

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 2012

Diane M. Fremgen
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. 2011AP776

Cir. Ct. No. 2007CF5485

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSE FERNANDEZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
REBECCA F. DALLET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jose Fernandez, *pro se*, appeals an order denying his motion to withdraw his guilty plea and modify his sentence. The issue is whether Fernandez's arguments are barred by *State v. Escalona-Naranjo*, 185

Wis. 2d 168, 185, 517 N.W.2d 157 (1994). We conclude that his claims are barred. We affirm.

¶2 Fernandez pled guilty to two counts of first-degree reckless injury with a dangerous weapon, as a party to a crime, one count of intentionally giving a dangerous weapon to a child, one count of possession of cocaine, and one count of possession of marijuana. On direct appeal, Fernandez’s appointed attorney filed a no-merit report. Fernandez responded to the report. After conducting an independent review of the record as mandated by WIS. STAT. RULE 809.32 (2009-10),¹ we affirmed. Fernandez then brought a motion in which he argued that he should be allowed to withdraw his plea and the circuit court should modify his sentence. The circuit court denied the motion.

¶3 Any 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 unless a sufficient reason is identified for not raising the claim earlier. *Escalona-Naranjo*, 185 Wis. 2d at 185. This bar applies even when the defendant’s direct appeal “was processed under the no merit procedure set forth in WIS. STAT. RULE 809.32.” See *State v. Tillman*, 2005 WI App 71, ¶2, 281 Wis. 2d 157, 696 N.W.2d 574. *Tillman* explains that the *Escalona-Naranjo* bar applies to cases in which an appeal as of right was conducted as a no-merit appeal as long as “the no merit procedures were in fact followed” and as long as those procedures carry “a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and

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

circumstances of the case.” *Tillman*, 281 Wis. 2d 157, ¶20. Fernandez has not demonstrated any procedural inadequacy in the no-merit procedure or identified any reason that would cause us to lack confidence in that procedure. Fernandez argues that he has a sufficient reason for not previously raising the issues—he received ineffective assistance from his lawyer who should have raised the issues—but he has not explained why he did not previously raise the issues himself when he responded to the no-merit report. Accordingly, Fernandez’s claims are procedurally barred.

By the Court.—Order affirmed.

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

