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August 16, 2016

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

2015AP510 State of Wisconsin v. Jose M. Guzman-Sandoval
(L. C. No. 2009CF512)

Before Stark, P.J., Hruz and Seidl, JJ.

Jose Guzman-Sandoval, pro se, appeals an order denying his WIS. STAT. § 974.06[1] postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Guzman-Sandoval's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21.

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

The State charged Guzman-Sandoval with one count of first-degree sexual assault of an eight-year-old child by sexual contact. According to the complaint, Guzman-Sandoval admitted to police that he had non-penetrative penis-to-vagina sexual contact with the child. In exchange for his no-contest plea to the crime charged, the State agreed to recommend eight years' initial confinement, but the parties remained free to argue regarding the length of the overall sentence. Out of a maximum possible sixty-year sentence, the circuit court imposed a fourteen-year sentence consisting of ten and one-half years' initial confinement followed by three and one-half years' extended supervision.

On direct appeal, appointed counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding there was no arguable basis for challenging Guzman-Sandoval's plea or the sentence imposed. Guzman-Sandoval was informed of his right to file a response to the no-merit report, but did not respond. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we concluded there was no arguable basis for appeal and summarily affirmed the judgment. Specifically, we concluded there was no arguable merit to a claim that Guzman-Sandoval's no-contest plea was not knowingly, intelligently, and voluntarily entered, and there was no arguable basis for challenging the sentence imposed. ***State v. Guzman-Sandoval***, No. 2010AP1846-CRNM, unpublished slip op. (WI App May 6, 2011).

Guzman-Sandoval subsequently filed the underlying WIS. STAT. § 974.06 motion for postconviction relief alleging he is entitled to withdraw his plea because: (1) a newly discovered medical examination report showed he was innocent; (2) his trial and postconviction counsel were ineffective by failing to present this exculpatory evidence to the circuit court; (3) the plea was unknowing and involuntary because trial counsel never presented the medical examination report to the trial court; and (4) trial counsel was ineffective by failing to file a motion to

suppress inculpatory statements Guzman-Sandoval made to police in violation of ***Miranda***.[2] Guzman-Sandoval also appeared to argue trial counsel was ineffective by allowing Guzman-Sandoval to waive his right to a preliminary hearing "without [his] understanding the waiver in English" and by failing to argue that the circuit court erroneously exercised its sentencing discretion.[3] The circuit court denied the motion without a hearing, and this appeal follows.

We conclude the circuit court properly denied Guzman-Sandoval's claims as procedurally barred by WIS. STAT. § 974.06(4)[4] and ***State v. Escalona-Naranjo***, 185 Wis. 2d

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[3] In his appellate brief, Guzman-Sandoval also claims trial counsel was ineffective by: (1) failing to inform Guzman-Sandoval of the sentencing guidelines prior to the entry of Guzman-Sandoval's no contest plea; (2) failing to explain that the sentence would include a period of extended supervision; and (3) failing to challenge accuracy of the presentence investigation report—specifically the victim's mother's statements that the victim suffered emotional harm. Arguments raised for the first time on appeal are generally deemed forfeited. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). Moreover, we will not read into a WIS. STAT. § 974.06 motion allegations that are not within the four corners of the motion. ***State v. Romero-Georgana***, 2014 WI 83, ¶64, 360 Wis. 2d 522, 849 N.W.2d 668.

Even on the merits, these arguments do not establish a sufficient reason to circumvent the procedural bar. *See infra* n.4. First, the statute requiring a circuit court to consider sentencing guidelines was repealed six months before Guzman-Sandoval's plea hearing. *See* ***State v. Barfell***, 2010 WI App 61, ¶¶3-4, 324 Wis. 2d 374, 782 N.W.2d 437. Second, during the plea colloquy, the circuit court informed Guzman-Sandoval, with an interpreter's assistance, that the court's sentence would include a period of extended supervision. Finally, Guzman-Sandoval fails to establish how counsel was deficient by failing to challenge at sentencing the victim's mother's report about the victim's suffering since the assault. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984) (counsel's strategic decisions are virtually unassailable).

[4] WISCONSIN STAT. § 974.06(4) provides:

(continued)

168, 517 N.W.2d 157 (1994). Successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason why the newly alleged errors were not previously raised. ***Escalona-Naranjo***, 185 Wis. 2d at 185. The bar to serial litigation may also be applied when the direct appeal was conducted pursuant to the no-merit procedures of WIS. STAT. RULE 809.32. *See* ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574; *see also* ***State v. Allen***, 2010 WI 89, ¶¶35-41, 328 Wis. 2d 1, 786 N.W.2d 124. Absent a sufficient reason for doing so, a defendant may not raise issues in later proceedings that could have been raised in the no-merit proceeding if the no-merit procedures were followed and the court has sufficient confidence in the outcome of the no-merit proceeding to warrant application of the procedural bar. ***Allen***, 328 Wis. 2d 1, ¶62.

