COURT OF APPEALS DECISION DATED AND FILED

January 13, 2009

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. 2008AP1335

Cir. Ct. No. 2005CF2966

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAYTON DEMARIO RICE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Dayton Demario Rice appeals *pro* se from an order denying his postconviction motion brought under WIS. STAT. § 974.06 (2005-06).[1]

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

The circuit court found that the motion was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree and affirm.

BACKGROUND

¶2 On May 23, 2005, David Franklin died from a gunshot wound to his chest. The State filed an information charging Rice with one count of first-degree intentional homicide while armed with a dangerous weapon and one count of possession of a firearm by a felon. Neither charge included an allegation that Rice acted as a party to a crime. According to the criminal complaint, Rice admitted to police that he was solely responsible for shooting Franklin.

¶3 Rice agreed to resolve the charges against him by pleading guilty to a single count of second-degree reckless homicide. The State did not file an amended information prior to the plea hearing. Instead, the State recited the elements of the charge during the plea colloquy, describing the offense as follows:

> [t]hat the defendant on the date in the criminal complaint and information, *as a party to a crime*, caused the death of David Franklin and that the death was caused by criminally reckless conduct that was conduct which created an unreasonable and substantial risk of death or great bodily harm. And the defendant was aware that his conduct created that risk. (Emphasis added.)

¶4 Rice told the circuit court that he understood the elements of the crime and that the allegations in the complaint were true and correct. Following a thorough colloquy, Rice entered a guilty plea to the charge of second-degree reckless homicide. The circuit court accepted the plea and found Rice "guilty of the charge of second-degree reckless homicide, a violation of section 940.06(1) of the Wisconsin Statutes." The judgment of conviction reflects the circuit court's finding.

¶5 Rice appealed from the judgment of conviction, and his appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32. Rice did not file a response. This court summarily affirmed Rice's conviction, concluding that the appeal did not present any arguably meritorious issues. *See* ***State v. Rice***, No. 2006AP2029-CRNM, unpublished slip op. (WI App Mar. 12, 2007) (***Rice I***).

¶6 On April 28, 2008, Rice filed the postconviction motion that underlies the instant appeal. Rice claimed that the State improperly amended the charge at the plea hearing to include the allegation that he committed second-degree reckless homicide as a party to a crime, pursuant to WIS. STAT. § 939.05.[2] He argued that this improper amendment violated his constitutional rights in several respects and that his conviction must be set aside as a result. The circuit court rejected Rice's claims as procedurally barred, and this appeal followed.

DISCUSSION

¶7 Defendants are not permitted to pursue an endless succession of postconviction remedies.

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[2] WISCONSIN STAT. § 939.05, provides, in pertinent part:

> **Parties to crime.** **(1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime …
>
> **(2)** A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it.

> We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185. Thus, claims that could have been raised in a prior postconviction motion or on direct appeal are procedurally barred in later litigation unless the prisoner offers a sufficient reason for failing to raise the issues earlier. ***Id.***

¶8 The bar to serial litigation may also apply when the direct appeal was conducted pursuant to the no-merit procedures of WIS. STAT. RULE 809.32. ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574. Absent a sufficient reason for doing so, a defendant may not raise issues in later proceedings that could have been raised in the no-merit proceeding if the no-merit procedures were followed and the court has sufficient confidence in the outcome of the no-merit proceeding to warrant application of the procedural bar. ***Id.***, ¶20. Whether an appeal is procedurally barred by a prior no-merit proceeding is a question of law that we review *de novo*. ***Id.***, ¶14.

¶9 Rice has not demonstrated that his no-merit appeal was procedurally inadequate. In ***Rice I***, we discussed the viability of several potential issues after conducting an independent review of the appellate record. ***Rice I*** addresses Rice's motion to suppress custodial statements, the validity of Rice's guilty plea, and the circuit court's exercise of sentencing discretion. Our discussion reflects that the no-merit review conducted by appellate counsel and by this court represented a full and conscientious examination of the record. Accordingly, our resolution of the no-merit proceeding "carries a sufficient degree of confidence warranting the application of the procedural bar." *See* ***Tillman***, 281 Wis. 2d 157, ¶20.

¶10 Rice nonetheless contends that he has a sufficient reason for avoiding the procedural bar because his appellate counsel failed to identify meritorious issues stemming from the improper application of WIS. STAT. § 939.05 to his prosecution. He argues that he cannot be faulted for relying on his appellate counsel's erroneous conclusion that his appeal lacked any issues of arguable merit. *See* ***State v. Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 709 N.W.2d 893. We reject Rice's assertion because Rice has not demonstrated that his case presents any issues of arguable merit in relation to § 939.05.

¶11 Rice's main contention on appeal is that the circuit court lost subject matter jurisdiction over his case when the State asserted during the plea hearing that Rice acted as a party to the crime of second-degree reckless homicide. Although Rice is not entirely clear in his brief, he appears to argue that "there was no offense charged" because the State did not cite a specific subsection of WIS. § 939.05(2). This claim lacks merit. The State may allege that a defendant acted as a party to a crime without including a reference either to § 939.05 generally or to any of its subsections in particular. ***State v. Cydzik***, 60 Wis. 2d 683, 687-88, 211 N.W.2d 421 (1973). Therefore, the circuit court never lacked subject matter jurisdiction over Rice's prosecution.

¶12 Rice also asserts that he was charged as either an aider and abettor pursuant to WIS. STAT. § 939.05(2)(b), or as a conspirator pursuant to § 939.05(2)(c). Building on that assertion, he claims that the State prevented him from preparing a defense and constructively deprived him of counsel by failing to clarify which of the two bases for liability supported his criminal conviction. These claims too are meritless.

¶13 "A party to a crime is statutorily defined as 'a person who directly commits the crime'; a person who 'intentionally aids and abets the commission' of a crime; or a person who 'is a party to a conspiracy with another to commit [the crime].'" ***State v. Howell***, 2007 WI 75, ¶14, 301 Wis. 2d 350, 734 N.W.2d 48 (citing WIS. STAT. § 939.05(1), (2)(b)). In this case, the criminal complaint includes Rice's admission that he fired a deadly shot at Franklin. During the plea colloquy, Rice admitted that the facts in the criminal complaint were true and correct. Thus, the plea colloquy established Rice's understanding that the basis for his criminal liability was "direct commission" of the crime.

¶14 Rice concludes his argument on appeal by stating that "[WIS. STAT.] § 939.05(2)(a) is an unconstitutional enactment." He offers neither analysis nor authority in support of that proposition. Accordingly, we do not address the claim. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (we will not consider issues that are inadequately briefed).

¶15 Rice pled guilty to direct commission of second-degree reckless homicide. His conviction was affirmed in a no-merit proceeding, and nothing in the instant litigation undermines our confidence in the outcome of that proceeding. We conclude that Rice has failed to demonstrate a sufficient reason for evading the procedural bar of ***Escalona-Naranjo***. For the reasons stated, we affirm.

By the Court.—Order affirmed.

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