COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2007

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP867 **Cir. Ct. No. 2002CF6537**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT BARNES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY,[1] Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

[1] This case was originally before the Honorable Elsa C. Lamelas. On November 26, 2004, this case was reassigned to the Honorable John Siefert. On December 12, 2005, this case was reassigned to the Honorable William Sosnay.

¶1 KESSLER, J. Defendant Robert Barnes appeals from a judgment of conviction and an order denying his motion for postconviction relief pursuant to WIS. STAT. § 974.06 (2003-04).[2] Barnes contends that his trial counsel was ineffective because counsel: (1) failed to adequately investigate by not interviewing witnesses and not challenging the lack of testing of the alleged cocaine by the State Crime Lab; (2) withdrew Barnes's motions to suppress relating to the search warrant issued on November 11, 2002, and to disclose the identity of a confidential informant, without his consent or knowledge; (3) failed to commence an action under WIS. STAT. § 968.20 for recovery of the property seized from Barnes's safety deposit box that was not Barnes's personal property; and (4) failed to allow Barnes to review the defense-commissioned presentence investigation (PSI) report prior to his sentencing. Barnes contends that because of this ineffective assistance of counsel, his plea was not knowingly, voluntarily or intelligently entered for if he had had effective assistance of counsel, he would have gone to trial and been acquitted of the charges. Barnes also contends that he was denied appointment of postconviction counsel. Finally, Barnes contends that his claims are not barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

¶2 Because we determine that Barnes's trial counsel was effective and that Barnes was not denied appointment of postconviction counsel, we affirm the trial court's denial of Barnes's motion on the merits.

BACKGROUND

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

¶3 On November 13, 2002, Barnes was arrested and charged with possession with intent to deliver more than one hundred grams of cocaine as a second or subsequent offense, in a violation of WIS. STAT. §§ 961.16(2)(b)(1), 961.41(1m)(cm)5. and 961.48 (2001-02). Preceding his arrest, the following actions were undertaken by the Milwaukee Metropolitan Drug Enforcement Group (MMDEG): (1) during the week of October 27, 2002, the MMDEG, through a confidential informant (informant), conducted a controlled buy from Barnes; (2) within seventy-two hours of November 8, 2002, the MMDEG, also through an informant, made a second controlled buy from Barnes; (3) on November 8, 2002, Milwaukee County District Attorney's Office Investigator Jeffrey Doss prepared and signed an affidavit relating to the controlled buys in support of a no-knock search warrant request for Barnes's house; and (4) on November 11, 2002, a no-knock search warrant was issued. During Barnes's arrest on November 13, he was shown the warrant and gave the officers the keys to his house to facilitate their gaining entry without damage to the home. As a result of the search, officers confiscated cocaine, packaging materials, a scale, money and miscellaneous documents.

¶4 On December 30, 2002, Barnes filed a motion to suppress the evidence seized during the execution of the no-knock warrant and also filed a motion to compel disclosure of the informant whose controlled buys with Barnes formed the basis for the warrant. On January 21, 2003, the State filed its response to Barnes's motion to disclose the identity of the informant. Barnes, through his counsel, and the State undertook plea negotiations and on January 30, 2003, the State filed an Amended Information removing the second or subsequent offense element, thereby reducing the presumptive minimum sentence from twenty years to ten years on the amended charge.

¶5 At a hearing on January 30, 2003, at which Barnes was present, Barnes's counsel informed the trial court that "[w]e are going to withdraw our motions and enter a plea…. I believe the state was going to amend its pleadings and remove the enhancer of second or subsequent, which changes the penalty structure" and trial counsel then requested some additional time to meet with Barnes to "explain the ramifications of this change in circumstances." The trial court then specifically asked Barnes's trial counsel: "You're not going to turn around and refile these motions," to which Barnes's trial counsel stated, "No, ma'am."