Discovery of new evidence may constitute a sufficient reason for failure to raise a claim in the first postconviction motion. *See* ***State v. Edmunds***, 2008 WI App 33, ¶¶9-12, 308 Wis. 2d 374, 746 N.W.2d 590. In order to warrant plea withdrawal on the basis of newly discovered evidence, a defendant must show by clear and convincing evidence that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the defendant proves

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> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

these four criteria, the circuit court must then determine whether a reasonable probability exists that a different result would be reached in a trial. ***Id.***

Here, the evidence at issue is not newly discovered. Guzman-Sandoval does not dispute that the medical examination report was in his counsel's possession prior to his conviction. Rather, he argues that he did not personally discover the report until postconviction/appellate counsel gave him his case file at the end of her representation. Even assuming Guzman-Sandoval satisfied the four criteria for newly discovered evidence outlined above, the circuit court properly observed there is no reasonable probability that this evidence would result in an acquittal. At most, the report shows that the victim had no injuries consistent with a violent assault. The State, however, charged Guzman-Sandoval with assault by sexual contact based on his confession to having non-penetrative penis-to-vagina contact with the victim. Thus, the fact that the medical examination report failed to show evidence of physical injury from such contact is not surprising. Because the report fails to establish or even support Guzman-Sandoval's innocence claim, it is insufficient to overcome ***Escalona-Naranjo***'s procedural bar.

With respect to Guzman-Sandoval's ineffective assistance of counsel claims, ineffective assistance of postconviction counsel "may … in some circumstances … constitute[] a sufficient reason as to why an issue" was not raised in the first motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Guzman-Sandoval appears to argue that he could not have raised his present claims on direct appeal because he was represented by counsel. Guzman-Sandoval, however, was given the opportunity to respond to his counsel's no-merit report and did not respond. In ***Allen***, our supreme court held that the opportunity to respond to the no-merit report combined with this court's independent review

justify application of ***Escalona-Naranjo***'s procedural bar following a no-merit appeal. ***Allen***, 328 Wis. 2d 1, ¶¶3-5.

Guzman-Sandoval nevertheless contends that the ineffectiveness of his postconviction counsel constitutes a sufficient reason for failing to raise his claims earlier. To the extent Guzman-Sandoval intimates that postconviction counsel was ineffective by failing to assert trial counsel's ineffectiveness, he must first establish that trial counsel was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 (to establish ineffectiveness of postconviction counsel, a defendant bears the burden of proving trial counsel's performance was both deficient and prejudicial).

In his WIS. STAT. § 974.06 postconviction motion, Guzman-Sandoval claimed his trial counsel was ineffective by not "presenting" the medical report to the circuit court. Because Guzman-Sandoval pleaded no contest to the crime, it is unclear when his trial counsel would have presented the report before he entered his plea.[5] Further, a valid guilty or no-contest plea waives all non-jurisdictional defects and defenses. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. To the extent Guzman-Sandoval challenges the validity of his plea, it is likewise unclear how the failure to present evidence which, as discussed above, was not exculpatory, would have rendered his plea invalid. Turning to Guzman-Sandoval's ***Miranda*** claim, it appears his argument is based primarily on the allegation that the waiver form contained some markings that are not in Guzman-Sandoval's handwriting. This conclusory allegation,

[5] Defense counsel argued at sentencing that medical information corroborated Guzman-Sandoval's claim that there was no physical penetration and no physical injuries to the victim documented.

without more, is not sufficient to circumvent ***Escalona-Naranjo***'s procedural bar. *See* ***Allen***, 328 Wis. 2d 1, ¶¶84-87. With respect to his preliminary hearing waiver, Guzman-Sandoval had a court-appointed Spanish language interpreter at the preliminary hearing and nothing in the record indicates he misunderstood the waiver.

Additionally, Guzman-Sandoval's conclusory and undeveloped challenge to the circuit court's sentencing discretion is not sufficient to undermine our confidence in the no-merit proceeding. On direct appeal, we concluded any challenge to the sentence imposed would lack arguable merit, as the circuit court applied the standard sentencing factors; considered both mitigating and aggravating factors; and explained its application of the various sentencing considerations in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

Guzman-Sandoval's various allegations are insufficient to establish the ineffectiveness of trial counsel. Therefore, his derivative challenge to the effectiveness of his postconviction counsel fails. Because Guzman-Sandoval has not offered a sufficient reason for failing to raise his arguments earlier, they are procedurally barred. *See* ***Allen***, 328 Wis. 2d 1, ¶44.

To the extent Guzman-Sandoval suggests the circuit court erred by denying his motion without a hearing, Guzman-Sandoval was not automatically entitled to an evidentiary hearing on his claims. If the factual allegations of the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny the motion without a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Here, the record shows that Guzman-Sandoval was not entitled to relief; therefore, the circuit court properly denied the motion without a hearing.

Upon the foregoing,

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

Diane M. Fremgen
Clerk of Court of Appeals