COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP88 **Cir. Ct. No. 2005CF2801**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE S. DAVIS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Willie S. Davis, *pro se*, appeals from an order denying his postconviction motion. The trial court denied Davis's motion as procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

¶2 Davis pled guilty to one count of second-degree sexual assault, arising from the July 11, 2002 sexual assault of Lakisha W. As part of a plea bargain, another sexual assault, committed on June 25, 2002, was read in at sentencing. The court imposed a bifurcated sentence of thirty years, comprised of twenty years of initial confinement and ten years of extended supervision.

¶3 Davis appealed, and his appointed attorney filed a no-merit report. *See* WIS. STAT. RULE 809.32 (2007-08).[1] Davis responded to the no-merit report. After considering both counsel's report and Davis'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 ***State v. Davis***, No. 2006AP850-CRNM, unpublished slip op. (WI App Apr. 25, 2007) (***Davis I***).

¶4 On December 24, 2007, Davis, acting *pro se*, filed a motion for postconviction relief.[2] Of the several arguments raised by Davis in the motion, only two are pursued on appeal—whether he should be allowed to withdraw his guilty plea because he was not competent during the plea hearing and a related challenge to the effectiveness of his trial attorney for not seeking a competency evaluation under WIS. STAT. § 971.14. The trial court denied Davis's motion

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

[2] Davis denominated his motion as being filed under WIS. STAT. RULE 809.30, the rule that governs a direct appeal from a judgment of conviction. Because Davis already appealed his conviction, the motion cannot be a RULE 809.30 motion. *See* WIS. STAT. § 974.02(1) (appeal from a judgment of conviction shall be taken under RULE 809.30). The circuit court correctly treated the motion as seeking relief under WIS. STAT. § 974.06. *See* § 974.06(1) (postconviction motion may be filed "[a]fter the time for appeal or postconviction remedy provided in s. 974.02 has expired").

because he had not raised the issues in response to counsel's no-merit report. Davis appeals.

¶5 WISCONSIN STAT. § 974.06(4) and ***Escalona-Naranjo*** require a defendant to raise all grounds for postconviction relief in his or her original motion or 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.*** The ineffective assistance of postconviction counsel can be a sufficient reason why a claim was not previously raised. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶6 The procedural bar of ***Escalona-Naranjo*** can be applied when the defendant's direct appeal was a no-merit appeal under WIS. STAT. RULE 809.32.

> [W]hen 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).

¶7 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). 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.

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

¶9 During the plea colloquy, the court was told that Davis was taking medication for mental health issues.[3] Davis's trial attorney told the court that she believed Davis was competent to proceed, noting that Davis has "been on the medication since basically right after he came into custody, and it seems the medication has no interference with him understanding anything." Davis's trial attorney said she spent "significant time" with Davis the previous night and she "believe[d] he understands everything." Davis expressly told the court that he agreed with his attorney's statements.

¶10 Davis makes no attempt in this appeal to explain why he did not raise a competency issue in his no-merit response. Davis included, in the appendix to his appellate brief, copies of numerous medical records, which presumably document his use of medication over the years. Most of those records, however, were not provided to the circuit court in the postconviction motion and, therefore, this court cannot consider them. *See* ***South Carolina Equip., Inc. v. Sheedy***, 120 Wis. 2d 119, 125-26, 353 N.W.2d 63 (Ct. App. 1984) (This court can

[3] Four drugs were identified on the plea questionnaire.

only review matters of record before the circuit court, and cannot consider new material attached to an appellate brief outside that record.). Although Davis did provide some medical records with his postconviction motion that confirmed he was taking medication while awaiting trial, those records do not show anything that was not already known by the circuit court at the plea hearing, that is, Davis was taking prescribed medication for mental health reasons. That Davis was taking medication does not compel a finding of incompetence. *See* ***State v. Weber***, 146 Wis. 2d 817, 826, 433 N.W.2d 583 (Ct. App. 1988).

¶11 During the plea colloquy, the court explored Davis's mental health and his ability to understand the proceedings.[4] The record lends no support to Davis's claim of incompetence. Nothing in Davis's postconviction motion suggests that this court failed to follow the no-merit procedure by not identifying an arguably meritorious issue. *See* ***Fortier***, 289 Wis. 2d 179, ¶¶23-27. Therefore, we have a "sufficient degree of confidence" in the integrity of the no-merit process in Davis's case so that the application of the procedural bar is warranted. *See* ***Tillman***, 281 Wis. 2d 157, ¶20.

¶12 Because the no-merit procedures were followed in Davis's case and they carry a sufficient degree of confidence, the application of the procedural bar is warranted. The trial court did not err when it denied Davis's postconviction motion as procedurally barred based on ***Escalona-Naranjo*** and ***Tillman***.

[4] A defendant is competent within the meaning of WIS. STAT. § 971.13(1) when he or she has the "capacity to understand the nature and object of the proceedings … to consult with counsel, and to assist in preparing … [a] defense." ***State v. Garfoot***, 207 Wis. 2d 214, 225-26, 558 N.W.2d 626 (1997) (citation omitted).

By the Court.—Order affirmed.

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