

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 25, 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. 2011AP1202

Cir. Ct. No. 2005CF417

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAVIS T. SHERIFF,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
DALE L. ENGLISH, Judge. *Affirmed.*

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

¶1 REILLY, J. Chavis T. Sheriff was convicted of repeatedly sexually assaulting his two daughters. His postconviction counsel filed a no-merit report with the court of appeals and Sheriff chose not to respond. We affirmed his

convictions. One-and-one-half years later, Sheriff filed a pro se postconviction motion, alleging that his trial counsel was ineffective and that his postconviction counsel was ineffective for not arguing that Sheriff's trial counsel was ineffective. As Sheriff has not provided a sufficient reason as to why he did not raise an ineffective assistance of counsel argument in response to the no-merit report, his claims are procedurally barred.

BACKGROUND

¶2 Sheriff was charged with repeatedly sexually assaulting his two daughters, J.S. and S.S., over a five-year period. Sheriff waived his right to a jury trial. The circuit court found Sheriff guilty on both counts and sentenced him to total consecutive sentences of fifty years in prison followed by twenty years of extended supervision. Sheriff filed a notice of intent to pursue postconviction relief and requested that the public defender's office appoint new counsel for him. Sheriff's postconviction counsel filed a no-merit report and Sheriff did not respond. We held that Sheriff's case presented no arguably meritorious issues and affirmed his convictions. Sheriff did not file a petition for review with the supreme court.

¶3 One-and-one-half years later, Sheriff filed a pro se postconviction motion pursuant to WIS. STAT. § 974.06 (2009-10)¹ and raised three issues: (1) ineffective assistance of trial counsel, (2) ineffective assistance of postconviction counsel, and (3) erroneous exercise of discretion by the circuit court. Sheriff provided a litany of complaints against his trial attorney, which we will not

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

delineate. He argued that his postconviction counsel was ineffective for not arguing that his trial counsel was ineffective. The erroneous exercise of discretion claim is in fact another claim of ineffective assistance of counsel based on an incident that occurred at trial. During cross-examination of S.S., the circuit court asked a woman named Diane Compton to leave the courtroom after it observed her “mouthing words” to S.S. on the stand. Diane Compton is a family friend of J.S., S.S., and their mother. The court stated that it did not know whether S.S. saw Compton mouthing words. At the motion hearing, Sheriff stated that he believed his trial counsel should have asked for a mistrial after Compton was removed from court.

¶4 The circuit court ruled that all of Sheriff’s claims were procedurally barred by *State v. Allen*, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, as Sheriff failed to provide a compelling reason as to why he did not raise these issues in response to the no-merit report. The court, nonetheless, addressed the merits of each of Sheriff’s claims. First, the court found that the trial attorney was not ineffective under any of the grounds alleged by Sheriff. The court also stated Compton was not “coaching” J.S., but rather “it was a brief nodding or mouthing a yes.” Had Sheriff’s trial counsel moved for a mistrial, the court would have denied it. His trial counsel was thus not ineffective for failing to ask for a mistrial. The court also agreed with postconviction counsel’s assessment that there were no issues of arguable merit to present to the court of appeals.

¶5 The circuit court denied the postconviction motion and Sheriff appeals.

DISCUSSION

¶6 We first address whether Sheriff's claims are barred by the fact that he did not raise any of these issues in response to the no-merit report. Whether Sheriff's claims are procedurally barred presents a question of law that we review de novo. *See id.*, ¶15.

¶7 *Allen* lays out the standard for determining whether issues raised in a WIS. STAT. § 974.06 postconviction motion are barred by the defendant's failure to raise the issues in response to a no-merit report. In that case, the defendant Allen was tried and convicted in 1998 of possession of a firearm by a felon and armed robbery. *Allen*, 328 Wis. 2d 1, ¶¶6, 8. A new attorney was appointed to serve as Allen's postconviction counsel. *Id.*, ¶8. In 2000, Allen's postconviction counsel filed a no-merit report with the court of appeals. *Id.*, ¶9. Allen did not file a response and the court of appeals affirmed his convictions. *Id.*, ¶¶9-10. In 2007, Allen filed a pro se motion for postconviction relief pursuant to § 974.06, alleging that his postconviction counsel was ineffective for failing to bring an ineffective assistance of counsel claim against his trial counsel. *Allen*, 328 Wis. 2d 1, ¶11. The circuit court denied his motion on the grounds that Allen waived his arguments by failing to raise them in response to his postconviction attorney's 2000 no-merit report. *Id.*, ¶12. This court affirmed, noting that Allen provided no sufficient reason as to why he did not raise the ineffective assistance of trial counsel argument in response to the no-merit report. *Id.*, ¶13.

