

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1870

Cir. Ct. No. 2004CF5735

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE M. BONILLA,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Jose M. Bonilla, *pro se*, appeals from an order denying his motion for postconviction relief brought under WIS. STAT. § 974.06

(2007-08).¹ The circuit court determined that the motion was procedurally barred by *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), and *State v. Tillman*, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. We affirm.

BACKGROUND

¶2 In 2006, Bonilla pled guilty to two felony offenses. He appealed pursuant to the no-merit procedures set out in WIS. STAT. RULE 809.32. In a no-merit report and a supplemental no-merit report, Bonilla's appellate counsel discussed the validity of Bonilla's pleas and the circuit court's exercise of sentencing discretion. See *State v. Bonilla*, No. 2006AP2092-CRNM, unpublished slip op. at 2 (WI App June 17, 2008) (*Bonilla I*). Bonilla filed two responses in which he disputed his appellate counsel's conclusions, claimed that his trial counsel performed ineffectively, and asserted that the circuit court lacked personal jurisdiction over him. See *id.* at 2-3. We conducted an independent review of the record and concluded that further appellate proceedings would lack arguable merit. *Id.* at 6. Accordingly, we affirmed the judgment of conviction. *Id.*

¶3 Bonilla next filed a postconviction motion pursuant to WIS. STAT. § 974.06, claiming that he was pursuing issues that neither he nor his appellate counsel raised in the no-merit proceeding. Bonilla alleged that his plea was not validly entered, that his trial counsel performed ineffectively, and that the State did not comply with its obligations to disclose exculpatory evidence. The circuit court summarily denied the motion without a hearing, and this appeal followed.

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

DISCUSSION

¶4 We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185. Therefore, a prisoner who wishes to pursue a second or subsequent postconviction motion under WIS. STAT. § 974.06 must demonstrate a sufficient reason for failing in the original postconviction proceeding to raise or adequately address the issues. *See id.* at 184.

¶5 “A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4).” *State v. Allen*, 2010 WI 89, ¶41, ___ Wis. 2d ___, 786 N.W.2d 124. Accordingly:

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.

Tillman, 281 Wis. 2d 157, ¶19. Before we apply the rule of *Escalona-Naranjo* to a § 974.06 motion filed after a no-merit appeal, however, we “consider whether the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar.” *Allen*, 786 N.W.2d 124, ¶62.

¶6 We have examined the submissions in *Bonilla I* and our decision summarily affirming Bonilla’s conviction. Our examination discloses that we conducted an independent review of the record. We discussed issues raised by Bonilla’s counsel, and we analyzed issues raised by Bonilla in response. Moreover, we granted Bonilla’s motion to amend his response to raise additional

issues. Ultimately, however, we determined that no potentially meritorious issues warranted further proceedings.

¶7 We are satisfied that the no-merit procedures were followed in *Bonilla I*, and we therefore have sufficient confidence in the outcome of *Bonilla I* to apply the procedural bar of *Escalona-Naranjo*. Accordingly, Bonilla may pursue the claims raised in his motion filed under WIS. STAT. § 974.06 only if he offered the circuit court a sufficient reason for failing to include a full presentation of those claims when he responded to the no-merit report. We determine the sufficiency of Bonilla’s reason by examining the four corners of Bonilla’s postconviction motion. See *State v. Allen*, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

¶8 Bonilla asserted in his WIS. STAT. § 974.06 motion that his appellate counsel’s failure to address all of his current claims in the earlier no-merit proceeding constituted a sufficient reason to permit serial litigation. The argument reflects a misunderstanding of the obligations imposed by § 974.06 and *Tillman*. As the supreme court recently explained:

[w]hatever reason the defendant offers as a “sufficient reason”—ignorance of the facts or law underlying the claim, an improperly followed no-merit proceeding, or ineffective assistance of counsel—the defendant must allege specific facts that, if proved, would constitute a sufficient reason for failing to raise the issues in a response to a no-merit report. If a defendant fails to do so, the circuit court should summarily deny the motion[.]

Allen, 786 N.W.2d 124, ¶91.²

¶9 Bonilla did not give the circuit court any reason, much less a sufficient reason, why his responses to the no-merit report failed to raise or adequately address the claims he raised in his WIS. STAT. § 974.06 motion. He therefore did not satisfy his obligations under that statute, and the circuit court properly entered a summary denial of his postconviction motion. *See Allen*, 786 N.W.2d 124, ¶91.

By the Court.—Order affirmed.

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

² Bonilla filed his postconviction motion before the supreme court decided *State v. Allen*, 2010 WI 89, ___ Wis. 2d ___, 786 N.W.2d 124. Nonetheless, *Allen* applies retroactively to this case. In *Allen*, our supreme court addressed the mechanics of applying *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), where, as here, a prisoner proceeds under WIS. STAT. § 974.06 after completing a no-merit appeal. *Allen*, 786 N.W.2d 124, ¶¶3-5. Proceedings under § 974.06 are civil in nature. § 974.06(6); *see also State ex rel. Krieger v. Borgen*, 2004 WI App 163, ¶11, 276 Wis. 2d 96, 687 N.W.2d 79. We presume the retroactive application of judicial holdings applying rules of civil procedure. *See Trinity Petroleum v. Scott Oil*, 2007 WI 88, ¶¶80-81, 302 Wis. 2d 299, 735 N.W.2d 1. Further, “the *Escalona-Naranjo* rule has been applied retroactively by our courts in the past.” *Krieger*, 276 Wis. 2d 96, ¶12. Thus, we rely on *Allen* here.

