COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP34 **Cir. Ct. No. 1996CF962687**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL JAMES GUERARD,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Daniel James Guerard appeals from an order of the circuit court denying without a hearing his WIS. STAT. § 974.06 (2009-10)[1]

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

postconviction motion. Guerard moved to withdraw his 1996 guilty plea, alleging that the circuit court had not conducted a proper plea colloquy. We agree with the circuit court's decision to the extent that it ruled the motion is procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), and ***State v. Tillman***, 2005 WI App 71, ¶4, 281 Wis. 2d 157, 696 N.W.2d 574. Therefore, we affirm.

BACKGROUND

¶2 In 1996, Guerard was charged with one count of first-degree reckless homicide with use of a dangerous weapon for the death of Tony Loomis. Loomis and Frederick Huffman had been walking down the street when they were approached by a man asking about their gang affiliation. When they denied any gang associations, the man started hitting Loomis. Loomis and Huffman fought back and, as they did so, five more men appeared and joined the melee. Loomis and Huffman broke free and started to run. Huffman heard five or six shots and turned to see one of the five—Guerard—holding a gun. Loomis died from a shot to the head. Guerard admitted firing the gun, though he would claim it was only meant to scare Loomis and Huffman. Guerard pled guilty to the reckless homicide charge and was sentenced to forty years' imprisonment.

¶3 Guerard, represented by a new attorney for postconviction and appellate proceedings, moved to withdraw his plea. He alleged only that his plea had not been knowing, intelligent, or voluntary because of misinformation from trial counsel about the medical examiner's determination of the range from which the fatal shot was fired. Guerard claimed that trial counsel recommended a plea to the reckless homicide charge to avoid an amended charge of first-degree intentional homicide that was arguably supported by a "point blank" range

determination. It appears that the medical examiner had actually opined that the fatal shot had been fired at close range, and Guerard alleged that had he not been "misled" by trial counsel, he would not have pled to reckless homicide.

¶4 The circuit court ruled that the postconviction motion failed to allege sufficient grounds for relief and denied the motion without a hearing. Specifically, the circuit court noted that Guerard had not alleged *why* he would have refused to enter a plea had he known the "actual range of fire." The circuit court explained that although there may have been "varying degrees of opinion as to exactly how close" the fatal shot was, Guerard still "risked being charged with a more serious offense."

¶5 Guerard appealed and counsel filed a no-merit report. *See* WIS. STAT. RULE 809.32. Guerard did not file a response. This court affirmed. *See* ***State v. Guerard***, No. 1997AP1363-CRNM, unpublished op. and order (Ct. App. Dec. 30, 1997). Guerard did not pursue a motion for reconsideration in this court or a petition for review with the supreme court.

¶6 On December 6, 2010, Guerard filed a WIS. STAT. § 974.06 motion seeking to vacate his conviction and withdraw his guilty plea. This time, he alleged that his plea was not knowing, intelligent, or voluntary because the circuit court did not conduct an adequate colloquy to ascertain Guerard's understanding of the elements of his crime, and because he specifically did not understand the "utter disregard for human life" element of first-degree reckless homicide. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260-62, 389 N.W.2d 12 (1986). To circumvent a procedural bar and explain why the issue had not been raised in the original postconviction motion, Guerard also alleged that postconviction counsel had been

ineffective for misinterpreting the applicable law and not also alleging this ground in the earlier postconviction motion.

¶7 The circuit court noted that WIS. STAT. § 974.06 and ***Escalona*** require a defendant to raise all issues in the original postconviction motion or appeal, and that this bar specifically applies, pursuant to ***Tillman***, even if the prior appeal was a no-merit appeal. The circuit court further noted that an exception to the ***Escalona/Tillman*** bar exists if the no-merit procedures are not followed by appellate counsel and this court. *See* ***State v. Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 709 N.W.2d 783. However, the circuit court ruled that the ***Escalona/Tillman*** bar applied because Guerard could have raised the issues about his plea in a no-merit response, and it denied the motion.[2] Guerard appeals.