¶6 At the plea hearing held on February 7, 2003, Barnes's trial counsel again noted on the record that Barnes had withdrawn his motions at the last hearing. During the plea colloquy, the following exchange occurred:

> [THE COURT]: How would you like to plead to the crime of possession of cocaine with intent to deliver in an amount of over 100 grams?
>
> [DEFENDANT]: Guilty.
>
> [THE COURT]: I have in my hands, Mr. Barnes, a document entitled Plea Questionnaire and Waiver of Rights. Is this your signature on the back? Is this your signature on the back of this Plea Questionnaire and Waiver of Rights form?
>
> [DEFENDANT]: Yes, ma'am.
>
> [THE COURT]: Did you sign the document after reviewing it with [your counsel]?
>
> [DEFENDANT]: Yes, ma'am.
>
> [THE COURT]: Do you understand everything on the form?
>
> [DEFENDANT]: Yes, ma'am.

> [THE COURT]: Do you realize, Mr. Barnes, that this form lists constitutional rights that you're giving up by pleading guilty here today?
>
> [DEFENDANT]: Yes, ma'am.
>
> [THE COURT]: Did [your counsel] explain that to you?
>
> [DEFENDANT]: Yes, he did.
>
> [THE COURT]: Did he also explain to you each of the constitutional rights that you are giving up by pleading guilty here today?
>
> [DEFENDANT]: Yes, he did.
>
> [THE COURT]: Do you have any questions of me about the constitutional rights that you are giving up?
>
> [DEFENDANT]: No, ma'am.

¶7 The trial court went on to discuss the elements of the crime to which Barnes was pleading guilty and when asked by the trial court whether his trial counsel had explained the elements of the offense to him and whether he understood the elements of the offense, Barnes answered affirmatively both times. During the hearing, Barnes's trial counsel specifically stated, on the record, "And I might point out that I've seen [Barnes] probably ten times during the pendency of this case, and we have thoroughly investigated the elements and all defenses he may have had to the case." Shortly following that statement by his trial counsel, the trial court again asked Barnes if he "still wish[ed] to go forward [with] the guilty plea" and Barnes answered, "Yes, ma'am." The trial court specifically asked, "Are you pleading guilty because you are guilty?" and Barnes answered, "Yes, ma'am."

¶8 At the conclusion of the plea hearing, Barnes's trial counsel asked the trial court if it wished to have a PSI report done. The trial court asked the

parties if they wanted one done and both the State and Barnes's trial counsel said no.

¶9 At the May 7, 2003, sentencing hearing, the trial court noted on the record that it had received from the defense a PSI report prepared by a third party and a letter from Barnes's son for its consideration. The PSI report was discussed on the record relating to the State's issue with how the report characterized Barnes's prior record. The State recommended twelve years' imprisonment consisting of six years' initial confinement and six years of extended supervision, a fine of $5000, and a $3406 contribution to a crime prevention agency, plus costs, a DNA sample and a surcharge. When asked by the trial court if this recommendation was what was agreed to in the plea bargain, Barnes's counsel answered yes, and noted that Barnes had not filed an action challenging forfeiture of the $3406 that had been seized from Barnes. The trial court then asked Barnes if this was his understanding of the plea agreement and Barnes answered, "Yes, Your Honor."

¶10 After argument by counsel, and receiving testimony from some of Barnes's relatives, as well as Barnes himself, the trial court sentenced Barnes to the sentence recommended by the State, except that the $5000 fine imposed was inclusive of costs, and Barnes's driving privileges were revoked for six months. In discussing its decision on the record, the trial court noted the impact on the community of Barnes's drug dealing, Barnes's addiction and prior drug conviction, as well as his addiction to the "good money" he made dealing drugs, the seriousness of Barnes's offense in that over three hundred grams of cocaine were recovered from his person and his house, and the mitigating factors provided by counsel, in the PSI report and through the testimony of witnesses at the hearing.

¶11 On November 26, 2004, Barnes filed a motion for sentence modification and a supporting brief, alleging that the trial court erroneously exercised its discretion in sentencing him. The trial court denied Barnes's motion as untimely under WIS. STAT. §§ 809.30 and 973.19 and also as failing to set forth a new factor claim. On December 12, 2005, Barnes filed a motion to vacate under WIS. STAT. § 974.06 and to correct his sentence based on newly discovered evidence. On March 21, 2006, the trial court denied Barnes's motion as being barred under ***Escalona-Naranjo***, and further found that Barnes's claims of ineffective assistance of counsel were without merit. Barnes appealed.

