COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1329-CR **Cir. Ct. No. 1995CF950130**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRACY TAMETTE DAVIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. In 1995, Tracy Tamette Davis was convicted of six counts of burglary as an habitual criminal. She appealed, but this court agreed with her attorney's assessment that there was no potential merit in further

postconviction or appellate proceedings. *See* WIS. STAT. RULE 809.32 (1997-98).[1] Eight years later, Davis sought postconviction relief under WIS. STAT. § 974.06 (2005-06), arguing that trial counsel had been ineffective for failing to specifically request concurrent sentences. The circuit court denied Davis's motion, and Davis appeals. Because we conclude that the circuit court correctly held that Davis's motion was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-182, 517 N.W.2d 157, 162 (1994) (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent defendant articulating a sufficient reason for failing to raise the claims in the earlier proceedings), we affirm.

¶2 Davis was originally charged with ten burglaries that took place over several months. Davis, who acknowledged that her victims were all aged or infirm and therefore more "vulnerable," accepted a plea bargain with the State by which four of the burglary charges were dismissed in exchange for her guilty pleas. The circuit court imposed consecutive eight-year prison sentences on each of the six counts to which Davis pled.

¶3 Davis's appellate counsel filed a no-merit report with this court pursuant to WIS. STAT. RULE 809.32 (1997-98), and Davis filed a response. Together, the report and Davis's response raised six issues, including whether the circuit court properly exercised discretion in imposing the consecutive sentences. We concluded, upon independent review of the record, that further appeal on that

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

or any other issue would be without merit. *See* ***State v. Davis***, 1998AP3154-CRNM, unpublished slip op. (Wis. Ct. App. Apr. 7, 1999).

¶4 Davis took no further action for eight years, when she filed the motion that is the subject of this appeal. In her motion, she argued, in part, that her trial counsel was ineffective for failing to argue for concurrent, rather than consecutive sentences. She also argued that consecutive sentences were harsh and unconscionable and that the circuit court had erroneously exercised its discretion in imposing consecutive sentences.

¶5 The circuit court denied Davis's motion, holding first that to the extent Davis was contesting the circuit court's exercise of sentencing discretion, her motion was untimely under WIS. STAT. § 973.19 (2003-04) and WIS. STAT. RULE 809.30 (2003-04). In regard to her claim that trial counsel had been ineffective for failing to specifically argue for concurrent sentences, the circuit court held that because she could have raised that issue in her response to the no-merit report, but did not, the issue was waived.

¶6 Davis renews her arguments on appeal. She also argues that ***Escalona*** does not apply because her appellate counsel failed to raise the issue of concurrent or consecutive sentences in the no-merit report and she should not be held responsible for failing to raise that issue in her no-merit response. More specifically, Davis argues that ***State v. Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 192, 709 N.W.2d 893, 899, precludes application of ***Escalona***. We disagree.

¶7 To overcome the ***Escalona*** bar to successive postconviction and appellate proceedings, a defendant must articulate a sufficient reason for having failed to raise the issue or issues in the earlier postconviction or appellate proceedings. ***Escalona***, 185 Wis. 2d at 181-182, 617 N.W.2d at 162. Whether

Escalona 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, 176 (Ct. App. 1997). Before applying that bar in a situation where there has been a prior no-merit decision, however, 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." ***State v. Tillman***, 2005 WI App 71, ¶¶19–20, 281 Wis. 2d 157, 167-169, 696 N.W.2d 574, 578-580 (no-merit procedure precludes successive 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).

¶8 In ***Fortier***, this court held that when postconviction counsel and a reviewing court miss an issue of potential merit, the ***Escalona/Tillman*** bar does not apply because the defendant has been deprived of the full examination of the appellate record to which he or she is entitled under WIS. STAT. RULE 809.32. ***Fortier***, 289 Wis. 2d 179, ¶27, 709 N.W.2d at 899. ***Fortier*** involved a contention supported by the record that the defendant's sentence was illegally raised and neither appellate counsel nor this court noticed that error. Consequently, the ***Escalona/Tillman*** bar did not apply in ***Fortier*** because the no-merit procedure had not been executed properly. ***Id.***

¶9 Here, unlike ***Fortier***, neither counsel nor this court missed an issue of potential merit relative to sentencing in general or to trial counsel's failure to seek concurrent sentences on Davis's behalf in particular. As Davis notes, this court adopted counsel's no-merit analysis, but refrained from discussing it at any great length. It does not follow, as Davis suggests, that this court missed any

sentencing issues, however. Counsel's analysis was thorough and accurate. Counsel noted that the circuit court considered on the record: (1) Davis's criminal record and that, at the time of the crimes, she had been recently released from prison; (2) Davis's victims were elderly and/or in ill health; (3) Davis's crimes required sophistication, planning and execution, in that they involved gaining the confidence of the victims and obtaining entry to their homes before stealing their valuables; and (4) Davis's continued failure to reform her behavior made it unlikely that she would cease her criminal acts. These considerations, as well as the fact that the burglaries each involved separate plans and execution, provide a reasonable explanation for the decision to impose consecutive, rather than concurrent sentences. The fact that the circuit court properly exercised its sentencing discretion when it imposed consecutive sentences, that there is record support for that decision, and that this court considered that issue in the no-merit context, renders ***Fortier*** inapplicable here.

¶10 Because ***Fortier*** is inapposite, ***Escalona*** applies. In this instance, Davis challenged the circuit court's sentencing decision in her response to the no-merit report, but did not challenge trial counsel's failure to argue for concurrent sentences. In her postconviction motion, Davis provided no reason, much less a sufficient reason, for her own failure to raise the issue in the no-merit context. Under ***Tillman***, Davis's challenge to trial counsel's performance is barred.

By the Court.—Order affirmed.

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