**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 12, 2009**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2008AP1487** **Cir. Ct. No. 2004CF3658**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DENNIS L. RANDLE,**

**DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Dennis L. Randle appeals from an order summarily denying his postconviction motion. We conclude that Randle's reason for belatedly challenging the children's paternity is insufficient to overcome the

procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Therefore, we affirm.

¶2 Randle pled guilty to three counts of failure to pay child support for more than 120 consecutive days, in violation of WIS. STAT. § 948.22(2) (2001-02).[1] Despite a more lenient negotiated recommendation from the State, the trial court imposed two four-year consecutive sentences, comprised of equal periods of initial confinement and extended supervision for two of the offenses; for the third offense, the trial court imposed and stayed a three and one-half year sentence in favor of a five-year term of probation.[2] This court affirmed the judgment of conviction in a no-merit appeal. *See* ***State v. Randle***, No. 2005AP2521-CRNM, unpublished slip op. (WI App June 30, 2006).

¶3 Randle moved for postconviction relief pursuant to WIS. STAT. § 974.06 (2007-08), alleging the ineffective assistance of trial counsel for failing to challenge the children's paternity, and the correlative ineffective assistance of appellate counsel for failing to pursue trial counsel's ineffectiveness.[3] The trial court summarily denied the motion as procedurally barred by ***Escalona-Naranjo***,

[1] This case involves two children. Randle was charged with four counts of failure to pay child support: two for each child. Incident to a negotiated plea agreement, one of the counts was dismissed and read-in for sentencing purposes.

[2] Incident to the negotiated plea agreement, the State recommended, for one of the offenses, a six- to eight-month term in the House of Correction with work release privileges conditioned upon Randle's maintaining gainful employment and being subject to a wage assignment; for the other two offenses, the State recommended stayed sentences of three years, equally divided into eighteen-month periods of initial confinement and extended supervision, in favor of a four-year term of probation conditioned upon remaining current in all monthly payment obligations among other conditions, in the event of Randle's default. Randle's challenge is in apparent response to the trial court's failure to impose the recommended sentence.

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

185 Wis. 2d at 185-86, and ***State v. Tillman***, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574.[4] Randle appeals.

¶4 To avoid ***Escalona***'s procedural bar, Randle 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) (application of ***Escalona*** bar is reviewed *de novo*).

¶5 Randle alleged that he did not raise this issue previously because of the ineffectiveness of his trial counsel for failing to challenge the children's paternity despite his instructions to do so, and for appellate counsel's correlative failure to pursue an ineffective assistance claim against trial counsel by instead

[4] Although the trial court summarily denied Randle's postconviction motion on the basis of waiver pursuant to ***State v. Tillman***, 2005 WI App 71, ¶4, 281 Wis. 2d 157, 696 N.W.2d 574, this case offers many bases on which to affirm the summary denial of Randle's postconviction motion. We affirm on a different basis than that relied upon by the trial court to avoid any potential concerns that could result from the supreme court's recent decision to grant review in ***State v. Allen***, 2008 WI App 64, 311 Wis. 2d 489, 750 N.W.2d 518, *review granted* (WI Mar. 18, 2009) (No. 2007AP795), raising the issue of whether a defendant's failure to respond to a no-merit report constitutes a waiver of the right to subsequently raise issues that could have been identified in a no-merit response.

pursuing a no-merit appeal. The crux of Randle's postconviction claim is that he is not the father of the two children whom he has now been convicted of failing to support. This claim is challenged in the context of the ineffectiveness of trial counsel for failing to demand blood testing, which Randle contends would negate his wrongfully imposed support obligation.

¶6 The paternity of these children was adjudicated in the underlying paternity action. Randle does not explain why he: (1) failed to challenge paternity in Milwaukee County Circuit Court Case No. 1993PA116673, the paternity action on which this criminal conviction that Randle now collaterally challenges is based; and (2) pled guilty in this criminal case in which he stipulated to the factual allegations in the complaint, including the paternity determinations from Milwaukee County Circuit Court Case No. 1993PA116673.[5]

¶7 Insofar as the present criminal case is concerned, Randle alleged that he failed to raise this issue previously because he directed his trial and appellate lawyers to do so and each refused.[6] Their refusals, however, should have alerted him to these claims.

¶8 Randle claims that he directed his trial counsel to challenge the children's paternity, or at least to inform the trial court at sentencing that he was not the biological father of these children. Randle should have realized at

[5] Challenging the validity of Randle's pleas was expressly rejected as an arguably meritorious claim on direct appeal in ***State v. Randle***, No. 2005AP2521-CRNM, unpublished slip op. (WI App June 30, 2006). *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (we will not revisit previously rejected issues).

[6] Randle alleges additional reasons for failing to previously raise this issue in his appellate brief. His reasons however, must be alleged in the postconviction motion itself to allow the trial court to evaluate their sufficiency. *See* WIS. STAT. § 974.06(4).

sentencing, or certainly by the time the judgment of conviction was entered, that trial counsel had not done so. Randle should also have realized that his appellate counsel did not raise this claim when Randle was served with the no-merit report.[7]

¶9 On June 30, 2006, we affirmed the judgment of conviction and explained why challenging the validity of Randle's guilty pleas based on "[t]he complaint[, which] provided a description of his offenses, and [to which] he stipulated that the facts in the complaint provided an adequate factual basis for his plea[s]" would lack arguable merit. ***Randle***, No. 2005AP2521-CRNM, unpublished slip op. at 2. Our express analysis of the validity of Randle's guilty pleas and his stipulating to the truth of the facts in the complaint, including his testimonial admissions to the trial court during the guilty plea hearing that he was the father of each of these two children for whom he has failed to pay child support, assures us that we examined this issue when we affirmed the judgment of conviction in the context of a no-merit appeal. *See* ***Tillman***, 281 Wis. 2d 157, ¶20.[8] Our rejection of this potential issue also negates the related ineffective

[7] We do not hold that Randle waived this claim by failing to raise it in response to appellate counsel's no-merit report, pursuant to ***Tillman***, 281 Wis. 2d 157, ¶4. We merely identify Randle's receipt of appellate counsel's no-merit report as a time when he should have realized that his trial and appellate counsel had not challenged the children's paternity, as he allegedly directed, in our independent evaluation of the sufficiency of Randle's reason for failing to previously raise this issue.

[8] We rejected Tillman's postconviction claim, raised in a comparable context, as follows:

> The only excuse offered by Tillman for not having previously cast this issue in its current terms … is that his trial counsel was ineffective. However, as noted, our no merit report specifically rejected that claim. Thus, Tillman has failed to present a sufficient reason why his current "spin" on this already adjudicated issue was not previously raised.

***Tillman***, 281 Wis. 2d 157, ¶25.

assistance claim that essentially challenges the very same substantive issue – the children's paternity – confirmed by Randle's valid guilty pleas and his testimonial admissions to the trial court. Randle's reason for failing to previously raise this issue is not sufficient to overcome ***Escalona***'s procedural bar, particularly when we rejected the substance of this very same issue in Randle's no-merit appeal. *See* ***Randle***, No. 2005AP2521-CRNM, unpublished slip op. at 2.

*By the Court.*—Order affirmed.

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