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DISTRICT IV

March 5, 2013

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

2012AP1811 State of Wisconsin v. Walter G. Matthews (L.C. # 2007CF1645)

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

Walter Matthews appeals an order that denied his motion for postconviction relief from a criminal conviction. Matthews contends that he is entitled to a hearing on several plea withdrawal claims, notwithstanding the fact that his conviction has already been affirmed by this court in a no-merit proceeding. After reviewing the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12)[1] We summarily affirm.

The State contends that all of the issues raised in Matthews' brief are procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). ***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The decision issued in ***State v. Matthews***, No. 2009AP162-CRNM, unpublished slip op. (Wis. Ct. App. July 30, 2009), sufficiently demonstrates that the proper no-merit procedures were followed on Matthews' prior appeal. Matthews was afforded the opportunity to submit a response to counsel's report, and did so. This court then engaged in an independent review of the record and concluded that Matthews' no-contest pleas and sentences were valid, and that all other non-jurisdictional issues had been waived by the pleas. Our discussion included several points relevant to Matthews' current plea withdrawal claims, including the fact that the court erroneously referred to some dismissed charges as read-ins and that Matthews was properly

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

advised that the court was not bound by sentencing recommendations (although the court did, in fact, follow the State's recommendation). Nothing in our current review of the record undermines our confidence in either the procedures or the outcome of the no-merit proceeding.[2]

Matthews asserts that the reason for his failure to raise all of his current issues during his no-merit proceeding was ineffective assistance of counsel.[3] *See generally* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶24, 314 Wis. 2d 112, 758 N.W.2d 806 (discussing how to determine whether ineffective assistance claims should be directed first to a circuit court or appellate court). When the viability of a defendant's WIS. STAT. § 974.06 motion hinges on a claim that prior counsel was ineffective, the defendant must make allegations sufficient to establish both deficient performance and prejudice under the standard set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Balliette***, 2011 WI 79, ¶63, 336 Wis. 2d 358, 805 N.W.2d 334; *see also* ***State v. Allen***, 2004 WI 106, ¶¶9-23, 36, 274 Wis. 2d 568, 682 N.W.2d 433 (discussing the pleading standard necessary to obtain a hearing).

[2] In ***State v. Fortier***, 2006 WI App 11, ¶¶24-27, 289 Wis. 2d 179, 709 N.W.2d 893 (WI App 2005), we reasoned that the failure of either counsel or this court to address an issue of "evident" merit led to the conclusion that the no-merit procedures had not been followed sufficiently well to warrant confidence in the outcome of the appeal. The Wisconsin Supreme Court appears to have approved this logic when it noted that a defendant may not be barred from raising an issue that the court of appeals and appellate counsel "*should* have found." ***State v. Allen***, 2010 WI 89, ¶63, 328 Wis. 2d 1, 786 N.W.2d 124. It is therefore implicit in our statement that we retain confidence in the outcome of the no-merit proceeding that we do not share the defendant's view of the merits of the issues that he now seeks to raise. To address in detail why that is the case, however, would undermine the judicial efficiency that is supposed to be achieved by applying the procedural bar of ***Escalona-Naranjo***.

[3] Matthews also asserts in a single sentence in his reply brief that he was incompetent during the prior proceedings. He did not, however, make any factual allegations to support that contention in his postconviction motion.

We conclude that Matthews' allegations regarding ineffective assistance of appellate counsel 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. To the extent that Matthews is alleging that counsel failed to discuss a potential issue that would have been evident from the record—namely, the court's misstatement about read-in offenses—his claim is defeated by our discussion above of that very issue. To the extent that Matthews is alleging that counsel failed to discuss potential issues that would have been based on facts outside of the record—such as allegations that trial counsel performed an inadequate investigation and improperly pressured Matthews into entering his pleas—Matthews was himself in the best position to bring that information to this court's attention. We therefore agree with the State that ***Escalona-Naranjo*** controls the disposition of this case. Matthews is procedurally barred from raising the issues he has set forth in his brief on appeal.

Accordingly,

IT IS ORDERED that the postconviction order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals