COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3052 **Cir. Ct. No. 2000CF3223**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HIPOLITO CLAUDIO,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Hipolito Claudio appeals from an order summarily denying his postconviction motion. Claudio alleges that his appellate counsel's ineffectiveness for failing to challenge the effectiveness of his trial counsel in three respects 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.[1] We conclude that because Claudio failed to allege a sufficient reason for not identifying these issues in his no-merit response, he has not overcome ***Tillman***'s procedural bar. Therefore, we affirm.

¶2 In 2000, Claudio pled guilty to armed robbery with the use of force and to attempted first-degree intentional homicide with the use of a dangerous weapon, each as a party to the crime. The trial court imposed thirty- and sixty-year concurrent sentences comprised of twenty- and forty-year respective concurrent periods of initial confinement. Appellate counsel filed a no-merit report addressing the validity of Claudio's guilty pleas and the trial court's exercise of sentencing discretion. Although Claudio's response is not in the record, we noted in our opinion that "Claudio's response to the no-merit report does not raise any additional issues and acknowledges that 'there is no merit for an appeal.'" ***State v. Claudio***, No. 2001AP2341-CRNM, unpublished slip op. at 2 (WI App Sept. 16, 2002). We affirmed the judgment of conviction. *See* ***id.***

¶3 Over four years later, Claudio filed a postconviction motion pursuant to WIS. STAT. § 974.06 (2005-06), alleging the ineffective assistance of trial counsel.[2] Claudio alleges that trial counsel was ineffective for failing to litigate Claudio's competency, for failing to move to suppress his confession, and for

[1] The procedural bar referenced in these two cases is the same; we therefore use the case names interchangeably by 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.

[2] All references to the Wisconsin Statutes are to the 2005-06 version.

failing to investigate the factual basis for the charges. Each of these alleged failures occurred prior to Claudio's entering his guilty pleas. The trial court summarily denied the motion, explaining that these three issues should have been raised in response to the no-merit report because Claudio had to have known about them at that time, and offered no reason why he did not then identify them. Claudio moved for reconsideration, further developing his ineffective assistance claims and emphasizing the ineffectiveness of postconviction/appellate counsel for not pursuing these challenges. The trial court found "nothing which would alter [its] original decision." Claudio appeals.

¶4 To avoid ***Escalona***'s procedural bar, Claudio 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." ***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).

¶5 Claudio alleges that he was incompetent when he pled guilty and when he was sentenced. He blames his trial counsel for failing to litigate his competence and the validity of his confession, and for failing to investigate the facts, but he does not allege why he failed to identify these concerns in his no-merit response; he implies that his trial counsel's claimed ineffectiveness and his incompetence precluded him from realizing the significance of these issues.[3]

¶6 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98.

[3] On appeal, and presumably in response to the trial court's application of ***Tillman***'s procedural bar, Claudio claims the ineffectiveness of postconviction and appellate counsel, and reiterates his claimed incompetence and trial counsel's alleged ineffectiveness. He alleges that he "only learned of these issues in early 2006, when he was able to secure the appropriate transcripts of his case and conduct an investigation of those transcripts." The reason for failing to previously raise these issues must be alleged in the postconviction motion itself to enable the trial court to initially assess the sufficiency of the alleged reason and whether to decide the substantive claim. *See* WIS. STAT. § 974.06(4). Additionally, Claudio should have requested and reviewed the transcripts in advance of filing his no-merit response. Furthermore, the transcript of the guilty plea hearing belies his competency claim, and does not support his failure to investigate claim.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

> As an assistance to defendants and their counsel, we propose that postconviction motions sufficient to meet the ***Bentley*** standard allege the five "w's" and one "h"; that is, who, what, where, when, why, and how. A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim.

Allen, 274 Wis. 2d 568, ¶23 (footnote omitted). "We require the [trial] court 'to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion.' ***Nelson***, 54 Wis. 2d at 498. *See* ***Bentley***, 201 Wis. 2d at 318-19 (quoting the same)." ***Allen***, 274 Wis. 2d 568, ¶9.

