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DISTRICT IV

March 15, 2016

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

2014AP2925

State of Wisconsin v. Antwane L. Rolack (L.C. # 2007CF201)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Antwane Rolack appeals an order that denied his motion for postconviction relief from a criminal conviction. Rolack contends that he is entitled to a hearing on a plea withdrawal claim, notwithstanding the fact that his conviction has already been affirmed by this court in a no-merit proceeding. He raises additional issues of ineffective assistance of trial counsel and appellate counsel in support of his plea withdrawal request. After reviewing the record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹

The State asserts that Rolack's plea withdrawal claim is procedurally barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and related cases. *Escalona-Naranjo* holds that an issue that could have been raised in a direct appeal or in a postconviction motion under WIS. STAT. § 974.02, cannot be the basis for a subsequent postconviction motion under WIS. STAT. § 974.06, unless there was a sufficient reason for failing to raise the issue earlier. *Id.* at 185. The procedural bar of *Escalona-Naranjo* may be applied to a defendant whose direct appeal was processed under the no-merit procedure set forth in WIS. STAT. RULE 809.32, so long as the no-merit procedures were in fact followed and the record demonstrates a sufficient degree of confidence in the result. *State v. Tillman*, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574.

The file from *State v. Rolack*, No. 2009AP2227-CRNM, unpublished slip op. (WI App Mar. 18, 2010), shows that the proper no-merit procedures were followed on Rolack's prior appeal. Not only was Rolack afforded the opportunity to submit a response to counsel's no-merit report, this court explicitly identified a potential problem with the plea hearing, and gave Rolack two chances to advise this court whether he wished to pursue plea withdrawal. *Rolack*, No. 2009AP2227-CRNM at 2. Based upon Rolack's failure to respond to this court's orders, we held that Rolack had forfeited the right to challenge his plea, then independently reviewed the record and determined that it revealed no other arguably meritorious grounds for an appeal. *Id.* at 2-3.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Nothing in our current review of the record undermines our confidence in those conclusions. We therefore agree with the State that Rolack must pass the procedural bar of *Escalona-Naranjo* in order to obtain review of his plea withdrawal claim.

To the extent that Rolack now may be attempting to raise a claim of ineffective assistance of appellate counsel as a sufficient reason for not raising the plea withdrawal issue in the no-merit proceeding,² the record defeats his claim. It was Rolack himself, not counsel, who failed to respond to this court's inquiry as to whether Rolack wished to pursue plea withdrawal, and thereby forfeited the issue.

IT IS ORDERED that the order denying Antwane Rolack's plea withdrawal motion is summarily affirmed under WIS. STAT. RULE 809.21.(1).

Diane M. Fremgen
Clerk of Court of Appeals

² Although the State correctly notes that the standard procedure for raising a claim of ineffective assistance of appellate counsel is by means of a habeas corpus petition under *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), a defendant may also raise such a claim in a WIS. STAT. § 974.06 motion when the viability of the motion hinges upon it. *State v. Balliette*, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334.