DISCUSSION

¶8 The postconviction procedures of WIS. STAT. § 974.06 allow a defendant to attack his conviction after the time for appeal has expired. ***Escalona***, 185 Wis. 2d at 176. A prisoner may move to vacate, set aside, or correct a sentence where the prisoner claims the sentence was imposed in violation of the

[2] The circuit court additionally concluded that it could not ascertain whether the no-merit procedures were followed by this court, nor would it have jurisdiction to make such a review, stating that only this court could conduct such an inquiry. We understand the circuit court's implicit reasoning, as it drew an analogy to ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), which explains why a challenge to appellate counsel's performance belongs in this court, not the circuit court. Nevertheless, it appears to be clearly contemplated that a circuit court may be called upon to review the no-merit process in some fashion, as it is the circuit court's role to first evaluate a WIS. STAT. § 974.06 motion for "sufficient reason" for not raising issues at an earlier opportunity. *See* ***State v. Allen***, 2010 WI 89, ¶¶62, 64, 328 Wis. 2d 1, 786 N.W.2d 124 ("a court reviewing a § 974.06 motion after a no-merit appeal must consider" whether no-merit procedures were followed; "a defendant will often provide 'sufficient reason' to make new § 974.06 claims by showing that his counsel and the court of appeals did not follow no-merit procedure.").

constitution, where the court imposing the sentence was without jurisdiction, or where the sentence exceeds the maximum or is otherwise subject to collateral attack. *See* WIS. STAT. § 974.06(1); ***State v. Allen***, 2010 WI 89, ¶22, 328 Wis. 2d 1, 786 N.W.2d 124.

¶9 All grounds for relief must be raised in the defendant's original, supplemental, or amended motion or appeal, regardless of whether the original motion was brought under WIS. STAT. § 974.06. ***Allen***, 328 Wis. 2d 1, ¶25; ***Escalona***, 185 Wis. 2d at 181. Claims that could have been raised on direct appeal or by prior motion are barred from being raised in a subsequent postconviction motion absent a sufficient reason for not raising the claims earlier. *See* ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. This bar also applies when the prior appeal is a no-merit appeal, even though a defendant is not specifically required to file a response. ***Allen***, 328 Wis. 2d 1, ¶4. The primary reason for this bar is that "the court will have performed an examination of the record and determined that any issues noted or any issues that are apparent, to be without arguable merit." ***Id.***, ¶61.

¶10 If, however, the defendant can show that appellate counsel and the court of appeals have not followed the no-merit process—a process involving this court's "'full examination of all the proceedings' to search for any 'legal points arguable on their merits'"—the defendant may have provided a sufficient reason allowing him to make new WIS. STAT. § 974.06 claims and avoiding ***Escalona***'s procedural bar. ***Allen***, 328 Wis. 2d 1, ¶58 (citing ***Anders v. California***, 386 U.S. 738, 744 (1967)), ¶64.

¶11 Thus, in his postconviction motion, Guerard attempted to overcome the ***Escalona*** procedural bar in two ways. First, he alleged that there was a failure

of the no-merit process, claiming that appellate counsel and the court of appeals both failed to notice or address the adequacy of the plea colloquy. Second, Guerard alleged ineffective assistance of postconviction counsel for misapplying the law in such a way that he failed to originally challenge the plea colloquy's sufficiency under ***Bangert***.[3] *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (ineffective assistance of postconviction counsel may be sufficient grounds to avoid ***Escalona*** bar). We conclude, however, that neither is sufficient to avoid the procedural bar here.

I. No-Merit "Failure"

¶12 Guerard complains that there was a failure of the no-merit process because neither appellate counsel nor this court identified a deficiency in the plea colloquy. He likens his case to ***Fortier***, where we held the procedural bar did not apply because appellate counsel failed to identify an issue regarding an illegal sentence, and this court similarly missed and never addressed the issue during its own independent review of the record. *See* ***id.***, 289 Wis. 2d 179, ¶¶23-27. Guerard's case, however, does not parallel ***Fortier***.

¶13 A defendant seeking to withdraw his plea based on a defective plea colloquy bears the initial burden of making a *prima facie* showing that the plea was accepted without the circuit court's conformity to statutory and court-mandated procedures. *See* ***Bangert***, 131 Wis. 2d at 274. Before the burden shifts to the State, the defendant must also allege "that he in fact did not know or

[3] To the extent that Guerard's motion raised other grounds not discussed on appeal, they are deemed abandoned. *See* ***Reiman Assocs., Inc. v. R/A Adver. Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

understand the information which should have been provided at the plea hearing[.]" ***Id.*** Guerard's WIS. STAT. § 974.06 motion essentially complained that appellate counsel missed a ***Bangert*** issue in the no-merit process—that the circuit court did not properly ascertain that Guerard understood the elements of first-degree reckless homicide, and Guerard specifically did not understand the "utter disregard for human life" element.

