COURT OF APPEALS DECISION DATED AND FILED

March 24, 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. 2008AP1047

Cir. Ct. No. 1997CF973526

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EARL JONES, JR.,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Earl Jones, Jr., appeals from an order summarily denying his postconviction motions for a new trial and for the appointment of

counsel.[1] Jones raises the issues of whether the trial court erroneously exercised its discretion in failing to: (1) compel the State to analyze and compare a splinter of wood recovered from the victim with the wood from the bat used to beat the victim; (2) act in response to the prosecutor's allegedly improper comments during closing argument; and (3) instruct the jury to sign only one verdict relating to felony murder and armed robbery. We conclude that Jones's fourth postconviction motion is procedurally barred for his failure to currently allege a sufficient reason for failing to previously raise or for renewing these issues as required by ***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] Therefore, we affirm.

¶2 In 1997, a jury found Jones guilty of armed robbery, and of felony murder based on the predicate offense of armed burglary. The trial court imposed a twenty-five-year sentence for the armed robbery and a sixty-year consecutive sentence for the felony murder. Jones's appellate counsel pursued a no-merit appeal; Jones sought to retain private counsel. We consequently extended Jones's deadline to respond to the no-merit report. Nothing further was filed from another lawyer or from Jones in response to the no-merit report. We conducted an independent review of the record, as required by ***Anders v. California***, 386 U.S. 738, 744-45 (1967), and affirmed the judgment of conviction. *See* ***State v. Jones***, No. 98-2112-CRNM, unpublished slip op. (Wis. Ct. App. Nov. 24 1998).

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[1] Jones does not appeal from the denial of his motion for the appointment of counsel.

[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.

¶3 In 1999, Jones moved for postconviction relief, claiming that his trial and appellate counsel were ineffective. The trial court summarily denied the motion; this court affirmed. *See* ***State v. Jones***, No. 99-2098, unpublished slip op. (Wis. Ct. App. Sept. 18, 2000).

¶4 In 2004, Jones moved for postconviction relief, seeking a ***Brady*** hearing and DNA testing.[3] The trial court summarily denied the motion. This court affirmed. *See* ***State v. Jones***, No. 2004AP821, unpublished slip. op. (WI App Nov. 8, 2005).

¶5 In 2006, Jones moved to vacate his conviction and sentence because appellate counsel pursued a no-merit appeal. The trial court summarily denied the motion as procedurally barred by ***Escalona***. This court affirmed. *See* ***State v. Jones***, No. 2006AP2988, unpublished slip op. (WI App Sept. 18, 2007). In that decision, we explained: (1) the necessity to allege a sufficient reason to overcome ***Escalona***'s procedural bar; (2) Jones's failure to avoid ***Escalona***'s applicability by seeking relief pursuant to WIS. STAT. § 973.13 (2005-06) and claiming the ineffective assistance of appellate counsel; (3) why ***Escalona***'s procedural bar was extended to apply to direct appeals reviewed pursuant to the no-merit procedure in ***Tillman***, 281 Wis. 2d 157, ¶¶18, 25-27; and (4) how "[t]he record reflects that the no-merit procedures were followed and provide[] a sufficient degree of confidence in the result" to avoid the ***Fortier*** exception. *See* ***Jones***, 2006AP2988,

[3] *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

unpublished slip op. ¶14 n.3 (citing ***Tillman***, 281 Wis. 2d 157, ¶¶19-20 and ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893).

¶6 Prior explanations notwithstanding, in 2008 Jones filed a motion for a new trial. The trial court summarily denied the motion as procedurally barred by ***Escalona*** and ***Tillman***. Jones appeals.

¶7 To avoid ***Escalona***'s procedural bar, Jones must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal. *See* ***Escalona***, 185 Wis. 2d at 185-86. 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). Whether ***Tillman***'s procedural bar applies 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).

¶8 Jones has been repeatedly advised of ***Escalona***'s requisite of a "sufficient reason" to overcome its procedural bar. Notwithstanding this repeated advice, he failed to allege any reason for failing to raise his current claims

previously.[4] Jones instead alleges his reasons in his notice of appeal and in his appellate brief.

¶9 Even Jones's belatedly alleged reasons are not sufficient; he alleged: (1) the no-merit procedures were not followed pursuant to ***Fortier***; and (2) we have discretion to consider the merits of his issues despite the potential applicability of ***Escalona***. In Jones's previous appeal, we explained that the ***Fortier*** exception did not apply to Jones's no-merit appeal. *See* ***Jones***, No. 2006AP2988, unpublished slip op. ¶14. We are not persuaded to exercise our discretion and ignore the procedural bar of ***Escalona***, of which Jones had been repeatedly warned.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

[4] Some of Jones's claims have been raised in previous appeals; ***Escalona*** also applies to claims that have already been raised. *See* ***Escalona***, 185 Wis. 2d at 181. The "sufficient reason" requirement must be alleged in the motion itself to allow the trial court to initially assess the sufficiency of the defendant's reason. *See* WIS. STAT. § 974.06(4); ***Escalona***, 185 Wis. 2d at 181-82.