

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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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. 2011AP1077

Cir. Ct. No. 2004CF573

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY M. BLANK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
SCOTT C. WOLDT, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Jeremy Blank appeals from an order denying his WIS. STAT. § 974.06 (2009-10)¹ postconviction motion alleging that his

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

postconviction counsel was ineffective for not raising claims that his trial counsel was ineffective. The trial court concluded that Blank's motion was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because this court had previously denied Blank's *Knight* petition.² We affirm the trial court's order albeit for a slightly different reason. See *State v. Sharp*, 180 Wis. 2d 640, 650, 511 N.W.2d 316 (Ct. App. 1993) (we may sustain the trial court's determination on different grounds). We conclude that Blank did not demonstrate a sufficient reason for failing to raise his ineffective assistance of trial counsel claims in response to the no-merit report filed in his appeal from his conviction.

¶2 In 2005 Blank was convicted of several crimes, including third-degree and fourth-degree sexual assault, after a jury trial. Blank was represented by the same attorney on his postconviction motion and a no-merit appeal under WIS. STAT. RULE 809.32.³ Blank did not file a response to counsel's no-merit report. His conviction was affirmed in the no-merit appeal. See *State v. Blank*, No. 2007AP1013-CRNM, unpublished op. and order (WI App June 4, 2008).

¶3 Blank filed a *Knight* petition in this court asserting that his appellate counsel was ineffective for not properly challenging the sufficiency of the evidence and for failing to bring a motion alleging ineffective assistance of trial

² *State v. Knight*, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992) (to bring a claim of ineffective assistance of appellate counsel a defendant must petition the appellate court that heard the appeal for a writ of habeas corpus).

³ Appointed counsel first filed a no-merit notice of appeal. The first appeal was voluntarily dismissed so that a postconviction motion could be filed in the trial court. Blank's postconviction motion alleged that he was denied his right to be present and his right to counsel when neither he nor his attorney was present when the court addressed questions from the jury prior to the return of the verdict. Blank voluntarily withdrew the postconviction motion and the no-merit appeal followed.

counsel. *State ex rel. Blank v. Dittmann*, No. 2009AP1194-W, unpublished op. and order at 2 (WI App Oct. 5, 2009). The petition was denied because the sufficiency of the evidence was previously considered and the issue was determined to lack arguable merit. *Id.* at 3. The decision denying Blank’s petition did not address Blank’s claim that appellate counsel was ineffective for failing to argue that trial counsel was ineffective and indicated that the claim must be raised in the trial court under *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 680-81, 556 N.W.2d 136 (Ct. App. 1996) (a claim that appointed counsel has failed to do something in the postconviction motion stage in the trial court cannot be addressed for the first time by the appellate court). *Blank*, No. 2009AP1194-W, at 3.

¶4 In 2011 Blank moved for a new trial under WIS. STAT. § 974.06, alleging that his “appellate counsel”⁴ was ineffective for not raising claims on direct appeal that his trial counsel was ineffective. His motion alleged that trial counsel was ineffective in twelve ways.⁵ The trial court referenced the October 5, 2009 decision on Blank’s *Knight* petition as addressing Blank’s ineffective

⁴ Throughout his motion Blank alleged the ineffectiveness of “appellate counsel” rather than postconviction counsel.

⁵ Blank claimed that trial counsel had failed to move to sever an unrelated bail jumping charge from remaining charges, to introduce testimony from crime lab technicians that Blank’s van was negative for trace evidence, to request cautionary and limiting jury instructions that he was not responsible for other persons’ attempts to bribe a witness to recant, to lay a proper foundation for admission of the victim’s prior false allegation of sexual assault, to object during the prosecutor’s closing argument to statements vouching for the victim’s credibility, to examine the victim about her prior sexual experience or impeach her on other points, to elicit testimony from other witnesses about the victim’s threats against Blank, and to obtain the victim’s school, social services, and mental health records. Blank also claimed that several of the omissions rendered his waiver of his right to not testify invalid and that postconviction counsel should have moved for relief on the cumulative effect of trial counsel’s omissions.

assistance of counsel claims and concluded that Blank was barred from pursuing those claims again. It denied Blank's § 974.06 motion.

