COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2106 **Cir. Ct. No. 2002CF2102**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN CRUZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Benjamin Cruz, *pro se*, appeals the circuit court's order denying his motion for postconviction relief under WIS. STAT. § 974.06

(2007-08).[1] He contends that he should be allowed to withdraw his plea and that he received ineffective assistance of counsel. We affirm.

¶2 On November 21, 2002, Cruz was convicted of two counts second-degree sexual assault of a child. His appointed appellate counsel filed a no-merit report. Cruz was informed of his right to respond to the report so that he could raise any issues he thought had arguable merit, but he did not respond. We accepted the no-merit report and affirmed the judgment of conviction on January 14, 2005. We stated in our decision that the circuit court "fully complied with the requirements set forth in WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), to ensure a knowing, intelligent and voluntary plea."

¶3 On April 11, 2008, Cruz filed a *pro se* motion for postconviction relief under WIS. STAT. § 974.06, arguing that he should be allowed to withdraw his plea. On April 10, 2009, the circuit court denied the motion, ruling that the motion was barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), because Cruz had not raised his issues in response to the no-merit report filed by his counsel. Cruz filed an appeal, but voluntarily dismissed it on July 17, 2009.

¶4 On July 9, 2009, while his second appeal was still pending, Cruz filed another *pro se* motion under WIS. STAT. § 974.06, in which he argued: (1) that he should be allowed to withdraw his plea because he did not understand that he would not be eligible for parole under the new truth-in-sentencing laws,

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

which abolished parole in favor of extended supervision; (2) that he should be allowed to withdraw his plea because he did not understand the nature of the charges against him; (3) that he should be allowed to withdraw his plea because the circuit court failed to alert him during the plea colloquy to the fact that his lawyer might discover defenses to the charges; (4) that he received ineffective assistance of counsel because his attorney should not have allowed him to waive his preliminary hearing when there was no physical evidence to support the sexual assault allegations; (5) that he received ineffective assistance of counsel because his attorney should have investigated whether Cruz was in custody during the time the third sexual assault allegedly occurred; and (6) that the State suppressed exculpatory evidence in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963). The circuit court denied the motion on July 22, 2009, once again concluding that it was barred by ***Escalona-Naranjo*** because Cruz did not raise the issues in response to the no-merit report filed by his counsel during his direct appeal.

¶5 "[A]ny claim that could have been raised on direct appeal or in a previous Wis. Stat. § 974.06 … postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion, absent a sufficient reason." ***State v. Lo***, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756; ***Escalona-Naranjo***, 185 Wis. 2d at 185. Where, as here, a defendant's appointed appellate counsel files a no-merit report on direct appeal, "a defendant may not raise issues in a subsequent § 974.06 motion that he could have raised in response to the no-merit report, absent a 'sufficient reason' for failing to raise the issues earlier in the no-merit appeal." ***State v. Allen***, 2010 WI 89, ¶4, __ WIS. 2d __, 786 N.W.2d 124.

¶6 Cruz contends that he has sufficient reason for not raising his arguments in his response to the no-merit report; he has mental health issues, he has difficulty communicating in English and he has a limited education. Beyond

baldly asserting that these circumstances should allow him to escape the ***Escalona-Naranjo*** bar, Cruz has provided no explanation of how these circumstances prevented him from previously raising his issues. The simple fact that Cruz suffers from mental health problems is not a sufficient reason under ***Escalona-Naranjo*** absent an explanation of how the mental health problems prevented Cruz from responding to the no-merit report. Cruz's contention that his poor knowledge of English and lack of education were sufficient reasons under ***Escalona-Naranjo*** is belied by the record. We have reviewed the transcripts and Cruz's prior filings in this case, including the briefs on appeal, which all show that he is able to meaningfully participate in these proceedings despite a limited education and his status as a non-native English speaker. The record shows that Cruz communicated with his bilingual attorney in both English and Spanish with ease. In sum, we conclude that Cruz has not provided a sufficient reason for failing to previously raise his arguments in the response to the no-merit report, and he is therefore barred from raising them now by ***Escalona-Naranjo*** and ***Allen***.

By the Court.—Order affirmed.

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