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DISTRICT I

March 22, 2022

To:

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Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County
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You are hereby notified that the Court has entered the following opinion and order:

2020AP424 State of Wisconsin v. Angelo Deniro Cruz (L.C. # 2013CF5493)

Before Donald, P.J., Dugan and Graham, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Angelo Deniro Cruz, *pro se*, appeals the order denying his WIS. STAT. § 974.06 (2019-20)[1] motion and his motion for postconviction discovery. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In 2014, Cruz pled no contest to two counts of attempted first-degree intentional homicide and pled guilty to two counts of first-degree recklessly endangering safety, with use of a dangerous weapon, one count of felon in possession of a firearm, and one count of intentionally pointing a firearm at a person. The charges stemmed from an incident that occurred when Cruz, who was a convicted felon, sped away from a police officer during a traffic stop, crashed his vehicle, fled from the scene, pointed a gun at civilians, and ultimately fired several shots at officers who pursued him. After Cruz was apprehended, a blood draw was performed. The State did not charge Cruz with any crimes based on the results of the blood test.

On direct appeal, appellate counsel filed a no-merit appeal, Cruz filed a response, and we affirmed. *See* ***State v. Cruz***, No. 2015AP413-CRNM, unpublished op. and order (WI App Oct. 9, 2015).

In 2020, nearly six years after he entered his pleas, Cruz filed a WIS. STAT. § 974.06 motion seeking to withdraw his pleas and a simultaneous motion seeking postconviction discovery.[2] In his motion for postconviction discovery, Cruz sought a copy of the "Informing the Accused" form that was read before he agreed to provide a blood sample following his arrest. Cruz argued that the form was necessary because it substantiated his claim in his § 974.06 motion that his trial counsel was ineffective for not pursuing a motion to suppress the results of his warrantless post-arrest blood draw.

[2] Cruz also filed a motion for the appointment of counsel. Cruz does not challenge the postconviction court's denial of that motion on appeal.

Cruz argued that the blood draw violated the Fourth Amendment.[3] In an effort to avoid the procedural bar, he asserted: (1) pursuant to ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 786 N.W.2d 124, he was not required to file a response to the no-merit report that was filed; (2) the bar only applies when the no-merit procedures are properly followed and this did not happen here because appellate counsel and this court failed to discover the "clear and obvious" issue related to the warrantless blood draw, an issue that trial counsel failed to pursue.

The postconviction court denied Cruz's motions without a hearing.[4] The court held that Cruz's WIS. STAT. § 974.06 motion was procedurally barred because "[t]here is no reason why [he] could not have raised his current issue in response to counsel's no[-]merit report." The court also rejected Cruz's claim on its merits, explaining that Cruz "was not charged with operating while under the influence or with any other charge related to intoxicants; as a result, the defendant's blood draw and blood alcohol level have little to no bearing on his case or on his calculus about pleading."

The postconviction court denied Cruz's motion for postconviction discovery because the "Informing the Accused" form requested was "of no consequence to the outcome of his case" and "would not create a reasonable probability of a different outcome." This appeal follows.

Absent a sufficient reason, a defendant may not bring a claim in a WIS. STAT. § 974.06 motion if that claim could have been raised in a prior motion or direct appeal. *See* ***State v.***

[3] In his motion, Cruz "concede[d] that the blood draw was performed in a reasonable manner and he did not object to the blood draw."

[4] The Honorable William W. Brash accepted Cruz's pleas and imposed sentence. The Honorable Lindsey Canonie Grady, as the successor court to Judge Brash's calendar, rendered the decision on Cruz's postconviction motions.

Escalona-Naranjo, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Whether a § 974.06 motion alleges a sufficient reason for failing to bring available claims earlier is a question of law that we review *de novo*. ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

The procedural requirements of ***Escalona-Naranjo*** are applicable even when a prior appeal was a no-merit appeal. *See* ***Allen***, 328 Wis. 2d 1, ¶16. Before applying the rule of ***Escalona-Naranjo*** to postconviction motions filed after a no-merit appeal, however, we "consider whether the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar[.]" ***Allen***, 328 Wis. 2d 1, ¶62.

As a sufficient reason, Cruz asserts that this court failed to do a full examination of the record and discover the issue related to the warrantless blood draw during its independent review of the record in his no-merit appeal. He argues that trial counsel failed to move to suppress the warrantless blood draw, an issue that was clear and obvious, "yet appellate counsel and the court of appeals when independently reviewing the record failed to discover it." Cruz suggests that our decision in ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893, permits his collateral challenge. *See* ***id.***, ¶¶24-27 (explaining that the failure of counsel and this court to address an issue of arguable merit led to the conclusion that the no-merit procedures had not been adequately followed to warrant confidence in the outcome of the appeal). Cruz's argument fails.

First, Cruz's claim that trial counsel was ineffective for failing to move to suppress the warrantless blood draw was not an issue of arguable merit. *See* ***id.***, ¶27. Cruz contends that trial counsel's alleged deficiencies prejudiced him in three ways: (1) the State was "permitted … to

use the drug evidence as a [sic] aggravating factor"; (2) "the blood draw evidence was information used against [the] defendant's liberty interest, as it was considered a relevant aggravating factor in the Presentence Investigation Report"; and (3) "the failure to suppress [the] warrantless blood draw permitted the police departments [sic] standard operating procedure to obtain blood sample from drivers involved in accidents of a serious nature, even when the policy is contrary to and results in the [F]ourth [A]mendment violation of defendants [sic] rights, which occurred here." *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (stating that a claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficiency resulted in prejudice). In response, the State argued that each of the aforementioned contentions fails because it either lacks record support or is difficult to understand. We agree, and, in any event, because Cruz did not refute the State's argument, we deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted).

Moreover, the record reflects that we properly followed no-merit procedure. *See* ***Allen***, 328 Wis. 2d 1, ¶61 (explaining that when this court follows the no-merit procedure, "a defendant is barred (absent a sufficient reason) from raising issues in a future WIS. STAT. § 974.06 motion, whether or not he raised them in a response to a no-merit report[.]"). On review, we agreed with appellate counsel's analysis that the issues he examined did not warrant postconviction relief. We additionally conducted our own independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), and found no arguable bases for reversing Cruz's convictions. In so doing, we addressed Cruz's double jeopardy claim, raised in response to counsel's no-merit report, and deemed it meritless.

Cruz has not provided a sufficient reason for failing to make his current claim in his response to the no-merit report. We conclude that the postconviction court properly applied the procedural bar.

Turning to Cruz's motion for postconviction discovery, the sought-after evidence must be relevant to an issue of consequence. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999). Evidence is consequential only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. ***Id.*** at 320-21. Cruz has not established a link between the "Informing the Accused" form he seeks and the crimes he committed.[5] Consequently, we affirm.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[5] Insofar as Cruz alleges on appeal that disclosure of the "Informing the Accused" form was required under ***Brady v. Maryland***, 373 U.S. 83 (1963), he forfeited this claim by failing to raise it below. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (explaining that "issues must be preserved at the circuit court").