¶5 At the outset we acknowledge that it was error for the trial court to deny Blank's WIS. STAT. § 974.06 motion on the ground that this court had denied Blank's *Knight* petition. Although Blank's *Knight* petition asserted that his appellate counsel was ineffective for failing to bring a motion alleging ineffective assistance of trial counsel, whether or not postconviction counsel was ineffective for that reason was not addressed by this court because the appellate court's review in a *Knight* proceeding is confined to consideration of the representation by appellate counsel before the appellate court. See *Rothering*, 205 Wis. 2d at 678-79. The decision on Blank's *Knight* petition held that Blank's argument that appellate counsel was ineffective for failing to argue that trial counsel was ineffective must be raised in the trial court. *Blank*, No. 2009AP1194-W, at 3. Consequently, this court's denial of Blank's *Knight* petition did not have any preclusive effect on raising in the trial court a claim that postconviction counsel was ineffective. However, it does not follow, as Blank suggests, that the denial of his *Knight* petition mandated that the trial court address Blank's ineffective

assistance of postconviction or trial counsel claims.⁶ The decision did not make any such mandate.

¶6 When Blank filed his WIS. STAT. § 974.06 motion he had already had a no-merit appeal. Thus, he had to establish in his § 974.06 motion that he had sufficient reason for not raising the claims in his prior appeal. See *State v. Tillman*, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574 (under *Escalona-Naranjo*, 185 Wis. 2d 168, and WIS. STAT. § 974.06(4), a prior no-merit appeal may serve as a procedural bar to a subsequent postconviction motion and ensuing appeal which raise the same issues or other issues that could have been previously raised).

¶7 Before the rule of *Escalona-Naranjo* is applied to a WIS. STAT. § 974.06 motion filed after a no-merit appeal, the court should “consider whether the no-merit procedures (1) were followed and (2) warrant sufficient confidence to apply the procedural bar.” *State v. Allen*, 2010 WI 89, ¶62, 328 Wis. 2d 1, 786

⁶ We summarily reject Blank’s contention that this appeal be converted to a proceeding for a writ of mandamus compelling the trial court to comply with this court’s mandate in the *Knight* proceeding to address Blank’s ineffective counsel claims. Also, we do not address Blank’s arguments that this court should revisit the result in his *Knight* proceeding in light of *State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶27, 314 Wis. 2d 112, 758 N.W.2d 806, and should overrule *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), or declare that it was overruled *sub silentio* by *State v. Lo*, 2003 WI 107, 264 Wis. 2d 1, 665 N.W.2d 756. The *Knight* proceeding was terminated long ago and remittitur cut off this court’s authority to act in that matter. See *State v. American TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 178-79, 443 N.W.2d 662 (1989); WIS. STAT. RULE 809.26(1). As the State points out, we have no authority to overrule *Rothering*. See *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) (court of appeals may not overrule, modify or withdraw language from a published opinion of the court of appeals). Moreover, in *State v. Balliette*, 2011 WI 79, ¶32, 336 Wis. 2d 358, 805 N.W.2d 334, the Wisconsin Supreme Court demonstrated that *Rothering* has not been overruled when it held that when “the conduct alleged to be ineffective is postconviction counsel’s failure to highlight some deficiency of trial counsel in a [WIS. STAT.] § 974.02 motion before the trial court, the defendant’s remedy lies with the *circuit court* under either WIS. STAT. § 974.06 or a petition for habeas corpus.” (Emphasis added.)

N.W.2d 124. We have examined the no-merit report submitted in Blank’s no-merit appeal and our decision summarily affirming Blank’s conviction. Our decision addressed issues not raised in the no-merit report and discussed issues raised by the no-merit report in greater detail than the report itself. This demonstrates that the court conducted an independent review of the record with an eye towards uncovering any potential meritorious issues. *See id.*, ¶82 (“we are entitled to rely on the court of appeals when it asserts that it has conducted the independent review ‘mandated by *Anders*.’”). We also note that in the no-merit appeal Blank was granted two extensions of time to file a response and had over six months to do so. But Blank did not file a response and never made any suggestion that he was dissatisfied with trial counsel’s performance or trial counsel’s failure to use information that was within Blank’s knowledge but outside the appellate record. He could have done so. *See id.*, ¶89 (if the appellate court is presented in a no-merit appeal with a colorable claim that trial counsel was ineffective, the court might be required to address it). This court could not be expected to manufacture and address possible ineffective assistance of trial counsel claims which depended on facts outside the record.