DISCUSSION

1. Ineffective assistance of counsel

¶12 Barnes asserts that his trial counsel was ineffective because counsel: (1) failed to adequately investigate by not interviewing witnesses and not challenging the lack of testing of the alleged cocaine by the State Crime Lab; (2) withdrew Barnes's motion to suppress relating to the search warrant issued on November 11, 2002, and motion to disclose the identity of an informant, without his knowledge or consent; (3) failed to commence an action under WIS. STAT. § 968.20 for recovery of the property seized from the safety deposit box that was not Barnes's personal property; and (4) failed to allow Barnes to review the defense-commissioned PSI report prior to his sentencing. Barnes contends that as a result of this ineffective assistance of counsel, his plea was not knowingly, voluntarily or intelligently entered and, therefore, he should be allowed to withdraw his plea and be released with time served.

¶13 The State argues first that "[l]aboratory testing of a putative controlled substance is not necessary to prove that the substance is an illegal

drug," citing to ***State v. Givens***, 217 Wis. 2d 180, 191-94, 580 N.W.2d 340 (Ct. App. 1998), and "identification of controlled substances need not be through laboratory testing but may be made through a lay witness familiar with the substance," citing to ***State v. Anderson***, 176 Wis. 2d 196, 202, 500 N.W.2d 328 (Ct. App. 1993). The State notes that the field test used (Cobalt-Thiocyante Field Test) registered positive for cocaine on the white powder recovered from Barnes during his arrest and as a result of the search warrant. The State further argues that at no time has Barnes contended that the substance was not cocaine.

¶14 On Barnes's claims that his counsel failed to investigate, the State argues that Barnes has failed to "allege with specificity what the investigation would have revealed," as required under ***State v. Thiel***, 2003 WI 111, ¶44, 264 Wis. 2d 571, 665 N.W.2d 305, and specifically, that Barnes has failed to "explain[] how an interview of the 'prosecutor's witness' or any other investigative actions by defense counsel would have yielded any information useful to the defense." The State next argues that the record refutes Barnes's claims that his counsel withdrew the motions to suppress and for disclosure of the informant without his knowledge, noting that "Barnes was present when his attorney withdrew the pretrial motions because a plea agreement had been reached with the State that significantly reduced Barnes's potential sentence … [and] Barnes was aware that the motions were being withdrawn and voiced no objection." The State goes on to note that Barnes has not shown that his motions would have been granted had they not been withdrawn or how his defense would have been aided if the identity of the informant had been disclosed. Finally, the State argues that Barnes has not shown how he was prejudiced by his "counsel's alleged failure to let him review the privately prepared [PSI]," making no claim

that any of the information was inaccurate or that the trial court used any inaccurate information in its sentence determination.

¶15 A defendant seeking to withdraw a guilty plea after sentencing must show, by clear and convincing evidence, that a manifest injustice would result if the motion to withdraw is denied. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The decision to allow plea withdrawal rests in the trial court's discretion, and we will reverse only where the trial court erroneously exercised that discretion. ***Id.*** Ineffective assistance of counsel constitutes a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A defendant claiming ineffective assistance of counsel must allege facts showing "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Id.*** at 312 (quoting ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)). In order to show that a failure to investigate was prejudicial, a defendant must show both what the investigation would have revealed and how it would have altered the outcome of the proceedings. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (defendant who alleges that lawyer was ineffective because the lawyer did not do something, must show with specificity what the lawyer should have done and how that would have either changed things or, at the very least, how the failure made the result either unreliable or fundamentally unfair).