¶14 Unlike in ***Fortier***, appellate counsel here did not fail to identify the issue. Instead, after describing the circuit court's obligations during a plea colloquy, counsel noted the two requirements derived from ***Bangert*** and stated that Guerard could not satisfy either one.[4] Nor did this court overlook the issue: in our no-merit opinion, we noted that we agreed with counsel's analysis of whether the plea was knowingly, intelligently, and voluntarily entered, and "we independently conclude[d] that pursuing th[is] issue[] would lack arguable merit." In other words, unlike in ***Fortier***, the issue of the colloquy's adequacy was not missed, it was rejected.[5] In fact, Guerard's WIS. STAT. § 974.06 motion expressly observes that the issue was addressed, noting that appellate counsel believed the colloquy was adequate and that this court, in accepting the no-merit report, agreed.

[4] On appeal, Guerard continually asserts that appellate counsel failed to notice any deficiencies in the plea colloquy. Even if there were a deficiency to notice, a deficient colloquy alone *does not* form a basis for relief. *See* ***State v. Giebel***, 198 Wis. 2d 207, 215-16, 541 N.W.2d 815 (Ct. App. 1995). While the current WIS. STAT. § 974.06 motion alleged that Guerard also failed to understand the element of utter disregard for human life, that argument is not repeated on appeal. We therefore deem it abandoned. *See* ***Reiman Assocs.***, 102 Wis. 2d at 306 n.1.

[5] On appeal, Guerard has further alleged that this court's no-merit opinion was contradictory about whether it completed a full review of the record during the no-merit process. We need not address this point, because it is was not offered as a reason in the circuit court. *See* ***State v. Allen***, 2010 WI 89, ¶46, 328 Wis. 2d 1, 786 N.W.2d 124 ("Defendants must, at the very minimum, allege a sufficient reason in their motion to overcome the *Escalona-Naranjo* bar."); *see also* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

Thus, we conclude that the ***Fortier*** exception to the ***Escalona/Tillman*** bar is not applicable here. *See* ***Allen***, 328 Wis. 2d 1, ¶82. ("[W]e are entitled to rely on the court of appeals when it asserts that it has conducted the independent review 'mandated by *Anders*.' … [W]e cannot assume that the court of appeals disregarded its duties under *Anders* when deciding a no-merit appeal.").

¶15 Indeed, instead of being an actual ***Fortier*** matter, this appears to be simply a case where Guerard, thirteen years after the fact, has decided he disagrees with this court's analysis of an issue. However, Guerard cannot relitigate an issue previously decided. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Moreover, neither Guerard's current WIS. STAT. § 974.06 motion nor his current appeal explain why he could not have filed a motion for reconsideration or a petition for review. *See* ***Allen***, 328 Wis. 2d 1, ¶71. "Failure of a defendant to respond to both a no-merit report *and* the decision on the no-merit report firms up the case for forfeiture of any issue that could have been raised."[6] ***Id.***, ¶72.

II. Ineffective Assistance of Postconviction Counsel

¶16 It is true that ineffective assistance of postconviction counsel may provide a sufficient reason to explain why an issue that could have been raised in a direct appeal was not. ***Rothering***, 205 Wis. 2d at 682. In his current WIS. STAT. § 974.06 motion, Guerard alleged that postconviction counsel had been ineffective for misapplying the law in such a way that he failed to originally challenge the

[6] On appeal, Guerard also protests that the no-merit process was not followed based on this court's refusal to grant Guerard an extension of time that would have allowed him to respond to the no-merit report. As with the claim that this court was "contradictory," denial of the extension was not raised in the circuit court, and we need not consider it further. *See* ***id.***

plea colloquy's sufficiency, but Guerard did not explain how postconviction counsel's ineffectiveness prevented him from raising the alleged ***Bangert*** violation in response to the no-merit report.

¶17 On appeal, Guerard abandons that approach to argue that original postconviction counsel was ineffective for failing to detect and raise an issue with the plea colloquy. As noted, however, counsel did not fail to detect the issue. As appellate counsel, he explained that Guerard could not fulfill both prongs of ***Bangert***; in postconviction posture, this means that counsel could not have ethically advanced a frivolous postconviction motion on ***Bangert*** grounds. In any event, a deficient colloquy, standing alone, is not a basis for postconviction relief. *See* ***State v. Giebel***, 198 Wis. 2d 207, 215-16, 541 N.W.2d 815 (Ct. App. 1995).

¶18 In sum, there is no sufficient reason here for avoiding the ***Escalona/Tillman*** procedural bar. On that basis, we affirm the circuit court.

By the Court.—Order affirmed.

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