¶7 Additionally, Claudio must meet the requisites to maintain an ineffective assistance claim. To demonstrate ineffective assistance, the defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶8 Claudio claims that his counsel was ineffective for failing to litigate his competency and the admissibility of his confession, and for failing to investigate the facts underlying the charges. Regardless of when Claudio realized the significance of these concerns, they all arose from alleged failures that had to have occurred, if they did, prior to his pleading guilty.

¶9 Claudio claims that he was on medication that caused him to be "confused and unfocused," as allegedly evidenced by his behavior during the plea colloquy. We have reviewed the guilty plea questionnaire and waiver of rights form and the transcript of the guilty plea hearing. In the former, Claudio denied he was on any medication. During the latter, there are no inconsistent or tentative responses, nor is there evidence of confusion. The record belies Claudio's allegations of confusion, much less incompetency.[4]

¶10 Claudio also challenges trial counsel's effectiveness for failing to move to suppress his confession. There is nothing in the record to support his claim that he was incompetent and thus, could not recognize that his confession was susceptible to a valid challenge. His confession was included in the criminal complaint, which he told the trial court he had read, and about which trial counsel, during the plea hearing, told the trial court: "we talked about the party to a crime and he has—he takes issue with some of the details, but overall [trial counsel] believe[s Claudio] understands what it means and says in the Complaint, and [Claudio] will tell you it's true and correct substantially, but not every detail." The fact that Claudio had concerns about some details alleged in the complaint,

[4] Although the trial court denied Claudio's motion as procedurally barred, it described him as "coherent and rational during the entire plea hearing."

but agreed the complaint was substantially true and correct, and did not mention any concerns about his confession to the trial court or to us in his no-merit response does not establish a sufficient reason for failing to raise these issues in response to the no-merit report.

¶11 Claudio also alleges that his trial counsel was ineffective for failing to investigate the facts underlying the charges. Incident to this claim, Claudio alleges that he testified in a different case that his confession in this case contained false statements.[5] These allegations, however, do not support an ineffective assistance claim. He does not allege that he discussed this with his trial counsel, or that based on the false confession he moved for plea withdrawal prior to sentencing.

¶12 Although Claudio alleges that trial counsel admitted he was not "fully informed … due to his sole reliance on the Criminal Complaint," he misunderstands counsel's representation to the trial court. Claudio misinterprets trial counsel's statement as an admission that he had not conducted a factual investigation or that he was unfamiliar with the facts. Trial counsel said that he relied on the complaint, as opposed to relying on the information, not that he relied on the complaint instead of investigating the facts.[6]

[5] The other case to which Claudio refers is ***State v. Soto***, Milwaukee County Circuit Court Case No. 2000CF3248.

[6] The information indicated that the armed robbery and the homicide occurred on the same date as opposed to two days apart, and had switched the addresses where the two crimes occurred. The complaint contained the correct dates and addresses. The trial court clarified and confirmed with Claudio that these errors in the information did not affect his responses during the plea colloquy.

¶13 Claudio implies in his postconviction motion that his counsel's alleged ineffectiveness precluded him from realizing that he should have challenged his competency and the constitutionality of his confession before pleading guilty, and that his claimed incompetence rendered invalid his guilty pleas. He also alleges that had his trial counsel conducted an adequate factual investigation, he may not have pled guilty. Claudio was aware of the facts underlying these claims when he pled guilty, and certainly by the time he responded to the no-merit report. He did not mention any concerns regarding these claims or their underlying facts during the guilty plea hearing or in his no-merit response. Consequently, we independently conclude that he has not overcome ***Tillman***'s procedural bar to belatedly litigate these claims. Moreover, his substantive claims are not supported by the record. Consequently, the trial court properly exercised its discretion in summarily denying Claudio's postconviction motion for failing to allege a sufficient reason for neglecting to identify these concerns in his no-merit response.

By the Court.—Order affirmed.

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