COURT OF APPEALS DECISION DATED AND FILED

November 8, 2011

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. 2010AP2226 **Cir. Ct. No. 2000CF5532**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH L. MORRIS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kenneth L. Morris appeals the orders denying his postconviction motion for plea withdrawal and the motion for reconsideration that followed. Because Morris's claims are procedurally barred, we affirm.

BACKGROUND

¶2 Morris was charged with one count of second-degree reckless homicide while armed, contrary to WIS. STAT. §§ 940.06(1) and 939.63 (1999-2000).[1] According to the complaint, Morris shot and killed Billy Smith while the two were in Morris's car.

¶3 Morris waived the preliminary hearing, and the State subsequently amended the charge against him to first-degree reckless homicide while armed. At a scheduling conference that followed, the circuit court inquired whether the State would be pursuing another or additional charges against Morris. In response, the State advised that it would proceed to trial against Morris on the charge of first-degree reckless homicide.

¶4 On the day Morris's trial was to begin, his retained counsel, Attorney Michael Backes, informed the court that he was not prepared to proceed. Backes explained that despite having indicated that he would enter a guilty plea, Morris had changed his mind. Backes went on to advise the court that Morris wanted a new attorney and that Backes had not prepared for trial. When asked, Morris added that there was a lack of communication and that he would "just feel better with a different attorney."

¶5 The circuit court denied the motion to withdraw. It did, however, offer to adjourn the case for two days. Despite a prior representation that it would

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[1] Because the current version of the statutory sections cited in this opinion are the same in all relevant respects, all references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

proceed against Morris on a charge of first-degree reckless homicide, the State advised the court that if the case went to trial, it would seek leave to file an information charging Morris with first-degree intentional homicide.

¶6 Later that afternoon, Morris pled guilty to first-degree reckless homicide. In exchange for his plea, the State dismissed the penalty enhancer for Morris's use of a dangerous weapon and refrained from making a sentencing recommendation. Morris subsequently fired Backes and retained a new attorney. The court sentenced Morris to thirty years of initial confinement and twenty years of extended supervision.

¶7 Attorney David J. Lang was appointed to represent Morris on appeal. Lang filed a no-merit report identifying two potential issues: (1) whether Morris's guilty plea was intelligently and voluntarily entered; and (2) whether the circuit court erroneously exercised its sentencing discretion. Morris did not respond. In reviewing the matter, this court was not aware that Lang had not provided Morris with the transcripts and court record as required by WIS. STAT. RULE 809.32(1)(b)2. We affirmed Morris's conviction and relieved Lang of further representing Morris on appeal.

¶8 Morris then filed a petition for *habeas corpus* in federal court and his current counsel was appointed. Action on Morris's petition was stayed so that he could exhaust his state court remedies. As a result, Morris filed a petition for *habeas corpus* with this court pursuant to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), challenging the effectiveness of Lang's assistance. We remanded the matter to the circuit court for a hearing and later denied Morris's petition after concluding that although Lang's performance in not providing Morris with the transcripts and record was deficient, it was not prejudicial. We

held that Morris could have responded to the no-merit report even without the transcripts and record. The supreme court denied review.

¶9 Morris next filed a WIS. STAT. § 974.06 motion arguing that his plea was not knowingly, voluntarily, and intelligently entered into. He claimed he was coerced to enter a plea based on the State's improper threat to increase the charge against him, Backes's complete failure to prepare for trial, and the circuit court's refusal to allow Morris to obtain competent substitute counsel or a reasonable adjournment.

¶10 In an attempt to avoid the bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), Morris argued that these issues were not previously presented because Lang failed to identify them in the no-merit appeal. Morris also argued that he was prevented from responding to the no-merit report because Lang did not provide him with the transcripts and record and because Morris did not understand that these claims could provide bases for relief from his conviction.

¶11 The circuit court summarily denied Morris's motion, and he sought reconsideration. The circuit court denied that motion as well.

DISCUSSION

¶12 As we have explained on numerous occasions:

> We need finality in our litigation. [WISCONSIN STAT. §] 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 § 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.

¶13 "A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 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.

State v. Tillman, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574.

¶14 Morris acknowledges that the issues he now argues were not previously raised in his no-merit appeal or in a response to the no-merit report submitted by counsel. He claims, however, that he has sufficient reasons for not raising the issues previously: (1) his appellate counsel's, Attorney Lang's, failure to comply with no-merit procedural requirements by not providing Morris with the transcripts and record; and (2) Morris's actual ignorance, at the time of the no-merit process, of the claims he now raises.

¶15 When it comes to establishing a "sufficient reason," ***Allen*** explained:

> Whatever 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.

Id., 328 Wis. 2d 1, ¶91. With this in mind, we address the reasons offered by Morris.

