1997) ("*Wisniewski I*").

¶3 Wisniewski filed a postconviction motion, pursuant to WIS. STAT. § 974.06, challenging his conviction on the bases of double jeopardy, and an unknowing, unintelligent and involuntary guilty plea. Wisniewski alleged that he failed to raise these issues previously because his postconviction counsel was ineffective for failing to challenge defense counsel's effectiveness. The trial court

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

denied the motion as procedurally barred because Wisniewski did not satisfactorily explain why he could not have identified those issues in response to the no-merit report. Wisniewski appeals.

¶4 Wisniewski’s substantive postconviction issues are double jeopardy and the validity of his guilty plea, both in the context of ineffective assistance of counsel. Wisniewski claims that his rights against double jeopardy were violated because he was convicted of felony murder and armed robbery, and that his guilty plea was invalid because he did not know the nature of the crime or its elements, and that the trial court failed to advise him that it was not bound by the plea bargain.

¶5 “[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. In a no-merit appeal, this court is obliged to independently review the record to search for every arguably meritorious issue, whereas in a conventional appeal, we only decide the issues appellant properly raises and adequately briefs. *See id.*, ¶¶15-18. As we explained:

This procedure demonstrates that, in some facets, the no merit procedure affords a defendant greater scrutiny of a trial court record and greater opportunity to respond than in a conventional appeal. As with a conventional appeal, appellate counsel examines the trial court record for potential appellate issues. However, the defendant in a conventional appeal does not receive the benefit of a skilled and experienced appellate court also examining the record for issues of arguable merit. Instead, the court’s role in a conventional appeal is limited to addressing the issues briefed by appellate counsel. Nor, as a general rule, is the defendant in a conventional appeal permitted to separately weigh in by raising objections to counsel’s brief or by raising additional issues [as is permissible in a no-merit response].

Id., ¶18. Potential double jeopardy violations and the validity of guilty pleas are fundamental issues appellate courts independently review in a no-merit appeal.

¶6 The alleged double jeopardy violations would have been obvious from the appellate record. Whether the trial court confirmed Wisniewski's understanding of the nature and elements of the offense and the nonbinding effect of a plea bargain on the trial court would have been readily apparent from a review of the transcript of the guilty plea hearing and Wisniewski's signed guilty plea questionnaire and waiver of rights form. Had we discovered even an arguably meritorious issue relating to double jeopardy, the validity of Wisniewski's guilty plea, or anything else, we would have unquestionably ordered further briefing at minimum, and more likely, rejected the no-merit report and ordered the appointment of successor postconviction/appellate counsel.² The fact that we accepted the no-merit report and affirmed the judgment of conviction and postconviction order necessarily demonstrate that these alleged double jeopardy and guilty plea challenges were not arguably meritorious. See *Anders v. California*, 386 U.S. 738, 744 (1967). Consequently, they would similarly fail if raised in the context of alleged ineffectiveness of counsel.³ Therefore, these issues (whether raised directly or in the context of ineffective assistance) are procedurally barred by *Tillman*. See *id.*, 281 Wis. 2d 157, ¶27.

² Moreover, Wisniewski presumably was aware of these potential issues before the expiration of his *Wisniewski I* response deadline. He chose not to respond.

³ Wisniewski repeatedly cites *Page v. Frank*, 343 F.3d 901 (7th Cir. 2003), to demonstrate that he overcame the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). *State v. Tillman*, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574, a Wisconsin case on point, postdates and does not conflict with *Page*. We therefore rely on *Tillman*.

By the Court.—Order affirmed.

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

