



OFFICE OF THE CLERK  
**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT II**

June 11, 2014

To:

Hon. James L. Carlson  
Circuit Court Judge  
Walworth County Courthouse  
P.O. Box 1001  
Elkhorn, WI 53121-1001

Sheila Reiff  
Clerk of Circuit Court  
Walworth County Courthouse  
P.O. Box 1001  
Elkhorn, WI 53121-1001

Daniel A. Necci  
District Attorney  
P.O. Box 1001  
Elkhorn, WI 53121-1001

Robert Probst  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Pedro Garcia 549913  
Jackson Corr. Inst.  
P.O. Box 233  
Black River Falls, WI 54615-0233

You are hereby notified that the Court has entered the following opinion and order:

---

2013AP1965

State of Wisconsin v. Pedro Garcia (L.C. #2008CF283)

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

Pedro Garcia appeals pro se from a July 23, 2013 circuit court order denying his WIS. STAT. § 974.06 (2011-12) motion<sup>1</sup> without a hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. Because the circuit court did not misuse its discretion in denying Garcia relief under § 974.06 without a hearing, we affirm.

---

<sup>1</sup> The WIS. STAT. § 974.06 motion denied in the July 23 order was filed on July 5, 2013. The motion substantially restated arguments offered in a § 974.06 motion filed on May 29, 2013, which the circuit court denied in a June 6, 2013 order. The September 3, 2013 notice of appeal was timely filed vis-à-vis both the June 6 and the July 23 orders denying § 974.06 relief. Therefore, we also consider the May 29 motion in this appeal. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

We affirmed Garcia's second-degree sexual assault conviction in 2011. Garcia's direct appeal proceeded under WIS. STAT. RULE 809.32. Appellate counsel filed a no-merit report, and Garcia filed a response to the no-merit report. *State v. Garcia*, No. 2010AP1682-CRNM, unpublished op. and order (WI App June 22, 2011). In his response to counsel's no-merit report, Garcia raised issues relating to his waiver of the preliminary examination, the audiotape of his confession, his statement to a detective, and the assistance rendered by trial counsel. In that appeal, we held that after reviewing the record, we could discern no arguable basis for a claim of ineffective assistance of trial counsel. *Garcia*, unpublished slip. op and order at 4. We concluded that Garcia's appeal did not present any issues with arguable merit.

In his May 29, 2013 WIS. STAT. § 974.06 motion, Garcia argued that his trial counsel was ineffective because he did not question the victim about either her prior sexual assault accusations or her reputation regarding her prior sexual conduct, and counsel did not move the circuit court or otherwise make an offer of proof relating to this evidence. In a June 6 order, the circuit court denied the May 29 motion without a hearing because use of this evidence was addressed during Garcia's trial and the circuit court had excluded the evidence during the State's case. The circuit court observed that Garcia had a WIS. STAT. RULE 809.32 no-merit appeal.

On July 5, Garcia filed a second WIS. STAT. § 974.06 motion. Garcia again argued trial counsel should have filed a motion relating to the victim's prior sexual history and his appellate counsel should have raised trial counsel's ineffective assistance. In an order dated July 23, the circuit court denied Garcia's second § 974.06 motion without a hearing and for the reasons stated in the June 6 circuit court order. Garcia appeals.

A circuit court has the discretion to deny a WIS. STAT. § 974.06 postconviction motion without a hearing if the motion is legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

*Id.* (footnote omitted).

Garcia's direct appeal proceeded as a WIS. STAT. RULE 809.32 no-merit appeal. Garcia filed a response to his appointed appellate counsel's no-merit report. Because Garcia had a no-merit appeal in which he filed a response to counsel's no-merit report, we apply *State v. Allen*, 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, to determine whether WIS. STAT. § 974.06 relief was available to Garcia after his RULE 809.32 direct appeal.

In *Allen*, the supreme court held that where a defendant files a response to a WIS. STAT. RULE 809.32 no-merit report and fails to raise an issue, the defendant may not later raise that issue in a WIS. STAT. § 974.06 motion without also alleging a sufficient reason for failing to raise the issue in response to counsel's no-merit report. *Allen*, 328 Wis. 2d 1, ¶¶5, 31-32. In the absence of either a sufficient reason or an indication that the court of appeals did not properly follow the no-merit procedure in the earlier RULE 809.32 appeal, *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), bars a defendant litigating these issues. *Allen*, 328 Wis. 2d 1, ¶5.

Garcia's response to counsel's WIS. STAT. RULE 809.32 no-merit report did not raise the evidentiary and ineffective assistance of counsel issues he alleged in his WIS. STAT. § 974.06

motions. Therefore, Garcia had to demonstrate a sufficient reason for failing to raise the issues in his response to counsel's no-merit report. *Allen*, 328 Wis. 2d 1, ¶41. As a sufficient reason, Garcia offered that his appellate counsel should have raised these issues in his direct appeal.

Garcia's reason is not sufficient to surmount the *Escalona-Naranjo* bar imposed by *Allen*. Appellate counsel's no-merit report set out the history of Garcia's case, including the evidentiary ruling that formed the basis for his WIS. STAT. § 974.06 motions. Even as Garcia's response to counsel's no-merit report challenged trial counsel's assistance, Garcia did not raise any issue relating to this evidentiary ruling or any issue later presented in his § 974.06 motions. In the no-merit appeal, we reviewed the record and did not find an issue with arguable merit relating to trial counsel's representation.<sup>2</sup> Finally, there is no indication that this court failed to follow the no-merit procedure. *Allen*, 328 Wis. 2d 1, ¶32. We conclude that Garcia's WIS. STAT. § 974.06 motions were barred under *Allen*. *Allen*, 328 Wis. 2d 1, ¶41.

Because the record conclusively demonstrates that Garcia was not entitled to relief on his WIS. STAT. § 974.06 motions, the circuit court did not err in denying the motions without a hearing.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

---

*Diane M. Fremgen*  
*Clerk of Court of Appeals*

---

<sup>2</sup> Were we to reach the merits of Garcia's WIS. STAT. § 974.06 motions, we would note that the evidentiary issue he raises was litigated in the circuit court with the involvement of trial counsel.