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

2015AP2536 State of Wisconsin v. Jesus Flores (L.C. # 1994CF943697)

Before Lundsten, Sherman, and Blanchard, JJ.

Jesus Flores appeals an order denying his WIS. STAT. § 974.06 (2013-14)[1] motion for postconviction relief in which he alleges ineffective assistance of postconviction and trial counsel and a deprivation of his state and federal constitutional right to an impartial jury.[2] Flores was convicted in 1995 of one count of first-degree intentional homicide and two counts of attempted first-degree intentional homicide following a jury trial. After reviewing the briefs and

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

[2] *See* U.S. CONST. amend VI; WIS. CONST. art. I, § 7.

the record,[3] we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

Flores's 1996 direct appeal proceeded as a no-merit appeal. Flores subsequently filed a ***Knight*** petition in 2001, alleging ineffective assistance of appellate counsel, which we denied. The State argues that the circuit court correctly concluded that Flores's claims are procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. Whether Flores's claims are procedurally barred is a question of law that we review de novo. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). After reviewing the relevant records, we conclude that Flores's claims are procedurally barred.

Escalona-Naranjo holds that an issue that was or could have been raised in a prior appeal or other postconviction motion or petition cannot form the basis for a subsequent postconviction motion under WIS. STAT. § 974.06, unless the defendant presents a sufficient reason for failing to have raised the issue earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 185. The ***Escalona-Naranjo*** procedural bar may be applied to a defendant whose direct appeal was addressed under the no-merit procedure set forth in WIS. STAT. RULE 809.32, as long as the no-merit procedures were followed and the record supports confidence in the result. ***Tillman***, 281 Wis. 2d 157, ¶¶19-20.

[3] In addition to the record in this appeal, we have reviewed the appellate records in Flores's two earlier postconviction filings: (1) no-merit appeal and order affirming the judgment of conviction in ***State v. Flores***, No. 1996AP586-CRNM, unpublished slip op. (WI App. Dec. 16, 1996); and (2) petition for a writ of habeas corpus pursuant to ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992), filed and denied in ***State ex rel. Flores v. Kingston***, No. 2001AP1262-W, unpublished slip op (WI App. May 16, 2001) *review denied* (WI Aug. 27, 2001).

Flores's arguments in the current appeal all relate in some manner to a juror's demeanor at trial. Flores alleges that the juror in question was asleep for some portion of the trial, and that Flores was prejudiced as a result. As the basis for his current WIS. STAT. § 974.06 motion, Flores alleges that trial and postconviction counsel were ineffective in having failed to raise the issue in postconviction proceedings, and that his constitutional right to an impartial jury was violated as a result of the juror having slept. Flores also makes at least passing reference to appellate counsel's failure to address the issue.[4] We conclude that all issues related to the allegedly sleeping juror claim were disposed of by our 1996 decision summarily affirming the judgment of conviction following our independent review of the record in the context of the no-merit appeal.

Our review of the no-merit appeal file satisfies us that the proper no-merit procedures were followed in Flores's prior appeal; further, we have sufficient confidence in the procedure as undertaken in this case to warrant application of the procedural bar. *See* ***Tillman***, 281 Wis. 2d 157, ¶20. Flores was afforded the opportunity to respond to counsel's no-merit report, which he did. Flores's response, for which he was granted an extension of time to file, raised his "fear" that no-merit counsel "has not adequately protected [Flores's] rights."[5] Flores did not, however, expound further on his alleged fear in his no-merit response.

The no-merit report addressed only the sufficiency of the evidence to support the verdict. This court, however, undertook its own independent review of the record, and concluded that there were no arguably meritorious issues for appeal. While the no-merit decision also directly

[4] The same attorney served as postconviction and appellate counsel.

[5] *See* October 22, 1996, letter from Flores to Clerk of the Court of Appeals, Wisconsin Court of Appeals file No. 1996AP586-CR.

addresses only the sufficiency of the evidence, the court of appeals is presumed to have "considered all issues of arguable merit and resolved them against the defendant, even though it did not spell out everything in its opinion." ***State v. Allen***, 2010 WI 89, ¶72, 328 Wis. 2d 1, 786 N.W.2d 124.

As Flores has noted in his brief, the juror issue was raised and discussed at trial. More specifically, although Flores's trial counsel did not move for a mistrial, counsel did raise the issue with the circuit court, which indicated that bailiffs had been addressing potential inattentiveness by the juror by steadily bringing the juror water. The court invited trial counsel to inform the court if counsel noticed additional issues with the juror. Based on this record, there is no reason to believe that we would not have identified and considered the potential issue when we undertook our independent review of the transcripts of the trial proceedings and concluded that there were no arguably meritorious issues for appeal related to this issue.

The procedural bar related to the juror issue disposes of both Flores's ineffective assistance of counsel claims[6] and his substantive right to an impartial jury claim because they are both inextricably tied to our 1996 no-merit decision and, therefore, deemed fully litigated and resolved. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.") (citation omitted). Further, since counsel cannot be deemed to have rendered ineffective assistance of counsel for having failed to raise a

[6] Flores's ineffective assistance of trial counsel claim is also disposed of by the no-merit process, because we would have considered counsel's performance as part of our independent review of the record.

non-meritorious claim, *see* ***State v. Cummings***, 199 Wis. 2d 721, 747, n.10, 546 N.W.2d 406 (1996), Flores's ineffective assistance of counsel claims against trial and postconviction counsel related to the juror issue necessarily fail on this basis too.

As noted above, Flores brought a ***Knight*** petition in 2001, alleging ineffective assistance of appellate counsel, which we denied. There, Flores argued that appellate counsel's subsequent felony theft conviction and license revocation by consent demonstrate in some manner a defect in appellate counsel's representation of Flores in his appeal of several years earlier. We rejected Flores's argument on the basis that the allegation was not supported by the materials Flores submitted in his support of his petition. This same concept regarding the attorney's later conviction and license revocation now crops up in Flores's current WIS. STAT. § 974.06 motion, both as a basis for again alleging ineffective assistance of postconviction/appellate counsel and as an explanation for why he failed to pursue his claims in his earlier postconviction filings. We reject Flores's arguments here for the same reason we rejected them previously. Flores's current claim of ineffective assistance of appellate counsel is procedurally barred by our resolution of his ***Knight*** petition.

Flores argues that our decision denying his ***Knight*** petition "direct[ed]" him to re-submit in a WIS. STAT. § 974.06 motion some of his current claims related to the ineffective assistance of postconviction counsel claim that he had raised in his ***Knight*** petition. We reject Flores's arguments and conclude that Flores has failed to offer sufficient reason to permit relitigation of his claims. However, Flores is incorrect in stating that we "direct[ed]" him to file the § 974.06 motion. Instead, our ***Knight*** decision merely apprised Flores that a ***Knight*** petition may review only the performance of appellate, rather than postconviction, counsel and that any claim alleging ineffective assistance of postconviction counsel must be brought before the circuit court

in a § 974.06 motion. We did not relieve Flores from any procedural bar that may have attached to his claims.

We conclude that the allegations in Flores's WIS. STAT. § 974.06 motion are insufficient to warrant a hearing, or to excuse his own failure to raise his current issues in response to counsel's no-merit report or in his ***Knight*** petition. We, therefore, agree with the circuit court and the State that Flores is procedurally barred pursuant to ***Escalona-Naranjo*** from raising the claims set forth in his brief on appeal.

Upon the foregoing reasons,

IT IS ORDERED that the circuit court order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals