COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3111-CR **Cir. Ct. No. 2003CF5430**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAVIER SALAZAR,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Javier Salazar appeals from an order summarily denying a motion to vacate his sentence. The issue is whether the trial court imposed an illegal sentence by misconstruing the felony murder statute as a penalty enhancer rather than as a stand-alone unclassified crime. We conclude

that, on direct appeal, we decided that there was no arguable merit to challenge the trial court's imposition of the maximum sentence for the felony murder that arose from an armed robbery for which Salazar was convicted; we will not decide that same issue again. Therefore, we affirm.

¶2 A jury found Salazar guilty of felony murder arising from an armed robbery, in violation of WIS. STAT. § 940.03 (amended Feb. 1, 2003). The trial court imposed a fifty-five-year sentence, comprised of thirty-five- and twenty-year respective periods of initial confinement and extended supervision. Appellate counsel filed a no-merit report addressing six potential issues.[1] *See* ***State v. Salazar***, No. 2005AP206-CRNM, unpublished slip op. at 2 (WI App July 11, 2007). Salazar filed two responses, responding to the six potential issues identified by appellate counsel, and identifying eight more potential issues.[2] *See*

[1] Those potential issues were identified as five because two of the potential issues, although unrelated in subject matter, would have been pursued in a motion for a new trial had they been arguably meritorious. Those potential issues were:

> (1) the validity of Salazar's confession; (2) the effective assistance of trial counsel for allegedly failing to investigate the facts or call any defense witnesses to testify; (3) the sufficiency of the evidence despite Salazar's statements and the testimony of his co-defendants; (4) the trial court's exercise of sentencing discretion in imposing the maximum sentence; and (5) a potential motion for a new trial because: (a) co-defendant Jose Luis Montana allegedly committed perjury; and (b) a juror and the court reporter were friends.

State v. Salazar, No. 2005AP206-CRNM, unpublished slip op. at 2 (WI App July 11, 2007).

[2] Salazar identified the following six instances of the alleged ineffectiveness of his trial counsel:

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id. at 2-3. We considered all of those issues in addition to our obligation in a no-merit appeal to independently search the record for any issue of arguable merit. *See* ***Anders v. California***, 386 U.S. 738, 744-45 (1967). We ultimately concluded on the identified concerns as well as following our independent review of the record, that there was no arguable merit to further proceedings. *See* ***Salazar***, No. 2005AP206-CRNM, unpublished slip op. at 2.

¶3 Eleven months after the supreme court denied Salazar's petition for review of our decision, he moved the trial court to vacate, set aside or modify his sentence as excessive because it erroneously imposed the sentence for felony murder as if it were a penalty enhancer rather than the stand-alone unclassified crime that it is. The trial court denied the motion as: (1) untimely; (2) barred as inappropriately brought pursuant to WIS. STAT. § 974.06 (2007-08); (3) waived 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, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574; and (4) erroneous on its substantive merit.[3] It is from this order that Salazar appeals.

> (1) [the] alleged breach of the attorney-client privilege; (2) [the] failure to pursue alleged prosecutorial misconduct; (3) [the] failure to object to the alleged untimeliness of evidence; (4) [the] failure to object to the admissibility of other acts evidence; and (5) [the] failure to request a jury instruction on the lesser included offense of conspiring to commit armed robbery.

Salazar, No. 2005AP206-CRNM, unpublished slip op. at 2. Salazar also contended that trial counsel was ineffective "for various failures involving the tape-recorded conversations between Salazar and his mother, including alleged violations pursuant to ***Brady v. Maryland***, 373 U.S. 83 (1963)." Salazar also identified as potential issues, the validity of his arrest and detention, and challenges to his confession pursuant to ***Franks v. Delaware***, 438 U.S. 154 (1978). ***Salazar***, No. 2005AP206-CRNM, unpublished slip op. at 3.

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

(continued)

¶4 We reject Salazar's contention because it was decided on direct appeal. In a no-merit appeal, unlike in an adversary appeal, the appellate court is obliged to independently search the record for issues of arguable merit; our review is not limited by those potential issues and concerns raised by counsel and by the appellant personally. *See* ***Anders***, 386 U.S. at 744-45. We are satisfied that we met our obligation in following the no-merit procedures. *See* ***id.***; ***Tillman***, 281 Wis. 2d 157, ¶20. It is therefore inconsequential whether appellate counsel "thoroughly examine[d] and present[ed] the is[s]ues in his no merit report."

¶5 Appellate counsel expressly addressed "the trial court's exercise of sentencing discretion in imposing the maximum sentence," and explained why that issue lacked arguable merit. *See* ***Salazar***, No. 2005AP206-CRNM, unpublished slip op. at 2-3. We reviewed the record and independently concluded that any challenge to the trial court's imposition of the maximum sentence would lack arguable merit. *See* ***id.*** We will not revisit an issue that we previously decided. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶6 Insofar as the precise challenge to the excessiveness of Salazar's sentence, allegedly contrary to ***State v. Mason***, 2004 WI App 176, 276 Wis. 2d 434, 687 N.W.2d 526, is concerned, Salazar offers two reasons for his belatedly raising this precise criticism: (1) his appellate counsel was ineffective for pursuing a no-merit appeal rather than challenging the sentence as contrary to

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Salazar contended in the trial court and in this appeal, that the sentence was imposed contrary to ***State v. Mason***, 2004 WI App 176, 276 Wis. 2d 434, 687 N.W.2d 526. The trial court disagreed, ruling that "nothing about the sentence imposed is at odds with the ***Mason*** criteria. The defendant's analysis is flawed in this regard, and he has not set forth a viable claim for relief even if the court were to review the merits of his claims."

Mason; and (2) as a lay person, Salazar did not recognize this particular challenge until he discovered ***Mason***, which was after we decided his appeal.

¶7 Salazar's reasons are not sufficient to overcome the ***Escalona***/***Tillman*** procedural bar because in a no-merit appeal, this court independently searches the record for an issue of arguable merit. *See* ***Anders***, 786 U.S. at 744-45. We decided ***Mason*** in August of 2004. We decided Salazar's direct appeal in July of 2007. Whether or not appellate counsel or Salazar was aware of ***Mason*** when Salazar's conviction was appealed, we were when we independently reviewed the trial court's imposition of the maximum sentence on direct appeal, and ultimately decided that there was no arguable merit to challenge that sentence in any respect. *See* ***Salazar***, No. 2005AP206-CRNM, unpublished slip op. at 2-3.

By the Court.—Order affirmed.

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