¶16 In order to prove an ineffective assistance claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***,

153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 687). Performance is deficient if it falls outside the range of professionally competent representation. ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985). We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See* ***Strickland***, 466 U.S. at 688, ***Pitsch***, 124 Wis. 2d at 637. We indulge in a strong presumption that counsel acted reasonably within professional norms. ***Pitsch***, 124 Wis. 2d at 637.

¶17 As to prejudice,[3] it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the defendant must show that, but for the attorney's error, there is a reasonable probability that the result would have been different.

¶18 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 324-25.

a. Failure to investigate

¶19 Barnes asserts, in conclusory terms, that "trial counsel failed to interview the prosecutor's witness, nor investigated this case before the unlawful

[3] The prejudice component of ***Strickland*** has been described as focusing "on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." ***Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993).

plea was taken and entered in this case," thereby failing to "marshal all the facts in this case." Barnes provides no information which he believed the State's witness would have provided in support of his defense of the case or what other investigation trial counsel failed to conduct. Additionally, trial counsel informed the trial court on the record that he had met with Barnes "probably ten times during the pendency of this case, and we have thoroughly investigated the elements and all defenses he may have had to the case." Barnes's conclusory statement that trial counsel failed to interview a State's witness or failed to investigate in order to "marshal all the facts in this case" is insufficient to show either that there was information that would have assisted Barnes's case or that the result, his plea, would have been different. Accordingly, under ***Strickland*** and ***Pitsch***, Barnes has failed to prove ineffective assistance of counsel on this claim. ***Strickland***, 466 U.S. at 688; ***Pitsch***, 124 Wis. 2d at 637.

¶20 Barnes also alleges that trial counsel was ineffective for not challenging the lack of testing of the cocaine by the State Crime Lab. We disagree. While under ***State v. Jackson***, 161 Wis. 2d 527, 468 N.W.2d 431 (1991), more than field testing of a substance is required for a finding of proof beyond a reasonable doubt, it is sufficient to prove probable cause. ***Id.*** at 528-29. Additionally, field test results, in combination with other evidence, such as the recovery of drug dealing paraphernalia including scales and baggies, or similar form of packaging to other drug seizures, can be sufficient to prove that the substance recovered was cocaine. *See, e.g.*, ***Givens***, 217 Wis. 2d at 194 (combination of field tests and recovered substance in similar packaging to drugs recovered from confidential informant sufficient for conviction). This case was in its pretrial stages when Barnes pled guilty. Had the matter proceeded to trial, the State had ample time to submit the substance recovered from Barnes to the State

Crime Lab for testing. Moreover, the record reflects that throughout the proceedings leading up to his guilty plea, Barnes at no time claimed that the substance seized from him upon his arrest and through the search warrant was not cocaine. Accordingly, we conclude that Barnes has not shown by clear and convincing evidence that trial counsel's alleged failure to challenge the lack of testing at the State Crime Lab constituted ineffective assistance of counsel such that the failure creates the manifest injustice required to allow Barnes to withdraw his guilty plea. ***McCallum***, 208 Wis. 2d at 473.

b. Withdrawal of motions

¶21 Barnes claims that his trial counsel withdrew his motion to suppress the evidence recovered from the search of his home and his motion to disclose the identity of the informant without Barnes's knowledge and consent. These claims are not supported by the record. First, Barnes was present at the January 30, 2003 hearing where trial counsel withdrew the motions and at the February 7, 2003 hearing where trial counsel confirmed that the motions had been withdrawn at the January 30, 2003 hearing. The withdrawal of the motions was specifically addressed by the trial court at the January 30, 2003 hearing and trial counsel confirmed that as part of the plea bargain negotiated between Barnes and the State, Barnes was withdrawing both motions. Again, during the February 7, 2003 hearing at which Barnes was present and pled guilty, trial counsel again confirmed that Barnes had withdrawn his motions as part of the plea bargain. And following this confirmation by trial counsel, and in answer to the trial court's question asking Barnes whether he agreed with what his trial counsel had said regarding the plea bargain, Barnes answered "yes." Accordingly, we agree with the trial court that Barnes cannot now assert that the motions were withdrawn without his knowledge or consent and thus, their withdrawal does not constitute either ineffective

assistance of counsel or a reason for Barnes to be allowed to withdraw his guilty plea.