¶8 The supreme court, applying the doctrine from *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), noted that a prisoner must raise all grounds for relief in his or her original, supplemental, or amended motion, regardless of whether it is a WIS. STAT. § 974.06 motion. *Allen*, 328 Wis. 2d 1,

¶25. A § 974.06 motion cannot be based on issues that were adjudicated, waived, or not raised in a prior postconviction motion, unless the defendant can show a “sufficient reason” for not raising an issue in a prior motion. *Allen*, 328 Wis. 2d 1, ¶¶25-26. As the supreme court stated, “[w]e need finality in our litigation.” *Id.*, ¶27 (quoting *Escalona-Naranjo*, 185 Wis. 2d at 185).

¶9 In analyzing whether Allen’s claims were procedurally barred, the court stated that “[t]he purpose behind WIS. STAT. § 974.06 is to avoid *successive* motions for relief by requiring a defendant to raise all grounds for relief in one motion.” *Allen*, 328 Wis. 2d 1, ¶40. The issue was whether Allen demonstrated a sufficient reason for not raising his ineffective assistance of counsel claims in response to the 2000 no-merit report. *Id.*, ¶41. Allen alleged three reasons for his failure: (1) he was unaware of the claims at the time of the no-merit proceedings, (2) a defendant is not required to respond to a no-merit report, and (3) ineffective assistance of postconviction counsel. *Id.*, ¶42.

¶10 The court rejected the first explanation, stating that Allen did not demonstrate that he was unaware of either the legal or factual basis for his claims. *Id.*, ¶43.

¶11 As to Allen’s second reason, the court pointed out that a defendant in a no-merit appeal, unlike a defendant on direct appeal, does not need to bring issues to the court’s attention for the court to address them. *Id.*, ¶58. To comply with *Anders*, a court “must perform a ‘full examination of all the proceedings’ to search for any ‘legal points arguable on their merits.’” *Allen*, 328 Wis. 2d 1, ¶58 (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)). Even when an issue is not raised in a no-merit report or a defendant’s response to a no-merit report, the issue is not forfeited; as long as the court of appeals complies with *Anders*, the

issue is considered reviewed. *Allen*, 328 Wis. 2d 1, ¶58. The supreme court is entitled to rely on the court of appeals' statement that it independently reviewed the defendant's no-merit appeal as mandated by *Anders*. *Allen*, 328 Wis. 2d 1, ¶82. This rule is necessary for two reasons: the supreme court cannot assume that the court of appeals disregarded *Anders*, and it would be impracticable for the court of appeals to "be forced to specifically identify and reject the nearly infinite number of issues without arguable merit" that are present in any case's record. *Allen*, 328 Wis. 2d 1, ¶82. As Allen's motion failed to undermine the supreme court's confidence in the court of appeals' no-merit opinion, the court held that Allen did not meet his burden of proof. *Id.*, ¶83.

¶12 Finally, Allen argued that the reason he did not raise the issue of ineffective assistance of trial counsel in response to the no-merit report was because his postconviction counsel was ineffective. *See id.*, ¶84. Allen did not allege any facts that demonstrated his postconviction counsel was ineffective, nor did he provide a reason why his postconviction counsel was responsible for Allen not raising his claims in response to the no-merit report. *Id.*, ¶¶86-87. As the court stated, "If Allen's motion had presented even a colorable claim that trial counsel was ineffective and provided specific reasons why postconviction counsel was ineffective for failing to bring a postconviction motion, this court might be required to address the issue." *Id.*, ¶89. Allen's motion did not pass this test, as "conclusory allegations" are not enough to constitute a sufficient reason for failing to raise an issue in response to a no-merit report. *Id.*, ¶¶89-90.

¶13 Sheriff has failed to allege anything that would undermine our confidence that this court complied with *Anders* when we accepted the no-merit report and affirmed Sheriff's convictions. He also has not provided a "sufficient reason" as to why he did not raise his ineffective assistance of trial counsel

argument in response to the no-merit report. As Sheriff's claims are procedurally barred, and as he has presented nothing more than meritless "conclusory allegations" that his trial and postconviction counsel were ineffective, we need not consider his substantive arguments. The order of the circuit court denying his postconviction motion is affirmed.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

