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June 24, 2013

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

2012AP747

State of Wisconsin v. Toby Hill (L.C. # 2001CF6034)

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Toby Hill, pro se, appeals orders denying his Wis. STAT. § 974.06 (2011-12)¹ postconviction motion and denying his motion for reconsideration. Upon our review of the record and the parties' briefs, we conclude at conference that the orders should be summarily affirmed because the postconviction motion was procedurally barred.

Hill was charged with two counts of first-degree reckless homicide and one count of felon in possession of a firearm, as a habitual criminal as to each of the three counts. Pursuant to

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

a plea agreement, he entered guilty pleas to two counts of second-degree reckless homicide with use of a dangerous weapon as a party to a crime and as an habitual criminal. By counsel, Hill filed a postconviction motion alleging ineffective assistance of trial counsel, claiming that he was not aware of his right to seek suppression of statements he made to police. In 2003, the trial court denied the postconviction motion. Hill's counsel then filed a no-merit report and supplemental no-merit report and Hill filed a response and supplemental response. This court affirmed the judgments and orders, concluding that there was no arguable basis for appeal.

In 2012, Hill filed the present pro se motion for postconviction relief under WIS. STAT. § 974.06, again alleging ineffective assistance of trial counsel. This motion alleged that Hill's trial counsel failed to investigate possible defenses of insanity and "heat of passion," and that the court failed at the plea hearing to alert Hill to the possibility that counsel could discover defenses or mitigating circumstances that would not be apparent to a non-lawyer. The circuit court denied the motion without a hearing, finding it to be procedurally barred. Hill then filed a motion for reconsideration, alleging in part that the postconviction motion was not procedurally barred because his postconviction counsel was ineffective for failing to raise this alleged ineffective assistance of trial counsel allegation in the initial postconviction motion. The circuit court denied the motion for reconsideration, again concluding that the postconviction motion was procedurally barred.

The circuit court may deny a postconviction motion without a hearing when the motion does not raise sufficient facts to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). When a defendant has had previous postconviction proceedings, a further postconviction motion is not allowed unless

sufficient reason is shown for the failure to have raised the issues in the earlier proceeding. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). This procedural bar applies when the earlier postconviction proceedings resulted in a no-merit report. *State v. Tillman*, 2005 WI App 71, ¶¶2, 26, 281 Wis. 2d 157, 696 N.W.2d 574. A defendant may not raise an issue in a subsequent WIS. STAT. § 974.06 motion that he could have raised in response to a no-merit report, absent sufficient reason for failing to have raised the issue in the no-merit appeal. *State v. Allen*, 2010 WI 89, ¶25, 328 Wis. 2d 1, 786 N.W.2d 124. The procedural bar does not apply if the defendant establishes that the no-merit procedures were not properly followed or if he identifies an issue of such obvious merit that it undermines our confidence in this court's no-merit decision. *Id.*, ¶¶62, 83. We determine the sufficiency of the defendant's reason for circumventing the *Escalona-Naranjo* procedural bar by examining the four corners of the postconviction motion. *Id.*, ¶27.

The circuit court properly denied Hill's WIS. STAT. § 974.06 motion without a hearing because the motion does not establish sufficient reason for Hill's failure to have raised the issues in the earlier postconviction proceedings. In a conclusory fashion, Hill merely alleges that his appellate counsel was ineffective for failing to have raised the issues. He does not address his own failure to raise the issues in his responses to the no-merit report.

In addition, we conclude that the motion fails to establish any prejudice from his postconviction counsel's failure to raise these issues because the issues have no merit. Hill's suggestion of a potential insanity plea was not supported by any claim, much less evidence, of a mental disease or defect. His claim that trial counsel should have investigated applicability of "heat of passion" fails because proof of heat of passion, that is, adequate provocation, could reduce a first-degree intentional homicide to second-degree intentional homicide, which had a

greater penalty than the offenses for which Hill was convicted. *See* WIS. STAT. § 939.44(2) (1999-2000). Hill's argument that the trial court failed to alert him that a lawyer might discover defenses or mitigating circumstances fails because Hill was represented by counsel throughout the proceedings. Courts must alert defendants to the advantages of being represented by counsel when defendants are not represented by counsel. *See State ex rel. Burnette v. Burke*, 22 Wis. 2d 486, 493-94, 126 N.W.2d 91 (1964). The requirement to alert a defendant of the advantages of representation by counsel does not apply to this case. Therefore, Hill's postconviction motion depended on conclusory statements and the record conclusively demonstrated that he was entitled to no relief.

After being alerted to the deficiencies in his motion, Hill filed a motion for reconsideration, again alleging ineffective assistance of postconviction counsel and defects in the manner in which the trial court took his guilty pleas. That motion also failed to provide sufficient reason for Hill's failure to have raised the issues in his initial postconviction motion or in his responses to the no-merit report.

IT IS ORDERED that the orders are summarily affirmed. WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals