COURT OF APPEALS DECISION DATED AND FILED

August 21, 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. 2006AP2169-CR **Cir. Ct. No. 1998CF2863**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL ORTIZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Daniel Ortiz appeals, *pro se*, from an order denying his motion to correct or modify sentence. The circuit court correctly concluded that his motion is procedurally barred and we affirm.

Background

¶2 Ortiz pled guilty in August 1998 to one count of armed robbery. *See* WIS. STAT. § 943.32(2) (1997-98). His appellate counsel filed a no-merit report. Ortiz did not respond, although advised of his right to do so. *See* ***State v. Ortiz***, No. 99-0901-CR-NM, unpublished slip op. at 1 (Wis. Ct. App. Aug. 30, 1999). We conducted an independent review of the record and summarily affirmed the conviction. ***Id.*** at 1-2.

¶3 On August 2, 2006, Ortiz filed a *pro se* motion "to correct or modify sentence" citing as authority WIS. STAT. § 973.19 (2005-06).[1] He claimed that the circuit court failed to order a competency evaluation, and that his guilty plea was not knowingly entered, all in violation of his right to due process. The court[2] denied the motion, deeming it barred by the holdings of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) and ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574. This appeal followed.

Discussion

¶4 WISCONSIN STAT. § 973.19 sets a time limit of ninety days after sentencing within which to bring a sentence modification motion that is outside of the direct appeal procedure of WIS. STAT. RULE 809.30. Ortiz's motion for relief from his sentence, brought eight years after disposition, was far outside of this time limit. Section 973.19 cannot provide him a basis for relief.

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

[2] The Honorable Bonnie L. Gordon sentenced defendant and the Honorable William W. Brash III ruled on the defendant's postconviction motion pursuant to Milwaukee County's calendar rotation.

¶5 After the time for appeal has expired, a prisoner may raise constitutional issues pursuant to WIS. STAT. § 974.06. This statute seems better suited to Ortiz's postconviction motion, which claimed constitutional violations based on allegations of incompetency to proceed and an involuntary plea. The statutory scheme does not permit Ortiz's claims, however, because they could have been raised during his no-merit appeal.

¶6 A defendant is barred from pursuing claims in a subsequent appeal that could have been raised in an earlier postconviction motion or direct appeal unless the defendant provides a "sufficient reason" for not raising them previously. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. The bar applies with equal force where the direct appeal was conducted pursuant to the no-merit procedure of WIS. STAT. RULE 809.32. *See* ***Tillman***, 281 Wis. 2d 157, ¶¶19-20.

¶7 The no-merit procedure in some respects provides defendants greater scrutiny of the trial court record than a conventional appeal. ***Id.***, ¶18. Both processes afford the defendant an appellate attorney's analysis, but the no-merit procedure additionally provides the benefit of an appellate court's examination of the record for issues of arguable merit. ***Id.*** Further unlike a conventional appeal, the no-merit process allows the defendant to raise additional concerns in a separate brief. ***Id.***

¶8 Plea procedure and defendant competency are both fundamental appellate issues. This court's independent review of the record pursuant to the no-merit procedure would lead to discovery of arguably meritorious issues related to these concerns. Indeed, the no-merit report filed on Ortiz's behalf addressed the plea procedure directly. We accepted the no-merit report and affirmed the

judgment of conviction, demonstrating that the record reflects no arguably meritorious issues. *See* ***Anders v. California***, 386 U.S. 738, 744-45 (1967).

¶9 The no-merit process afforded Ortiz appellate review of his case. He has not offered any reason for failing to raise his claims independently during that process when given an opportunity to do so. Ortiz is thus barred from raising his claims now. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

¶10 In his appellate brief, Ortiz discusses matters not presented to the circuit court: whether a new factor warrants sentence modification and whether the court failed to consider evidence to rebut aggravating factors. Generally, we will not consider issues raised for the first time on appeal. ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). This policy gives trial courts the opportunity to correct errors, thereby avoiding appeals and conserving judicial resources. ***Id.*** We adhere to our policy in this case.

By the Court.—Order affirmed.

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