

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 7, 2007**

A. John Voelker  
Acting 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. 2006AP269**

**Cir. Ct. No. 2000CF402**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ARNULFO G. TORRES,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Sheboygan County:  
TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Arnulfo Torres appeals from a circuit court order denying his WIS. STAT. § 974.06 (2003-04)<sup>1</sup> motion challenging his 2001 conviction for repeated sexual assault of the same child contrary to WIS. STAT. § 948.025(1) (1999-2000) as a habitual criminal. The circuit court denied the motion without an evidentiary hearing. We affirm.

¶2 We affirmed Torres' conviction in his direct appeal based upon counsel's WIS. STAT. RULE 809.32 (2001-02) no-merit report. *State v. Torres*, No. 2001AP1928-CRNM (Wis. Ct. App. Nov. 21, 2001). Torres did not respond to counsel's no-merit report. In November 2005, Torres filed a WIS. STAT. § 974.06 (2003-04) motion claiming that his no contest plea was not entered knowingly, voluntarily and intelligently, and that the circuit court improperly applied a penalty enhancer, would not accept an *Alford*<sup>2</sup> plea, and did not inform Torres of the WIS. STAT. RULE 809.32 (2001-02) no-merit procedure. Torres also claimed that his postconviction counsel was ineffective. The court denied the § 974.06 motion without a hearing because Torres' claims could have been raised in his direct appeal and were therefore barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Torres appeals.

¶3 We review whether the circuit court erred in denying Torres' WIS. STAT. § 974.06 motion without an evidentiary hearing. Denying the motion without an evidentiary hearing is not a misuse of discretion if the record

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

<sup>2</sup> An *Alford* plea is a conditional guilty plea in which the defendant maintains his or her innocence of the charge while at the same time pleading guilty or no contest to it. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *State v. Spears*, 147 Wis. 2d 429, 434-35, 433 N.W.2d 595 (Ct. App. 1988).

conclusively demonstrates that the movant is not entitled to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. “Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.” *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

¶4 Torres’ appellant’s brief focuses on the circuit court’s decision to deny his WIS. STAT. § 974.06 motion without a hearing. We agree with the circuit court that with the exception of his challenge to the representation provided by postconviction counsel, all of Torres’ § 974.06 claims are barred. In *State v. Tillman*, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, *review denied*, 2005 WI 136, 285 Wis. 2d 628, 703 N.W.2d 378, we held that *Escalona-Naranjo* bars a defendant from raising issues already addressed in a WIS. STAT. RULE 809.32 no-merit appeal unless the defendant demonstrates a sufficient reason for failing to raise those issues previously. *Tillman*, 281 Wis. 2d 157, ¶19.

¶5 Torres’ WIS. STAT. § 974.06 motion did not allege that he did not understand the no-merit process.<sup>3</sup> Counsel’s no-merit report addressed whether Torres’ no contest plea was voluntarily and knowingly entered, the propriety of the sentence, including the habitual criminality enhancer, and whether the record supports an ineffective assistance of trial counsel claim. We held that these issues lacked arguable merit for appeal. Torres expressed his concerns about his trial counsel and circuit court proceedings to his appointed appellate counsel. Counsel recounted those concerns in the no-merit report, and we agreed with counsel that the concerns lacked arguable merit for appeal. Torres has not offered a sufficient

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<sup>3</sup> It was appellate counsel’s responsibility to inform Torres about the no-merit process. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 604-07, 516 N.W.2d 362 (1994).

reason for failing to raise all of the complaints set forth in his § 974.06 motion as part of his no-merit appeal.<sup>4</sup> Therefore, *Tillman* applies, and the issues are barred. The circuit court did not err in denying the motion without an evidentiary hearing because Torres was not entitled to relief. *Allen*, 274 Wis. 2d 568, ¶9.

¶6 We turn to whether the circuit court properly denied Torres' request for relief in relation to the performance of his postconviction counsel. Preliminarily, we note that the circuit court erroneously applied *Escalona-Naranjo* to this claim. An ineffective assistance of postconviction counsel claim

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<sup>4</sup> Torres contends that he did not understand the no-merit report because he does not read English. However, we note that the no-merit report states that counsel consulted with Torres by telephone and in person, and Torres expressed his concerns to counsel. The no-merit report stated:

In this case, during counsel's meeting with Torres, he raised issues of the performance of his trial attorney. However, his dissatisfaction was based on non-specific accusations that his attorney did not spend adequate time with him prior to Torres entering his plea and being sentenced. Torres did not articulate how the amount of time he spent with his attorney affected the outcome of his plea. Further, Torres claims that his understanding of English is quite limited. However, counsel personally met with Torres for approximately one and one-quarter hours at Waupun Correctional Institution and did not find that an interpreter was needed nor did she have any difficulty communicating with Torres during the course of that meeting. Torres has not asserted anything specific that his trial attorney did-or failed to do-resulted in his "no contest" plea. At the Change of Plea Hearing, Judge VanAkkeren asked Torres if he was satisfied with the work his attorney did in the case. Torres responded, "Yes." Moreover, nothing in counsel's review of the pre-trial proceedings, plea colloquy, or sentencing suggests ineffective representation of counsel. Under the circumstances, the best his trial attorney could do was negotiate a plea to reduce the sentence from the maximum possible. There is nothing to suggest that trial counsel was ineffective.

At the time of his no-merit appeal, Torres had a means to make his complaints known to counsel and this court. We heard nothing from Torres at the time of his no-merit appeal.

could not have been raised on direct appeal and had to be raised in the circuit court via a WIS. STAT. § 974.06 motion. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). Nevertheless, we may affirm if the circuit court reached the right result for the wrong reason. *State v. Rognrud*, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990).

¶7 We conclude that Torres' WIS. STAT. § 974.06 motion made conclusory allegations about the failure of postconviction counsel to challenge the conduct of trial counsel. Torres' motion suggests that because trial counsel was ineffective, postconviction counsel was ineffective. These are undeveloped, conclusory allegations. A motion supported by conclusory allegations does not warrant an evidentiary hearing. *Bentley*, 201 Wis. 2d at 309-10. In addition, the record, which we reviewed in Torres' no-merit appeal, demonstrates that Torres was not entitled to relief on his ineffective assistance of trial counsel claim. Therefore, the circuit court properly exercised its discretion when it rejected Torres' claim of ineffective assistance of postconviction counsel without a hearing. *Id* at 310-11.

¶8 Finally, we reject Torres' suggestion that our February 6, 2003 order denying his request for appointed counsel for further postconviction proceedings somehow authorized him to proceed in the circuit court via a WIS. STAT. § 974.06 motion. Our order did not so state. It merely addressed and denied the request for appointed counsel.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