A. Counsel's failure to comply with no-merit procedural requirements.

¶16 First, Morris points to Lang's failure to provide him with the transcripts and record as a sufficient reason for not previously raising the issues. *See* ***id.***, ¶65 (explaining that "'the attorney *shall* inform the person that if a no-merit report is filed the attorney will serve a copy of the transcripts and the circuit court case record upon the person *at the person's request*'") (citation omitted); *see also* ***id.***, ¶66 ("Today, an alleged and demonstrated *failure* to comply with these detailed no-merit procedural requirements provides a sufficient reason to permit new issues to be raised."). Morris submits that he is not raising a substantive claim of ineffective assistance of counsel but instead is arguing that Lang's errors constitute a sufficient reason for not previously raising the issues.

¶17 It is undisputed that Lang did not comply with all of the no-merit procedural requirements. When Morris requested the transcripts and record, Lang did not give them to him and instead told Morris he would have to pay for copies.

¶18 As set forth above, whatever reason Morris offers as a "sufficient reason"—here, an improperly followed no-merit proceeding that deprived him of the transcripts and records in his case—he "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." ***Id.***, ¶91. In denying Morris's petition for a writ of *habeas corpus*, we previously concluded:

> Morris was also not prevented from responding to the no-merit report simply because he lacked the record and transcripts. Although a lack of these documents may have prevented him from responding more eloquently or more

> effectively, Morris still had the opportunity to file a response of some kind. He could have called attention to the fact that he had not received the documents *and argued that he felt his plea was forced, even if he was not able to specifically identify "coercion." In short, Morris has not demonstrated that counsel's failure to provide him the transcripts and record prevented him from raising a coercion claim.*

State ex rel. Morris v. Pollard, 2008AP1844, unpublished slip op. at 4-5 (June 19, 2009) (emphasis added). Thus, we have already resolved, to Morris's detriment, the question of whether the absence of the transcripts and record constituted a sufficient reason for his failure to raise the coercion claim in response to the no-merit report.[2]

¶19 Given the procedural underpinnings of this appeal, we are not imposing an additional requirement or modifying ***Allen***. Instead, we are holding that this issue, though artfully rephrased here, has already been resolved and consequently, will not be revisited. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue. Other courts have reached the same result where defendants attempted to apply new 'theories' to matters previously litigated." (citations omitted)).

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[2] We note, but do not resolve, what could be construed as tension between language set forth in ***State v. Allen***, 2010 WI 89, ¶66, 328 Wis. 2d 1, 786 N.W.2d 124 ("Today, an alleged and demonstrated *failure* to comply with these detailed no-merit procedural requirements provides a sufficient reason to permit new issues to be raised.") and ***id.***, ¶91 ("Whatever reason the defendant offers as a 'sufficient reason[,]'… 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."). Pursuant to ¶66, one could argue, as Morris does, that to establish a sufficient reason, all a defendant needs to show is a failure to comply with the no-merit procedural requirements. In contrast, ¶91 indicates that something more is needed.

B. Morris's actual ignorance, at the time of the no-merit process, of the claims he now raises.

¶20 As an additional "sufficient reason," Morris argues he did not understand, at the time of the no-merit process, that the claims he now asserts in his WIS. STAT. § 974.06 motion—i.e., that he was coerced to enter a plea based on the combined effect of the State's improper threat to increase the charge against him, Backes's complete failure to prepare for trial, and the circuit court's refusal to allow Morris to obtain competent substitute counsel or a reasonable adjournment—could provide bases for relief from his conviction.

¶21 As stated, in denying Morris's petition for a writ of *habeas corpus*, we concluded: "[Morris] could have … *argued that he felt his plea was forced, even if he was not able to specifically identify* '*coercion*.'" ***State ex rel. Morris***, 2008AP1844, unpublished slip op. at 4 (emphasis added). Now, instead of arguing the ineffective assistance of appellate counsel as a basis for a failure to raise his coercion claim, Morris claims his own ignorance was the reason it was never raised. Given that we have already concluded that Morris could have "argued that he felt his plea was forced, even if he was not able to specifically identify 'coercion,'" he cannot now be said to have been actually ignorant.[3] Again, because this issue has been resolved, we will not revisit it. *See* ***Witkowski***, 163 Wis. 2d at 990.

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[3] Morris relies on ***State v. Howard***, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), *overruled in part by* ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765, for the proposition that actual ignorance of a claim is sufficient reason for failing to raise the claim in a prior appeal. We need not resolve ***Howard***'s applicability because we previously concluded that Morris was not actually ignorant of his coercion claim, even if he was not able to specifically identify it as such.

¶22 In light of the forgoing, we agree with the State that Morris has not presented sufficient reasons allowing him to circumvent the procedural bar of ***Escalona-Naranjo*** and its progeny. Consequently, we do not address the merits of Morris's claim that his guilty plea was not knowing, intelligent, and voluntary.[4]

By the Court.—Orders affirmed.

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

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[4] While the circuit court's reasoning denying Morris's WIS. STAT. § 974.06 motion and the reconsideration motion that followed varies from our own, "we may affirm on grounds different than those relied on by the [circuit] court." *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).