¶8 We are satisfied that the no-merit procedures were followed in Blank’s appeal. Blank did not establish in his WIS. STAT. § 974.06 motion an issue of obvious merit so as to undermine confidence in the decision in the no-merit appeal. *See Allen*, 328 Wis. 2d 1, ¶83. Therefore, we have sufficient confidence in the outcome of that appeal to permit application of the procedural bar of *Escalona-Naranjo*. Blank may pursue the claims raised in his § 974.06 motion only if he offered the trial court a sufficient reason for failing to raise those claims in response to the no-merit report. *See Allen*, 328 Wis. 2d 1, ¶35 (the relevant inquiry is “whether [the defendant] is procedurally barred under

§ 974.06(4) from raising issues about the alleged ineffective assistance of his postconviction counsel for failing to bring an ineffective assistance of counsel claim against his [trial counsel] *because* he did not raise these issues in response to a prior no-merit report”).

¶9 Whether a defendant offered the trial court a sufficient reason to avoid the procedural bar of WIS. STAT. § 974.06(4), is a question of law subject to de novo review. *State v. Kletzien*, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920, *review denied*, 2011 WI 86, 335 Wis. 2d 148, 803 N.W.2d 850. We determine the sufficiency of Blank’s reason by examining the four corners of the postconviction motion. *See State v. Allen*, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

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....

Allen, 328 Wis. 2d 1, ¶91.

¶10 In his WIS. STAT. § 974.06 motion Blank asserted as a sufficient reason the lack of any warning that the failure to file a response to the no-merit report would create a procedural bar to a future postconviction motion, the failure of the appellate court to follow the no-merit procedure, and postconviction counsel’s ineffectiveness. We are not persuaded that this court is under any obligation to warn defendants that the failure to file a response may create a procedural bar. In *Tillman*, 281 Wis. 2d 157, ¶¶19, 26, the seminal case applying the procedural bar of *Escalona-Naranjo* following a no-merit appeal, the

defendant had no warning that the failure to respond could create a procedural bar and the procedural bar was enforced. The same is true of the defendant in *Allen* where again the procedural bar was applied. *Id.*, 328 Wis. 2d 1, ¶93. It is sufficient that a defendant is informed of the opportunity to respond to the no-merit report and that the no-merit procedure provides an opportunity to review all potential issues for postconviction relief. That is because a response to the no-merit report is not required and the no-merit review is the same whether or not a response is filed. *See id.*, ¶¶55, 60. We have already determined that the no-merit procedure was followed and, consequently, that is enough. *See id.*, ¶61; *Tillman*, 281 Wis. 2d 157, ¶20.

¶11 Blank's claim that postconviction counsel was ineffective was conclusory and alleged no facts with respect to postconviction counsel's conduct in the "five 'w's' and one 'h' format." *See State v. Balliette*, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334 (to garner an evidentiary hearing on a claim of ineffective assistance of postconviction counsel the defendant must present facts in the five 'w's' and one 'h' format, that is who, what, where, when, why and how). *Balliette* requires that a defendant do more than "point to issues that postconviction counsel did not raise[; the defendant must] "show that failing to raise those issue fell below an objective standard of reasonableness." *Id.* Blank's motion made no factual assertion to establish that postconviction counsel's review of the record should have revealed the potential ineffective assistance claims or

that he raised such concerns with postconviction counsel.⁷ His motion was inadequate because it also failed to demonstrate that the issues postconviction counsel failed to raise were obvious and very strong such that the failure to raise them cannot be explained or justified. *See id.*, ¶69. He did not show with some particularity how he intended to “show that postconviction counsel’s performance was objectively deficient and how that performance resulted in prejudice to the defense.” *Id.*, ¶40. Moreover, Blank does not explain how postconviction counsel’s ineffectiveness prevented him from raising complaints or concerns about trial counsel’s performance in the response to the no-merit report. Thus, Blank failed to establish linkage between the alleged ineffectiveness of postconviction counsel and his failure to raise his claims in response to the no-merit report.

¶12 Blank did not demonstrate in his motion any sufficient reason why he failed to raise in response to the no-merit report the claims raised in his WIS. STAT. § 974.06 motion. Consequently, the procedural bar of *Escalona-Naranjo* and § 974.06(4) applies. The postconviction motion was properly denied. *See Allen*, 328 Wis. 2d 1, ¶91.

By the Court.—Order affirmed.

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

⁷ The only factual assertion Blank makes is that postconviction counsel was aware that trial counsel possessed information and lab reports from crime scene technicians that trace evidence was not found in Blank’s van. *See Balliette*, 336 Wis. 2d 358, ¶79. In support of his factual assertion Blank gives citation to one sentence in defense counsel’s closing argument that no trace evidence was found. That defense counsel was permitted to argue that to the jury indicates that it was based on evidence at trial and does not suggest that additional testimony was necessary to bring the point home to the jury. Moreover, Blank fails to identify who would have been called as a witness and what the testimony was likely to prove.

