COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2988 **Cir. Ct. No. 1997CF973526**

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

STATE OF WISCONSIN,

PLAINTIFF–RESPONDENT,

V.

EARL JONES, JR.,

DEFENDANT–APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Earl Jones, Jr. appeals from an order denying his motion, brought pursuant to WIS. STAT. § 973.13 (2005-06)[1] to vacate his

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

conviction and sentence. We conclude that Jones's claim that he has been convicted and sentenced in violation of the double jeopardy clauses of the federal and state constitutions is procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). To the extent that Jones seeks relief based on claimed ineffective assistance of his appellate attorney, he has chosen an improper vehicle for doing so. Therefore, we affirm.

Background

¶2 A jury found Jones guilty of two offenses, both as party to a crime: felony murder with armed burglary as the underlying offense, and armed robbery. *See* WIS. STAT. §§ 940.03, 943.10(2)(a) & (d), 943.32(2), 939.05 (1997-98). In December 1997, the circuit court imposed a maximum sixty-year sentence for felony murder and a consecutive twenty-five year sentence for armed robbery.

¶3 Jones's appointed appellate attorney filed a Notice of Appeal, followed by a no-merit report addressing two issues: whether sufficient evidence supported the convictions; and whether the trial court properly exercised its sentencing discretion. Jones notified the court that he was seeking private representation but no privately retained attorney appeared on his behalf. Jones did not file any further materials, although we granted him an extension of time to respond to the no-merit report. We then accepted the no-merit report and affirmed the convictions.

¶4 In July 1999, Jones, acting *pro se*, filed a motion "for a ***Machner*** hearing or in the alternative an evidentiary hearing."[2] He claimed that both his

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

trial and appellate attorneys were ineffective in a variety of respects. The circuit court denied the motion on the grounds that it was procedurally barred and this court affirmed. The supreme court denied review. ***State v. Jones***, No. 99-2098 (Wis. Dec. 12, 2000).

¶5 In February 2004, the circuit court construed assorted correspondence from Jones as postconviction motions. The circuit court then denied those motions as procedurally barred and this court affirmed. ***State v. Jones***, No. 2004 AP 821, unpublished slip. op. (Wis. Ct. App. Nov. 8, 2005). The supreme court denied review. ***State v. Jones***, No. 2004 AP 821 (Wis. Feb. 27, 2006).

¶6 In November 2006, Jones initiated the instant litigation pursuant to WIS. STAT. § 973.13. He claimed wrongful imprisonment under an excessive sentence, specifically that he was convicted of felony murder and the lesser included offense of armed burglary in violation of the double jeopardy clauses of the United States and Wisconsin constitutions. *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 8(1). He further claimed deficient performance by his appellate attorney and error by this court in our review of the record during the no-merit process. The circuit court denied Jones's motion, holding that it could not address errors in the no-merit procedure and that as to all other allegations the motion was procedurally barred. This appeal followed.

Applicability of ***Escalona-Naranjo***

¶7 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 the claims previously. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. "[D]ue process for a

convicted defendant permits him or her a single appeal of that 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). The ***Escalona-Naranjo*** rules apply with equal force where the direct appeal was conducted pursuant to the no-merit procedure of WIS. STAT. § 809.32 so long as the procedures were in fact followed and the record demonstrates a sufficient degree of confidence in the result. *See* ***State v. Tillman***, 2005 WI App 71, ¶¶19–20, 281 Wis. 2d 157, 696 N.W.2d 574.

¶8 Jones first asserts that by couching his claim as one brought pursuant to WIS. STAT. § 973.13, he is exempted from the strictures of ***Escalona-Naranjo***, and he points for support to ***State v. Flowers***, 221 Wis. 2d 20, 586 N.W.2d 175 (Ct. App. 1998). Jones’s reliance on ***Flowers*** is misplaced.

¶9 ***Flowers*** carved out a “limited exception” to WIS. STAT. § 974.06 and ***Escalona-Naranjo*** that only applies to criminal defendants seeking relief from faulty repeater sentences under WIS. STAT. § 973.13. ***State v. Mikulance***, 2006 WI App 69, ¶¶14, 16, 291 Wis. 2d 494, 713 N.W.2d 160. Jones was not sentenced as a repeater and the relief he seeks is unrelated to proof of repeater allegations. The ***Flowers*** exception is inapplicable here.

Sufficiency of Reason for Belated Claim

¶10 Jones alternatively asserts that his current litigation is not barred by ***Escalona-Naranjo*** because he has shown sufficient reasons for a serial claim. He points to alleged ineffective assistance of appellate counsel in failing to assert double jeopardy violations on direct appeal and he points to alleged error by this court in failing to identify those violations during our independent review of the record during the no-merit process. We are not persuaded.

¶11 Jones cannot succeed in avoiding the ***Escalona-Naranjo*** bar here by claiming that his appellate attorney was ineffective. Ineffective assistance of an appellate attorney can only be addressed in a writ of *habeas corpus* filed pursuant to ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). Jones cannot circumvent that mandate by tucking his ineffective assistance of appellate counsel claim into another vehicle.

¶12 Similarly unavailing is Jones's contention that this court erred in summarily affirming his convictions following the no-merit review without flagging potentially meritorious double jeopardy issues. In a no-merit appeal, this court is obliged to search the record independently for every arguably meritorious issue it might present. In a conventional appeal, we only decide the issues appellant raises and adequately briefs. *See* ***Tillman***, 281 Wis. 2d 157, ¶¶17–18. In some facets, then, the no-merit procedure "affords a defendant greater scrutiny of a trial court record … than in a conventional appeal." ***Id.***, ¶18.

¶13 "The constitutional guarantee protecting a person from double jeopardy is one of the most fundamental rights in our society." ***State v. Gecht***, 17 Wis. 2d 455, 458, 117 N.W.2d 340 (1962). This court is vigilant in protecting that right. *See* ***id.*** If Jones had been convicted and sentenced in violation of the double jeopardy clauses, any such violation would have been noted by this court. Our observation would certainly have been followed either by ordering Jones's appointed appellate attorney to brief the issue further, or by our rejection of the no-merit report. Instead, we accepted the report, reflecting that arguably meritorious double jeopardy issues were not present.

¶14 The record reflects that the no-merit procedures were followed and provides a sufficient degree of confidence in the result. *See* ***Tillman***, 281 Wis. 2d

157, ¶¶19–20. This court reviewed the issues raised in the no-merit report and independently reviewed the record for other potentially meritorious issues. We concluded that there were no meritorious issues. Under these circumstances, Jones has failed to demonstrate a sufficient reason for failing to raise the issues he raises now in earlier postconviction litigation.[3]

Ineffective Assistance of Appellate Counsel

¶15 Although somewhat unclear, Jones's moving papers and briefs suggest that he claims ineffective assistance of his appellate attorney as an independent ground for relief. As we have already noted, however, this allegation can only be addressed in a ***Knight*** petition for *habeas corpus*. ***Knight***, 168 Wis. 2d at 522. WISCONSIN STAT. § 973.13 is not a viable alternative. We therefore consider the claim no further.

By the Court.—Order affirmed.

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

[3] This case is distinguishable from ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893. Here, unlike ***Fortier***, the record provides assurance that the no-merit procedures were followed. We therefore have a sufficient degree of confidence in the result as to warrant application of the procedural bar.