¶22 Additionally, Barnes makes the conclusory statement, citing to the motions filed by trial counsel, that the search warrant was invalid and therefore, he would have been acquitted at trial if the motions had not been withdrawn. However, Barnes offers no facts or argument supporting this optimistic statement. *See* ***State v. Multaler***, 2002 WI 35, ¶7, 252 Wis. 2d 54, 643 N.W.2d 437 (defendant bears the burden of proof in a challenge to the existence of probable cause to satisfy an issued search warrant). Additionally, the State responded to Barnes's motion to disclose the identity of the informant and Barnes provides no facts to support his claim that his motion would have been granted if not withdrawn. The record also reflects that at the January 30, 2003 hearing, and in the attorney billing records attached to Barnes's second reply in support of his WIS. STAT. § 974.06 motion, trial counsel noted that the State was contemplating additional charges and that both motions were withdrawn as part of a negotiated plea agreement between Barnes and the State whereby Barnes agreed to plead guilty to a reduced charge, rather than stand trial on the current charge and possibly additional charges. The record in this case does not support Barnes's contention that but for his trial counsel's withdrawal of the motions to suppress and for disclosure of the informant, he would have been acquitted at trial, and that, therefore, he should be allowed to withdraw his guilty plea based on ineffective assistance of counsel. ***Lockhart***, 506 U.S. at 372; ***Erickson***, 227 Wis. 2d at 773.

c. Failure to commence action for recovery under WIS. STAT. § 968.20

¶23 Barnes next contends that trial counsel's failure to commence an action under WIS. STAT. § 968.20, for recovery of the property seized from the

safety deposit box which Barnes claims was not his property, was ineffective assistance of counsel. Under § 968.20,[4] an action to recover property is to be made by the "person claiming the right to possession of [the] property seized." In this case, Barnes argues that his trial counsel should have requested a hearing to determine who owned the property seized from his safety deposit box, and in his briefing to the trial court, claims that some of the property seized (*e.g.*, some of the gold and diamonds) belonged to his mother.

¶24 The record reflects that on-going discussions regarding at least some of the seized items occurred prior to Barnes entering his guilty plea. At the January 30, 2003 hearing, trial counsel, in response to the State's filing of the Amended Information reducing the presumptive minimum sentence from twenty years to ten years, entered a plea of not guilty on behalf of Barnes, and specifically informed the trial court that "my client and I have been contemplating the motions, pretrial matters, *return of his automobile, which he got*, drug treatment, all of the matters that happened kind of before a plea" (emphasis added). Consequently, Barnes was aware that he was entitled to the return of some of the items seized and in fact, received them. Barnes did not previously assert that some of the property seized from his safety deposit box belonged to his mother. At his sentencing hearing on May 7, 2003, in response to the trial court's following the State's

[4] WISCONSIN STAT. § 968.20 states, in pertinent part:

> **(1)** Any person claiming the right to possession of property seized pursuant to a search warrant … may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. The court shall order such notice as it deems adequate to be given to the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership.

recommendation that Barnes contribute $3406 to a crime prevention agency, trial counsel clarified on the record that this was pursuant to the plea negotiations, that the $3406 was money that had been seized, and further that Barnes had not filed a forfeiture action to recover this money. Barnes consequently was aware at that time that a procedure was available to recover seized property. Importantly, however, Barnes fails to show how his trial counsel's alleged failure to request a hearing on the recovery of non-drug-related property seized by police prejudiced his defense, or would have changed the outcome, his guilty plea. *See* ***State v. Provo***, 2004 WI App 97, ¶16, 272 Wis. 2d 837, 681 N.W.2d 272 (even assuming counsel's performance was deficient, must show prejudice). Accordingly, we conclude that Barnes's ineffective assistance of counsel claim fails on this contention.

