

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 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. 2007AP800

Cir. Ct. No. 2003CF4588

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS JOSEPH BLACK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
M. JOSEPH DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Nicholas J. Black appeals pro se from the circuit court's denial of his WIS. STAT. § 974.06 (2005-06)¹ postconviction motion. Black argues on appeal that the circuit court erred when it concluded his postconviction motion was procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent a sufficient reason for failing to raise the claims in the earlier proceedings). We conclude that the circuit court appropriately determined that Black's postconviction motion was procedurally barred. We also conclude that Black's claims in his postconviction motion are unsupported by the record. We therefore affirm the circuit court's order.

¶2 The factual and procedural background is undisputed. Black was holding a gun when he approached a seventy-year-old man mowing his lawn. Black demanded the man's wallet and then punched him in the chest, knocking him over. The victim told police that Black also hit him in the head with the handgun. Black took the victim's wallet. Shortly after the robbery, the victim's wife called to cancel a credit card, and she learned that the card had just been used at a nearby mall. Security photographs from the mall led to Black's arrest.

¶3 Black pled guilty to the crime, and the circuit court imposed a ten-year prison sentence that required Black to serve a minimum of five years in initial confinement. The state public defender appointed postconviction counsel to represent Black, and counsel concluded that there were no issues of potential

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

postconviction or appellate merit. Consequently, counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2003-04). Black was advised of his right to file a response, but he filed no response. This court conducted an independent review of the appellate record and concluded that there were no issues of potential merit. We therefore affirmed the judgment of conviction and relieved counsel of further representation of Black. RULE 809.32(3) (2003-04).

¶4 Black filed a motion for sentence modification without success. He then filed the WIS. STAT. § 974.06 postconviction motion that is the subject of this appeal. In the motion, he argued that his postconviction counsel had been ineffective when he failed to file a motion to withdraw his guilty plea based on a claim of trial counsel ineffectiveness. He argued that, at the final pretrial hearing, his trial attorney had “prejudiced [his] presumption of innocence to the court.” More specifically, he argued that despite being “given 4 separate and direct opportunities to bring forward motions for suppression to the court,” trial counsel instead “declined and reasserted her belief in a plea agreement.” He also argued that trial counsel was ineffective for failing to challenge what he terms “highly suggestive” identification procedures.

¶5 The circuit court denied Black’s motion without a hearing. The circuit court reasoned that the motion was barred because Black had failed to raise the issues in his direct appeal and had failed to establish a reason for that failure sufficient to overcome the procedural bar of *Escalona-Naranjo*. See *State v. Tillman*, 2005 WI App 71, ¶19, 281 Wis.2d 157, 696 N.W.2d 574 (no-merit procedure precludes postconviction motion raising same or other issues absent the defendant demonstrating a sufficient reason for failing to raise those issues through counsel or in a no-merit response).

¶6 On appeal, Black argues that his claim of ineffective assistance by trial counsel and postconviction counsel was sufficient to overcome the *Escalona-Naranjo/Tillman* bar. In support, Black relies on this court’s opinion in *State v. Fortier*, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893. He suggests that *Fortier* permits all collateral challenges to no-merit decisions without the defendant having to raise the issues in the no-merit appeal either through counsel or by filing a pro se response. He also argued that his motion was sufficient to overcome any procedural bar. Black is incorrect.

¶7 Whether *Escalona*’s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Before applying that bar in a situation where there has been a prior no-merit decision, this court “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.” See *Tillman*, 281 Wis. 2d 157, ¶20.

¶8 In *Fortier*, the court simply held that the *Tillman* bar did not apply in that case because Fortier raised issues of potential merit that his postconviction counsel *and this court* missed, thus depriving Fortier of the full examination of the appellate record to which he was entitled under WIS. STAT. RULE 809.32. *Fortier*, 289 Wis. 2d 179, ¶27. Here, however, Black’s claims of ineffective assistance by trial counsel are without record support even in those portions of the record Black cites to support his argument. Consequently, Black fails to provide sufficient support to overcome the *Tillman* bar.

¶9 Moreover, the court is satisfied that the no-merit review conducted by appellate counsel and by this court represented a full and conscientious examination of the record and that if Black had raised in response to the no-merit report the issues he now raises, the court’s no-merit conclusion would remain unchanged. More specifically, Black argues that his trial counsel was ineffective for failing to file suppression motions and instead telling the circuit court that the matter was heading to a plea agreement. However, nothing in the record—or in the postconviction motion that is the subject of this appeal—suggests that Black disagreed with trial counsel’s decision to forego a suppression motion and seek a plea agreement. The plea questionnaire that Black signed and Black’s plea colloquy with the circuit court addressed his decision to forego suppression motions and plead guilty. The circuit court noted at the plea hearing that by pleading guilty, Black was “giving up any defenses that you have to this charge and your right to challenge legal issues, such as your arrest, your identification, [and] any statements that were made.” Black signed the plea questionnaire and indicated that he understood the consequences of his plea. Because there is nothing in the record to suggest that Black did not understand the consequences of his plea or was dissatisfied with trial counsel’s representation, we conclude that Black’s WIS. STAT. § 974.06 motion was procedurally barred.

By the Court.—Order affirmed.

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

