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DISTRICT II

March 13, 2013

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

2012AP1743 State of Wisconsin v. Robert Lee McQueen (L.C. # 1984CF515)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Robert Lee McQueen appeals pro se from an order summarily denying his WIS. STAT. § 974.06 (2011-12)[1] postconviction motion. 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. McQueen's motion does not establish a sufficient reason for failing to raise his postconviction claims during the course of his no-merit appeal. Therefore, his claims are procedurally barred, and we affirm the trial court's order.

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

In 1985, a jury found McQueen guilty of five felony counts, and the trial court imposed an aggregate sentence of eighty-nine years. On appeal, McQueen's appointed counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (1983-84). McQueen did not file a response to the no-merit report, and this court affirmed his conviction in a sixteen-page per curiam opinion. ***State v. McQueen***, No. 1986AP88-CRNM, unpublished slip op. (WI App Nov. 4, 1987).

In 2012, McQueen filed a WIS. STAT. § 974.06 motion in the trial court alleging that appellate counsel was ineffective for failing to file a postconviction motion challenging trial counsel's failure to: (1) poll the jury and (2) object to the sentencing court's exercise of discretion. The trial court determined that McQueen could have raised these issues on appeal decades earlier and denied the motion without a hearing.[2] McQueen appeals.

Absent a sufficient reason, a defendant is procedurally barred from raising issues in a WIS. STAT. § 974.06 postconviction motion that could have been raised on direct appeal or in a prior § 974.06 motion. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). This bar applies to § 974.06 motions brought after a no-merit appeal as long as the no-merit procedures were in fact followed. ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574. Thus, a defendant may not subsequently raise issues in a § 974.06 motion that could have been raised in a no-merit response, even where the criminal defendant never actually

[2] Though McQueen apparently believes that the postconviction hearing was rescheduled and held in his absence, he is incorrect. The trial court concluded that McQueen's WIS. STAT. § 974.06 motion along with the record conclusively demonstrated that he was not entitled to relief and denied the motion without a hearing.

filed a response to counsel's no-merit report. ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 786 N.W.2d 124.

We conclude that McQueen's WIS. STAT. § 974.06 claims are procedurally barred. The file from ***McQueen***, No. 1986AP88-CRNM, demonstrates that the no-merit procedure was followed in the prior appeal. Appellate counsel filed and provided McQueen with a copy of a no-merit brief. McQueen was informed of his right to file a response and elected not to do so. After independently reviewing the record along with counsel's no-merit brief, this court determined that further proceedings "would be frivolous and without arguable merit." Nothing in our present review of the record undermines our confidence in the prior no-merit appeal. *See* ***Allen***, 328 Wis. 2d 1, ¶¶5, 31 (procedural bar applies where the prior no-merit decision "carries a sufficient degree of confidence to warrant application of the ***Escalona-Naranjo*** bar to the issues" raised in the subsequent motion).

We reject McQueen's contention that appellate counsel's ineffective assistance constitutes a sufficient reason for failing to raise his claims. First, with regard to the alleged sentencing errors, both counsel's no-merit brief and this court's opinion squarely addressed the application of the dangerous weapons and habitual criminality enhancers, as well as the sentencing court's exercise of discretion. ***McQueen***, No. 1986AP0088-CRNM at 9-10, 13-16. We will not revisit McQueen's repackaged sentencing claims. *See* ***Tillman***, 281 Wis. 2d 157, ¶¶23-24 (in the WIS. STAT. § 974.06 context, we will not address issues which are "simply a resurrection of [the defendant's] prior arguments" previously rejected in a no-merit decision).

Second, any claim that appellate counsel was ineffective fails to account for the fact that McQueen, himself, failed to raise his identified issues in his no-merit response. The asserted

jury-polling and sentencing errors existed and were apparent in the record back in 1987. McQueen is incorrect when he suggests that he could not raise these issues in his no-merit response because they were not first addressed by the trial court. A criminal defendant is free to raise any potential issue in a no-merit response. Similarly, in a no-merit appeal, this court independently reviews the record for any arguably meritorious issue, not just preserved claims that have been addressed by the trial court.

Finally, with regard to the jury-polling issue, aside from any procedural bar, McQueen's WIS. STAT. § 974.06 motion failed to establish that he was entitled to relief. Assuming that trial counsel did actually waive the polling of the jury,[3] McQueen's motion fails to establish that this was reversible error. The decision whether to poll the jury is delegated to trial counsel. ***State v. Jackson***, 188 Wis. 2d 537, 542-43, 525 N.W.2d 165 (Ct. App. 1994). The purpose of jury polling is to ensure juror unanimity. ***State v. Yang***, 201 Wis. 2d 725, 745, 549 N.W.2d 769 (Ct. App. 1996). McQueen does not allege and the record does not demonstrate that there is any reason to question the unanimity of the jury's verdict. There is no merit to McQueen's claim that his constitutional rights were violated. *See* ***id.*** at 744-46 (in the absence of any indication that the jury's verdict was not unanimous, defendant failed to establish that trial counsel's waiver of the right to poll the jury was either deficient or prejudicial).

Upon the foregoing reasons,

[3] As pointed out in the State's brief, the appellate record does not contain any portion of the trial transcript. It is the appellant's responsibility to ensure that the record is complete, and we are to assume that any missing transcripts would support the trial court's decision to deny McQueen's WIS. STAT. § 974.06 postconviction motion. ***State v. Provo***, 2004 WI App 97, ¶19, 272 Wis. 2d 837, 681 N.W.2d 272.

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

Diane M. Fremgen
Clerk of Court of Appeals