COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP985 **Cir. Ct. No. 2006CF6238**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICOLAS ALEXANDER LEE,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Nicolas Alexander Lee, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 motion for postconviction relief. The court deemed the motion 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. Lee believes the procedural bars are inapplicable. We agree with the circuit court and affirm the order.

¶2 Lee was originally charged with one count of first-degree intentional homicide while armed. Pursuant to a plea bargain, he pled guilty to one count of first-degree reckless homicide. Out of a possible maximum of sixty years' incarceration, Lee was sentenced to twenty-five years' initial confinement and ten years' extended supervision.

¶3 Lee appealed, and counsel filed a no-merit report on his behalf. *See* ***State v. Lee***, No. 2007AP2772-CRNM, unpublished slip op. and order (WI App Nov. 10, 2008). Lee filed a *pro se* extension request, which was granted, but he ultimately did not respond to the no-merit report.

¶4 In the no-merit report, counsel addressed four potential issues: whether the circuit court erred in denying a motion to suppress; whether Lee entered his plea knowingly, intelligently, and voluntarily; whether he received ineffective assistance from trial counsel, who encouraged him to enter the plea bargain; and whether the sentence imposed could be challenged. After our independent review of the Record and the no-merit report, we concluded that there were no issues of arguable merit, and we summarily affirmed the conviction. A petition for review was denied.

¶5 On February 26, 2010, Lee filed the underlying WIS. STAT. § 974.06 motion, seeking to withdraw his plea. He claimed his plea was not knowing, intelligent, and voluntary; that he received ineffective assistance of trial counsel, and that the circuit court erroneously exercised its sentencing discretion. As noted, the circuit court rejected the motion as procedurally barred. Lee appeals.

¶6 WISCONSIN STAT. § 974.06(4) requires a prisoner to raise all grounds for postconviction relief in his or her original, supplemental, or amended motion or appeal. *See* ***Escalona***, 185 Wis. 2d at 185–186, 517 N.W.2d at 163–164. Issues that could have been, but were not, raised previously may not be raised in a later motion absent a sufficient reason. *See* ***Tillman***, 2005 WI App 71, ¶1, 281 Wis. 2d at 160, 696 N.W.2d at 575. Thus, "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" previously. ***Id.***, ¶19, 281 Wis. 2d at 167–168, 696 N.W.2d at 579. In addition, although a defendant is not required to respond to a no-merit report, "a defendant may not raise issues in a subsequent § 974.06 motion that he could have raised" in a no-merit response. ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 5, 786 N.W.2d 124, 125.

¶7 The ***Escalona*** procedural bar is not ironclad; there are certain exceptions. Ineffective assistance of postconviction counsel, for instance, might sometimes constitute a "sufficient reason as to why an issue which could have been raised on a direct appeal was not." ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996). A failure to raise an issue in a no-merit report may sometimes constitute ineffective assistance of postconviction counsel. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶18, 314 Wis. 2d 112, 122, 758 N.W.2d 806, 811. Further, if no-merit procedures are not followed in a no-merit appeal, such as when both appellate counsel and this court overlook an issue of arguable merit, a defendant may have a "sufficient reason" for not raising an issue earlier, despite the defendant's failure to respond to the no-merit report. *See* ***State v. Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 191–192, 709 N.W.2d 893, 899.

¶8 Lee relies on ***Fortier*** and ***Panama*** to assert on appeal that the circuit court

> fails to detail its review of the merits to determine if in fact a failure of the no merit procedures existed. It in fact simply avoided the issue, coming to the conclusion, since Lee did not provide a response to the no merit proceedings, he has waived any future postconviction motions.

Lee thus contends that the court's position is contrary to ***Fortier*** and ***Panama***. Lee misapprehends these cases.

¶9 In ***Fortier***, we declined to apply ***Escalona*** and ***Tillman*** because Fortier's attorney had failed to identity an issue of arguable merit in the no-merit report, and we did not notice the issue ourselves during our independent review of the Record. ***Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d at 191–192, 709 N.W.2d at 899. In ***Panama***, we explained that ***Fortier*** "is best understood as concluding that counsel's failure to raise an *arguably meritorious* issue in a no-merit report is a 'sufficient reason' under ***Escalona-Naranjo*** for the defendant's failure to raise the issue in a response, thus preventing the no-merit procedure from serving as a procedural bar" to a subsequent WIS. STAT. § 974.06 motion. ***Panama***, 2008 WI App 146, ¶16, 314 Wis. 2d at 121, 758 N.W.2d at 810–811 (emphasis in original).

¶10 Here, though, Lee does not show that counsel failed to raise arguably meritorious issues in the no-merit report.[1] Instead, the issues that Lee now attempts to raise were not only identified by counsel but were expressly addressed by this court.[2] *See* WIS. STAT. § 974.06(4); *see also* ***Tillman***, 2005 WI App 71,

[1] We note that Lee's conclusory insistence that "a failure of the no merit procedures existed" does not make that claim a fact.

[2] Arguably, this is exactly the opposite of the situation in ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893.

¶1, 281 Wis. 2d at 159–160, 696 N.W.2d at 575 (issues finally adjudicated on appeal may not form basis of new WIS. STAT. § 974.06 motion). What Lee perceives to be new substantive issues are merely arguments he could have made in response to issues previously raised, and rejected, in the no-merit appeal. Lee offers no sufficient reason for his failure to advance his arguments earlier, so the circuit court properly deemed them procedurally barred.

By the Court.—Order affirmed.

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