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

**June 23, 2009**

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



**Appeal No. 2008AP1274-CR** **Cir. Ct. No. 2003CF412**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**OMAR S. FORD,**

**DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Omar S. Ford[1] appeals from an order denying his postconviction motion. The trial court denied Ford's motion as procedurally

[1] In his brief, Ford spells his first name "Omarr." The State uses that spelling in its brief. Court records show, however, that Ford's first name is spelled "Omar"; for consistency's sake, we use that spelling.

barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

¶2 A jury found Ford guilty of one count of second-degree sexual assault, by use or threat of force or violence. *See* WIS. STAT. § 940.225(2)(a) (2003-04).[2] The jury found Ford not guilty of a second count. Ford appealed his conviction, and his appointed attorney filed a no-merit report. *See* WIS. STAT. RULE 809.32. Ford responded to the no-merit report. After considering both counsel's report and Ford's response, and upon our independent review of the record, we concluded there were no arguably meritorious appellate issues and affirmed the judgment of conviction. ***State v. Ford***, No. 2005AP1060-CRNM, unpublished slip op. (WI App Apr. 10, 2006) (***Ford I***).

¶3 On April 17, 2008, Ford filed a two-page, handwritten document with the trial court in which he made several conclusory assertions. With no elaboration, Ford asserted there were "new factors" that were not considered when he was sentenced, and that his sentence "was based on irrelevant or improper considerations." Ford also complained that no witnesses were called on his behalf and that his DNA was not found in or on the victim.[3]

¶4 The trial court denied Ford's motion because he had not raised his arguments in response to counsel's no-merit report. Ford appeals, and his

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

[3] Ford's latter arguments do not travel to the sentence, and are more properly characterized as seeking postconviction relief under WIS. STAT. § 974.06, whereas Ford's challenges to the sentence could be characterized as seeking modification of his sentence. Regardless of the precise nature of Ford's motion, it is procedurally barred.

appellate brief is virtually identical to the postconviction motion filed in the circuit court. For the reasons stated below, we affirm the circuit court's order.

¶5 WISCONSIN STAT. § 974.06 and ***Escalona-Naranjo*** require a defendant to raise all grounds for postconviction relief in his or her original motion on appeal. The reason for this is that we need finality in our litigation. ***Escalona-Naranjo***, 185 Wis. 2d at 185. Accordingly, when we are presented with postconviction motions raising issues either previously raised or which could have been raised in a previous motion or appeal, we hold that the claims are procedurally barred absent a sufficient reason for failing to raise them previously. *See* ***id.*** Moreover,

> when a defendant's postconviction issues have been addressed by the no merit procedure under WIS. STAT. RULE 809.32, the defendant may not thereafter again raise those issues or other issues that could have been raised in the previous motion, absent the defendant demonstrating a sufficient reason for failing to raise those issues previously.

***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574 (citation omitted).

¶6 The procedural bar of ***Escalona-Naranjo*** "is not an ironclad rule" and in considering whether to apply it when the prior appeal was taken under WIS. STAT. RULE 809.32, we "pay close attention to whether the no merit procedures were in fact followed." ***Tillman***, 281 Wis. 2d 157, ¶20; *see also* ***State v. Fortier***, 2006 WI App 11, ¶¶23-27, 289 Wis. 2d 179, 709 N.W.2d 893 (procedural bar not applied when no-merit counsel and this court did not discuss an arguably meritorious issue). Additionally, we "must consider whether [the no merit] 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." ***Tillman***, 281 Wis. 2d 157, ¶20.

¶7 With those standards in mind, we turn to Ford's no-merit appeal and his postconviction arguments.

¶8 The first issue discussed in appellate counsel's no-merit report was whether Ford's trial attorney was "ineffective in not introducing DNA evidence and failing to present additional defense witnesses to impeach the credibility of the state's witnesses." Ford filed a lengthy response to the no-merit report in which he complained that "no witnesses were called on his behalf." Ford also raised the precise "questions" that he set forth in his postconviction motion, namely "was there any DNA test done on the victim" and "was [his] DNA found in or on the victim."[4]

¶9 In our opinion, we considered Ford's assertion that his trial attorney had been ineffective by not introducing various witnesses and theories of defense and we concluded that no arguably meritorious issue was present. ***Ford I***, unpublished slip op. at 8-9. The effectiveness of trial counsel, for the precise matters that Ford again complains, was considered in Ford's no-merit appeal.

[4] In a submission dated May 14, 2009, Ford asks this court to allow him to "prove [his] innocence by taking a DNA test." This court is a reviewing court only and, therefore, not in a position to grant Ford's request. Moreover, we note the following statement of appellate counsel in his no-merit report:

> [T]he admission of the DNA evidence (with its one in 103,000 chance of it being someone else in the general population) would hurt rather than help Mr. Ford. Despite these odds, Mr. Ford was still included as a possible contributor of the DNA found in [the victim]. By no stretch of the imagination can it be argued that trial counsel was deficient for failing to admit what was essentially inculpatory evidence.

Because those issues were addressed in the no-merit appeal, Ford cannot relitigate them. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

¶10 In his discussion of the fourth issue addressed in the no-merit report, appellate counsel alluded to Ford's belief that "the trial [c]ourt sentenced him based upon inaccurate and misleading information and abused its discretion in sentencing." In his response, Ford argued that "inaccurate or misleading information" was included in the pre-sentence investigation report and "the court was not able to consider important changes which have taken place in his family situation, his mental or physical health, and other circumstances since his sentencing resulting in hardship which can be relieved by an appropriate modification of sentence." In his postconviction motion, Ford repeated that identical assertion.

¶11 In our opinion, we considered whether the trial court had properly exercised its sentencing discretion.[5] We concluded that the court considered proper and relevant factors when imposing sentence. ***Ford I***, unpublished slip op. at 9-11. As with Ford's other arguments, his challenge to sentencing was addressed in the no-merit appeal, and Ford cannot relitigate it. *See* ***id.***

[5] A "new factor" sentence modification motion would not be procedurally barred and Ford did not make such an argument in his no-merit appeal. Ford does not, however, identify any "new factor" which he believes would support the modification of his sentence and, therefore, any "new factor" argument is wholly conclusory.

¶12 Because the record shows that the no-merit procedures were followed and do carry a sufficient degree of confidence to warrant the application of the procedural bar, the trial court did not err when it summarily denied Ford's postconviction motion based on ***Escalona-Naranjo*** and ***Tillman***.

*By the Court.*—Order affirmed.

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