d. No review of defense-commissioned[5] *PSI report before sentencing*

¶25 "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews *de novo*." ***Id.*** The United States Supreme Court has developed a test, the ***Townsend/Tucker*** test, to determine whether a defendant has been denied due process in sentencing by the sentencing court's use of a PSI report. ***United States v. Tucker***, 404 U.S. 443 (1972); ***Townsend v. Burke***, 334 U.S. 736 (1948); ***Tiepelman***, 291 Wis. 2d 179,

[5] The PSI report used by the trial court at sentencing was prepared by the defense, and was not court-ordered nor prepared by the Department of Corrections (DOC). As noted in the PSI report, which was part of the record in this case, it was based upon interviews with the defendant, his friends, family, AODA counselor and employer, as well as police and court records and Barnes's DOC T-file.

¶14. This test was reconfirmed as applicable to Wisconsin courts in ***Tiepelman***. ***Id.***, 291 Wis. 2d 179, ¶14. The ***Townsend/Tucker*** test requires that a defendant show that the sentencing court used "false information [as] part of the basis for the sentence. The two elements of that showing are, first that information before the sentencing court was inaccurate, and second that the sentencing court relied on the misinformation in passing sentence." ***Id.*** (citation omitted). "Whether the court 'actually relied' on the incorrect information at sentencing was based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.*** (citation omitted).

¶26 Barnes makes numerous conclusory statements regarding his PSI report. First, he claims that he never saw the PSI report prior to sentencing. However, the report was prepared for his attorney, not the State. Hence, any claim that his own attorney did not share the report with him, would require demonstrating that the attorney thereby rendered ineffective assistance. (See discussion ¶15-17, *supra*.) Barnes identifies no information which he contends was inaccurate in the PSI report, in either his motion or briefs to the trial court or in his brief to this court. All of these he prepared after receiving and reviewing a copy of the PSI report in April 2005 (the receipt of which he evidences by attaching a letter from the preparer of the PSI report to his submissions to the trial court and this court). Because Barnes does not set forth any information which he believes was inaccurate in the PSI report, Barnes has failed to establish a *prima facie* case that his counsel was ineffective if he did not show Barnes the report. *See* ***Pitsch***, 124 Wis. 2d at 636-37.

2. Entitlement to appointment of postconviction counsel

¶27 Barnes argues that he was never appointed postconviction counsel to pursue the types of claims which he is now making in his current *pro se* motion. During the trial court proceedings, Barnes was represented by privately retained counsel. In fact, Barnes argues in his brief that his trial counsel "promised to assist [him] with his 'Direct Appeal,' but failed to do so," referencing a letter from trial counsel to Barnes dated December 13, 2004, and noting that it was attached to Barnes's reply brief filed with the trial court. However, when we review this letter from trial counsel to Barnes, it does not address any of the postconviction claims that Barnes is now making; rather, it discusses motions for postconviction relief regarding access to programming outside of prison and opportunities for early release. Additionally, in a second letter dated November 7, 2005 (only the first page of which is attached to Barnes's reply brief to the trial court), from trial counsel to the Office of Lawyer Regulation regarding Barnes's grievance with trial counsel, counsel notes that "I was never hired by Mr. Barnes to do an appeal, nor do I do appellate work…. Eligibility for early release … and an appeal based on new factors … have already been initiated by Mr. Barnes. Both reviews have been denied…." The record is also silent as to a request from Barnes to the trial court for appointment of postconviction counsel by the State or that Barnes attempted to hire other postconviction/appellate counsel, but was unsuccessful. Based on no showing by Barnes that he ever requested the appointment of postconviction counsel, we affirm the trial court's denial of his claim.

3. Applicability of *Escalona-Naranjo*

¶28 Barnes also argues that the trial court erred in holding that his claims were barred by ***Escalona-Naranjo***. Because we have addressed the merits of

Barnes's claims, we decline to determine whether the procedural bar of ***Escalona-Naranjo*** applies where a defendant has filed only an untimely request for sentence modification prior to filing a motion under WIS. STAT. § 974.06. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

CONCLUSION

¶29 Based on the above, we affirm the trial court's denial of Barnes's WIS. STAT. § 974.06 motion on the merits.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.