COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP336 **Cir. Ct. No. 1999CF5101**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COURTNEY A. FELDERS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Courtney A. Felders appeals from that part of an order summarily denying his motion for postconviction relief.[1] The issue is whether the alleged ineffective assistance of counsel is a sufficient reason to overcome the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994) and ***State v. Tillman***, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574.[2] We conclude that the alleged ineffective assistance of counsel is not a sufficient reason to overcome ***Tillman***'s procedural bar, particularly when Felders has been procedurally barred previously from seeking the same relief he now seeks. Therefore, we affirm.

¶2 Incident to plea negotiations, Felders pled guilty to two counts of burglary and the theft of a firearm, in exchange for the State reducing one of the burglary charges from armed burglary (thereby reducing the potential maximum sentence by thirty years), and dismissing three other charges, one which had been pursued in a different case. The State also agreed to recommend an eight-year sentence, along with the imposition and staying of five- and eight-year sentences in favor of consecutive five-year probationary terms. Felders accepted the proposal and pled guilty. Defense counsel filed a no-merit appeal, identifying potential challenges to Felders's guilty pleas and his sentence; Felders admits that he did not respond to the report. This court affirmed the judgment of conviction in

[1] Felders does not appeal from that part of the postconviction order that granted him partial sentence credit.

[2] The procedural bar referenced in these two cases is the same; we therefore use the case names interchangeably when referring to ***Escalona***'s procedural bar, or ***Tillman***'s procedural bar. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994); ***State v. Tillman***, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574.

a no-merit appeal.[3] *See* ***State v. Felders***, No. 2000AP2500-CRNM, unpublished slip op. at 1-2, 5 (WI App Apr. 2, 2001) ("***Felders I***").

¶3 In August of 2002, Felders filed a *pro se* postconviction motion pursuant to WIS. STAT. § 974.06 (2001-02), seeking to withdraw his guilty pleas. The trial court denied his motion as procedurally barred by ***Escalona***. This court affirmed the trial court's denial on the basis of ***Escalona***. *See* ***State v. Felders***, No. 2002AP2279, unpublished slip op. at 4 (WI App Feb. 24, 2003) ("***Felders II***").

¶4 In September of 2004, Felders *pro se* moved for sentence modification on several bases. The trial court denied the motion; however, it forwarded a copy of the amended judgment of conviction to the Wisconsin Secure Program Facility to alleviate various placement problems Felders had alleged. Consequently, while the trial court denied sentence modification, its forwarding of the amended judgment of conviction resolved at least one of Felders's alleged concerns. ("***Felders III***"). The ***Felders III*** order was not appealed.

¶5 On January 8, 2007, Felders *pro se* moved for plea withdrawal or sentence modification. In that motion, he alleged that his counsel was ineffective. The trial court awarded Felders nine days of sentence credit, and summarily denied the remainder of his motion. It is from that part of this order, denying his third postconviction motion (following his direct appeal), that Felders now appeals.

[3] We directed the trial court upon remittitur to amend the judgment to correctly set forth the reduced charge. This amendment is not relevant to this appeal. *See* ***State v. Felders***, No. 2000AP2500-CRNM, unpublished slip op. at 2 n.2, 5 (WI App Apr. 2, 2001).

¶6 To avoid ***Escalona***'s procedural bar, Felders must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal or in his original postconviction motion. *See* ***Escalona***, 185 Wis. 2d at 185-86. Whether ***Escalona***'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). "[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." *See* ***Tillman***, 281 Wis. 2d 157, ¶27. We extended ***Escalona***'s applicability to postconviction motions following no-merit appeals. *See* ***Tillman***, 281 Wis. 2d 157, ¶27**.** Before applying ***Tillman***'s procedural bar however, both the trial and appellate courts "must pay close attention to whether the no merit procedures were in fact followed. In addition, the court must consider whether that procedure, even if followed, carries a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case." ***Id.***, ¶20 (footnote omitted).

¶7 On appeal, Felders alleges that his trial, postconviction and appellate counsel were ineffective, implying that their alleged ineffectiveness constituted a sufficient reason to overcome ***Tillman***'s procedural bar. On appeal, Felders repeatedly alleges that the trial court's recent award of sentence credit demonstrates appellate counsel's ineffectiveness in pursuing a no-merit appeal, rather than seeking sentence credit.

¶8 Felders's recent (third) postconviction motion (following his no-merit appeal, thus his fourth attempted challenge) is procedurally barred. *See* WIS. STAT. § 974.06(4) (2005-06); ***Escalona***, 185 Wis. 2d at 181-82; ***Tillman***,

281 Wis. 2d 157, ¶27.[4] Felders has repeatedly sought to withdraw his guilty pleas. We initially concluded that there was no arguable basis to challenge the validity of Felders's guilty pleas. *See* ***Felders I***, No. 2000AP2500-CRNM, unpublished slip op. at 2-3. In ***Felders II***, we applied ***Escalona***'s procedural bar, explaining why we declined to consider his belated motion for plea withdrawal. *See* ***Felders II***, No. 2002AP2279, unpublished slip op. at 2-3. Incident to our explanation, we also rejected the belatedly alleged ineffectiveness of trial and appellate counsel as sufficient reasons to overcome ***Escalona***'s procedural bar. *See* ***Felders II***, No. 2002AP2279, unpublished slip op. at 3-4. We also indicated that an ineffective assistance of appellate counsel claim is not properly raised in a postconviction motion pursuant to WIS. STAT. § 974.06, but must be raised in a habeas corpus petition pursuant to ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). *See* ***Felders II***, No. 2002AP2279, unpublished slip op. at 3.

¶9 On appeal, Felders insists that the trial court's recent award of partial sentence credit undermines our conclusion in ***Felders I***, as well as demonstrates appellate counsel's ineffectiveness in that the no-merit procedure was not the result of a conscientious or full examination of the record. *See* ***State v. Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 709 N.W.2d 893. However, Felders's allegation of a sufficient reason to overcome the procedural bar must be alleged in

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

the motion itself, not for the first time on appeal. *See* WIS. STAT. § 974.06(4).[5] Felders did not allege this reason in his postconviction motion. We therefore conclude, as we have previously, that Felders's recent (third) postconviction motion is procedurally barred by § 974.06(4), ***Escalona*** and ***Tillman***.

¶10 Felders alternatively seeks to reinstate his appellate rights. After a direct appeal and three postconviction motions, there is no reason to reinstate Felders's appellate rights to allow him to circumvent the procedural bar that we conclude applies.

By the Court.—Order affirmed.

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

[5] We do not address whether the trial court's award of partial sentence credit renders Felders's contentions moot.