COURT OF APPEALS DECISION DATED AND FILED

April 24, 2007

David R. Schanker
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. 2005AP2203

Cir. Ct. No. 2000CF1657

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGGIE L. TOWNSEND,

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. Reggie L. Townsend appeals from a postconviction order summarily denying his motion for plea withdrawal. The issue is whether Townsend was entitled to an evidentiary hearing on his plea withdrawal motion. We conclude that our rejection of this issue and our affirming

the amended judgment incident to a no-merit appeal constitutes a procedural bar to Townsend's current postconviction motion pursuant to ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574. Therefore, we affirm.

¶2 Townsend pled guilty to first-degree reckless homicide as a party to the crime. Townsend moved for presentence plea withdrawal. After an evidentiary hearing, the trial court denied the motion. Ultimately, the trial court imposed a forty-three-year sentence comprised of twenty-three- and twenty-year respective periods of confinement and extended supervision. Townsend's appellate counsel filed a no-merit report to which Townsend responded.[1] *See* WIS. STAT. RULE 809.32 (amended July 1, 2001); ***Anders v. California***, 386 U.S. 738 (1967). This court considered the report and Townsend's response, and independently reviewed the appellate record, ultimately concluding that, despite proposed challenges to the validity of Townsend's guilty plea and the order denying his presentence plea withdrawal motion, there were no arguably meritorious appellate issues. *See* ***State v. Townsend***, No. 2001AP2403-CRNM, unpublished slip op. at 3 (WI App Dec. 13, 2001) ("***Townsend I***").

¶3 Several years later, Townsend filed a *pro se* postconviction motion, again seeking plea withdrawal. The trial court summarily denied the postconviction motion as procedurally barred by ***Tillman*** and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). It is from this summary order that Townsend appeals.

[1] Townsend insists that he did not respond to the no-merit report. Although his no-merit response is not in the appellate record in this case, this court indicated that Townsend had filed a response, and repeatedly quoted from that response throughout its ***Townsend I*** order. *See* ***State v. Townsend***, No. 2001AP2403-CRNM, unpublished slip op. at 2-3 (WI App Dec. 13, 2001) ("***Townsend I***").

¶4 “[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.” ***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.

¶5 In his postconviction motion for plea withdrawal, in addition to challenging the validity of his guilty plea, claiming that it was entered unknowingly, unintelligently and involuntarily, Townsend claimed that his trial counsel was ineffective, as was his postconviction/appellate counsel who “challenged” the amended judgment only as a no-merit appeal. Townsend raised substantially similar claims in his original motion for presentence plea withdrawal. All of these claims were available to Townsend when he responded to the no-merit report. In the no-merit report, appellate counsel addressed why challenging the validity of Townsend’s guilty plea and the trial court’s exercise of discretion in

denying his motion for presentence plea withdrawal would lack arguable merit. *See* ***Townsend I***, No. 2001AP2403-CRNM, unpublished slip op. at 2. After independently reviewing the record incident to the no-merit appeal, this court concluded that any further challenges to Townsend's guilty plea would lack arguable merit, essentially negating Townsend's ineffective assistance of postconviction/appellate counsel claim. *See* ***id.*** at 3. There is no legitimate reason not to apply ***Tillman***'s procedural bar to Townsend's postconviction motion.[2] Consequently, he is not entitled to an evidentiary hearing to again address the merits of his plea withdrawal claim.[3] *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

By the Court.—Order affirmed.

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

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[2] Townsend claims that the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), does not apply because this was his first postconviction motion. ***Escalona***'s procedural bar extended from a successive postconviction motion (procedurally barred by WIS. STAT. § 974.06(4) (1993-94)) to a postconviction motion following a direct appeal. *See* ***Escalona***, 185 Wis. 2d at 185. ***Tillman*** extended ***Escalona***'s procedural bar to a postconviction motion following a no-merit appeal. *See* ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574.

[3] While we are not required to address the merits of Townsend's plea withdrawal and related ineffective assistance claims, they (with the exception of the claimed ineffectiveness of postconviction/appellate counsel) were essentially decided by the trial court before sentencing, and all of these claims were essentially decided by this court in ***Townsend I***. We will not consider them again. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("[a] matter once litigated may not be relitigated … no matter how artfully the defendant may rephrase the issue").