COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP225 **Cir. Ct. No. 1995CF950287**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN FRANCIS FERGUSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. John F. Ferguson, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2005-06)[1] postconviction motion to withdraw his guilty plea. Ferguson claimed that he did not enter his guilty plea knowingly because the trial court did not inform him that it was not required to impose the sentence recommended in a plea agreement. Because Ferguson's claims are barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), we affirm.

Background

¶2 Ferguson was initially charged with first-degree intentional homicide, party to a crime, in the 1995 shooting death of Rickey Hardin. Ferguson was subsequently charged with two additional counts of attempted first-degree intentional homicide, party to a crime. As part of a plea agreement, Ferguson pled guilty to one count of first-degree reckless homicide, while using a dangerous weapon, party to a crime. The State agreed to recommend "a period of substantial incarceration … with no specific recommendation" as to the length of sentence. Ferguson pled guilty on May 5, 1995, and on June 30, 1995, the court sentenced Ferguson to thirty-five years.

¶3 Ferguson filed a notice of appeal and his appointed counsel filed a no-merit report that addressed the adequacy of the plea colloquy, the effectiveness of trial counsel, and the trial court's sentencing discretion. Ferguson did not file a response to counsel's no-merit report. After independently reviewing the record,

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

this court affirmed the judgment of conviction. ***State v. Ferguson***, No. 96-1164-CRNM, unpublished slip op. (Wis. Ct. App. Oct. 1, 1996).

¶4 After several years of litigation designed to obtain documents from both the circuit court and from his appellate attorney, Ferguson filed a motion to withdraw his guilty plea on December 19, 2005. In the motion, Ferguson asserted that the trial court failed to inform him that it was not obligated to accept the plea agreement in violation of ***State v. Hampton***, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14. The trial court denied Ferguson's motion on two grounds: (1) the holding of ***Hampton*** did not apply to Ferguson because he pled guilty in 1995; and (2) Ferguson's motion was procedurally barred by ***Escalona-Naranjo***. Ferguson appeals.

Discussion

¶5 Ferguson was convicted in 1995. Ten years later, after a no-merit appeal in which he did not file a response,[2] Ferguson first raised this challenge to the adequacy of the plea colloquy. Ferguson could have raised the issue in his direct no-merit appeal. He did not, and accordingly, he is procedurally barred from raising the issue at this late date.

¶6 WISCONSIN STAT. § 974.06 and ***Escalona-Naranjo*** require a defendant to raise all grounds for postconviction relief in his or her original motion or appeal. The reason for this is that we need finality in our litigation. ***Escalona-Naranjo***, 185 Wis. 2d at 185. Due process requires only that a

[2] Ferguson requested several extensions of time in which to file a response. The requests were granted, but nonetheless, Ferguson did not respond to the no-merit report.

defendant be afforded "a single appeal of [a] conviction and a single opportunity to raise claims of error …." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Accordingly, a § 974.06 motion that raises an issue which could have been raised in a previous motion or appeal is procedurally barred absent a sufficient reason for failing to raise the issue previously. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185.

¶7 The procedural bar of ***Escalona-Naranjo*** applies with equal force where the direct appeal was conducted pursuant to the no-merit process of WIS. STAT. RULE 809.32. *See* ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574 (holding that the procedural bar applies to a defendant whose direct appeal was via the no-merit procedure, as long as the no-merit procedures were in fact followed, and the record demonstrates a sufficient degree of confidence in the result). Because Ferguson failed to raise this issue in a response to the no-merit report, he is procedurally barred from raising it in this subsequent postconviction motion.[3]

¶8 "Whether to retroactively apply the holding of a case is a question of law that we decide de novo." ***State ex rel. Krieger v. Borgen***, 2004 WI App 163, ¶7, 276 Wis. 2d 96, 687 N.W.2d 79. The threshold inquiry is whether the ***Hampton*** holding was a "new" rule for purposes of a retroactivity analysis. ***Krieger***, 276 Wis. 2d 96, ¶8. "A rule is new if the result was not dictated by

[3] Ferguson now asserts that his appellate counsel did not provide him with the transcripts or court record and his ability to file a response to the no-merit report was compromised. After Ferguson informed this court that his appointed attorney had not provided him with transcripts, this court, in a June 25, 1996 order, granted Ferguson an extension of time, until August 26, 1996, in which to file a response to the no-merit report. Ferguson did not file a response within that deadline. Ferguson did not request additional time, nor did he inform this court that he had not been provided with the transcripts by counsel.

precedent existing at the time the defendant's conviction became final." ***Id.***, ¶9. In ***Hampton***, 274 Wis. 2d 379, ¶38, the supreme court "reaffirm[ed] the rule that a circuit court must advise the defendant personally that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court and, concomitantly, ascertain whether the defendant understands this information." The supreme court grounded its holding in several earlier cases including ***State ex rel. White v. Gray***, 57 Wis. 2d 17, 203 N.W.2d 638 (1973), ***State v. McQuay***, 154 Wis. 2d 116, 452 N.W.2d 377 (1990), and ***State v. Comstock***, 168 Wis. 2d 915, 485 N.W.2d 354 (1992). ***Hampton***, 274 Wis. 2d 379, ¶¶2, 27-38. Because the holding of ***Hampton*** was not a new rule, the basis for Ferguson's claim existed at the time of his direct no-merit appeal. Therefore, he was obligated to raise it on his direct no-merit appeal. *See* ***Tillman***, 281 Wis. 2d 157, ¶19.

By the Court.—Order affirmed.

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