COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP66 **Cir. Ct. No. 2010CF4172**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN LEE BANISTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: LINDSEY CANONIE GRADY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Kevin Lee Banister, *pro se*, appeals an order denying his motion for postconviction relief brought under WIS. STAT. § 974.06

(2011-12).[1] The circuit court determined that the motion was procedurally barred by ***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. We affirm.

BACKGROUND

¶2 In 2010, the State charged Banister with one count of attempted first-degree intentional homicide as an act of domestic abuse and one count of substantial battery, all while armed. Pursuant to a plea bargain, he resolved the charges with a guilty plea to a single count of first-degree reckless injury while armed. The circuit court imposed a twenty-two year term of imprisonment, bifurcated as twelve years of initial confinement and ten years of extended supervision.

¶3 Banister appealed pursuant to the no-merit procedures set out in WIS. STAT. RULE 809.32. In a no-merit report, his appellate counsel discussed the validity of his guilty plea and the circuit court's exercise of sentencing discretion. Banister filed a response to the no-merit report and a supplement to that response contending that he could pursue an arguably meritorious claim for plea withdrawal because he did not understand the elements of the offense or the maximum sentence that he faced. He further contended that a new factor, namely, a post-sentencing medical diagnosis, warranted sentence modification. We directed appellate counsel to file a supplemental no-merit report addressing the allegations Banister raised in regard to his claim for sentence modification. Counsel complied. Thereafter, we released a nine-page opinion and order affirming the

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

judgment of conviction and explaining why further appellate proceedings would lack arguable merit. *See* ***State v. Banister***, 2011AP2663-CRNM, unpublished op. and order (WI App Oct. 11, 2012) (***Banister I***).

¶4 Banister next filed the postconviction motion underlying this appeal. He sought plea withdrawal on the ground that his plea was not knowing, intelligent, and voluntary because neither the circuit court nor his trial counsel had explained the elements of the offense to him, and he did not understand the elements at the time of his guilty plea. The circuit court denied the motion without a hearing, and this appeal followed.

DISCUSSION

¶5 "[WISCONSIN STAT. §] 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***Escalona-Naranjo***, 185 Wis. 2d at 185. The obligation reflects the need for finality in our litigation. *See* ***id.*** The purpose of the statute is to require a convicted prisoner to raise all of his or her claims in a single motion or appeal. *See* ***id.*** at 178. A prisoner who wishes to pursue a second or subsequent postconviction motion under § 974.06 must therefore demonstrate a sufficient reason for failing in the original postconviction proceeding to raise or adequately address the issues. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184.

¶6 "A no-merit appeal clearly qualifies as a previous motion under [WIS. STAT.] § 974.06(4)." ***State v. Allen***, 2010 WI 89, ¶41, 328 Wis. 2d 1, 786 N.W.2d 124. Accordingly:

> when a defendant's postconviction issues have been addressed by the no merit procedure under WIS. STAT. RULE 809.32, the defendant may not thereafter again raise those issues or other issues that could have been raised in

> the previous motion, absent the defendant demonstrating a sufficient reason for failing to raise those issues previously.

Tillman, 281 Wis. 2d 157, ¶19. Before we apply the rule of ***Escalona-Naranjo*** to a § 974.06 motion 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.

¶7 We have examined the submissions filed in this court during the pendency of ***Banister I***, and we have reviewed our decision in that case.[2] Our examination discloses that we considered the issues raised by Banister and by his appellate counsel, and we ensured a full airing of Banister's concerns by requiring a supplemental no-merit report. We also independently reviewed the record and concluded that it revealed no issues warranting further postconviction proceedings. Only then did we affirm Banister's conviction. We are satisfied that this court and appellate counsel followed the no-merit procedures to the letter, and we therefore have sufficient confidence in the outcome of the proceedings in ***Banister I*** to apply the procedural bar of ***Escalona-Naranjo***.

¶8 Accordingly, Banister may pursue the claims raised in his most recent postconviction litigation only if he offered the circuit court a sufficient reason for serial litigation. We determine the sufficiency of Banister's reason by examining the four corners of his postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433.

[2] "Generally, a court may take judicial notice of its own records and proceedings for all proper purposes. This is particularly true when the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same." ***Johnson v. Mielke***, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970).

¶9 Banister argued to the circuit court, as he argues to this court, that his challenge to the validity of his guilty plea is permitted by our decision in ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893. There, we concluded that a convicted prisoner may have a sufficient reason for a second or subsequent postconviction motion challenging the legality of a sentence when appellate counsel did not raise that issue in the no-merit proceedings and this court also did not consider the issue when affirming the conviction. *See* ***id***, ¶27.

¶10 ***Fortier*** is inapplicable here. In this case, Banister's appellate counsel discussed the sufficiency of the plea proceeding in the no-merit report, and Banister himself filed a response asserting that the plea was invalid because he lacked an understanding of the elements of the offense. We examined the record, and we concluded that its various components, including the plea questionnaire and waiver of rights form, the addendum, and the court's colloquy with Banister, showed that his plea conformed to the requirements of law and demonstrated that Banister entered a knowing, intelligent, and voluntary plea. *See* ***Banister I***, No. 2011AP2663-CRNM at 3-4. Because we expressly considered the validity of the guilty plea in the no-merit proceeding, Banister cannot rely on ***Fortier*** as a basis for raising the validity of his guilty plea in a second postconviction proceeding.

¶11 As we explained in ***Tillman***, when we specifically reject a claim in a proceeding under WIS. STAT. RULE 809.32, the convicted prisoner cannot pursue the claim again in a subsequent postconviction motion absent "a sufficient reason why his current 'spin' on th[e] already adjudicated issue was not previously raised." ***Tillman***, 281 Wis. 2d 157, ¶25. Banister failed to present a sufficient reason in this case. Accordingly, the circuit court correctly barred his serial litigation.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.