

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2008

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. 2006AP2643

Cir. Ct. No. 1999CF212

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DENNIS L. MOORE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Dennis Moore, pro se, appeals an order denying his postconviction motion. Moore argues the circuit court erred in ruling his claims are procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994); and *State v. Tillman*, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. Moore contends that ineffective assistance of his postconviction

counsel is a sufficient reason for failing to previously raise issues via the no-merit procedure. We reject Moore's arguments and affirm.

¶2 Moore was charged with seven counts of second-degree sexual assault with the threat or use of force and one count of kidnapping. All of the counts were enhanced by habitual criminality. As part of a plea agreement, Moore entered no contest pleas to three of the sexual assault charges and the kidnapping charge. The three remaining sexual assault charges were dismissed and read in. Moore was sentenced to three consecutive twenty-five-year sentences for the sexual assaults. A forty-year sentence was imposed and stayed for the kidnapping, and a fifty-year probation term was ordered. The imposed and stayed sentence was made consecutive to the sentences for the sexual assaults, while the probation was concurrent to those sentences.

¶3 A no-merit report was subsequently filed, to which Moore did not respond. This court accepted the no-merit report and summarily affirmed the judgment of conviction. Moore then filed a pro se postconviction motion. The circuit court concluded the motion was barred by *Escalona-Naranjo* and *Tillman*. The court further concluded that even reaching the merits, Moore's arguments failed. Moore now appeals the denial of his postconviction motion.

¶4 *Escalona-Naranjo* bars claims that could have been raised in a prior postconviction motion or on direct appeal unless a "sufficient reason" for failing to raise the issue is presented. *Escalona-Naranjo*, 185 Wis. 2d at 181-82. The *Escalona-Naranjo* rules apply with equal force where the direct appeal was conducted pursuant to the no-merit process of WIS. STAT. RULE 809.32 (2005-

06),¹ so long as the procedures were in fact followed and the record demonstrates a sufficient degree of confidence in the result. See *Tillman*, 281 Wis. 2d 157, ¶¶19-20.

¶5 Moore’s attorney filed a no-merit report which addressed: (1) whether Moore received effective assistance of counsel; (2) whether plea withdrawal was necessary to correct a manifest injustice; and (3) whether the circuit court erroneously exercised its sentencing discretion. This court reviewed all of the issues raised and conducted an independent review of the record. We concluded that Moore’s judgment of conviction should be affirmed because the record did not contain any meritorious issues. We conclude the no-merit procedures were, in fact, followed and the record demonstrates a sufficient degree of confidence in the result. See *id.*, ¶¶19-20. Reviewing the merits of the “new” claims Moore brings on appeal does not alter our confidence in the result.²

¶6 Moore attempts to evade the procedural bar of *Escalona-Naranjo* and *Tillman* by raising claims in the context of ineffective assistance of postconviction counsel. Moore asserts that “but for counsel’s unreasonable failure to file a merits brief, Moore would have prevailed on appeal.” However, the factual basis for the claims Moore now brings could have been and should have been known to Moore at the time of the no-merit report. Because Moore received

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

² Moore argues on appeal that: (1) the plea colloquy conducted by the court was inadequate; (2) the State violated the plea agreement; (3) the circuit court erroneously exercised its sentencing discretion; (4) the court erroneously denied his motion for sentence modification; and (5) the court improperly denied his motion that information be stricken from the presentence investigation report. We have examined each of these claims and have concluded that they are without merit.

a copy of the no-merit report, Moore himself had the opportunity to raise any issues not raised by counsel. Moore does not provide sufficient reasons why he identified issues now in bringing a postconviction motion but could not have done so when given an opportunity to respond to the no-merit report. The claims, the denial of which Moore is appealing, are all claims Moore could have raised on direct appeal but failed to do. Because Moore had the opportunity on direct appeal to raise the issues he now asserts, and has not provided a sufficient reason for failing to raise the issues, we conclude the circuit court did not err in denying Moore's postconviction motion based on the procedural bar of *Escalona-Naranjo* and *Tillman*.

By the Court.—Order affirmed.

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