OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

April 19, 2016

To:

Hon. Brian A. Pfitzinger
Circuit Court Judge
210 W. Center St.
Juneau, WI 53039

Kurt F. Klomberg
District Attorney
Dodge County
210 W. Center Street
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Aaron R. O'Neil
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Timothy David Kiefer
Kiefer Law Office LLC
P. O. Box 1546
Madison, WI 53701-1546

Peter J. Weyker 225602
Dodge Corr. Inst.
P.O. Box 700
Waupun, WI 53963-0700

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

2014AP1841 State of Wisconsin v. Peter J. Weyker (L.C. # 2008CF228)

Before Lundsten, Higginbotham and Sherman, JJ.

Peter Weyker appeals an order that denied his WIS. STAT. § 974.06 (2013-14)[1] motion for postconviction relief from a criminal conviction on the grounds of ineffective assistance of counsel. *See* § 974.06. Specifically, Weyker contends that he was prejudiced by a delay in his trial date caused by counsel's failure to appear that allowed the State an opportunity to amend the information to add additional charges. Weyker contends that he is entitled to a hearing on his motion, notwithstanding the fact that the conviction has already been affirmed by this court in a

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

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.

The State contends that Weyker's ineffective assistance claim is 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 on a prior appeal cannot form the basis for a subsequent postconviction motion under WIS. STAT. § 974.06, unless the defendant presents 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 file in ***State v. Weyker,*** No. 2010AP2691-CRNM, unpublished slip op (WI App Apr. 20, 2012) shows that the proper no-merit procedures were followed on Weyker's prior appeal. Weyker was afforded the opportunity to submit a response to counsel's report, and he did so—raising a different claim of ineffective assistance of counsel than the one he raises here. This court then engaged in an independent review of the record; addressed a motion for severance, the sufficiency of the evidence, the sentences, and counsel's performance with respect to challenging the DNA evidence; and concluded that there were no arguably meritorious issues for appeal. Nothing in our current review of the record undermines our confidence in those

conclusions.[2] Therefore, ***Escalona-Naranjo*** does apply here, and Weyker must demonstrate a sufficient reason why he did not raise earlier the ineffective assistance claim that is the subject of his current WIS. STAT. § 974.06 motion.

Weyker attributes his failure to raise his current ineffective assistance of trial counsel claim earlier to his "lack of education and legal training, combined with the hardships of litigating from prison," as well as the ineffective assistance of appellate counsel.

A response to a no-merit report is not, however, a formal brief requiring citations to the record and legal authorities. *Cf.* WIS. STAT. RULES 809.19 and 809.32. Rather, it is a less formal document that is designed to allow a pro se litigant to raise complaints in layman's terms, so that this court may independently assess them to determine whether it would be frivolous to pursue them. Therefore, we are not persuaded that Weyker's lack of education or legal knowledge or the general difficulty of conducting litigation from prison provide an adequate reason for Weyker's failure to raise his complaint about trial counsel missing the trial date and failing to object to the subsequent addition of charges to the information in Weyker's response to counsel's no-merit report.

[2] In ***State v. Fortier***, 2006 WI App 11, ¶¶24-27, 289 Wis. 2d 179, 709 N.W.2d 893, 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 adequately followed 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 evidentiary issue which 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***.

It is true that the ineffective assistance of appellate counsel may, in some instances, provide an adequate reason why an issue was not earlier raised. *See generally* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶¶23-25, 314 Wis. 2d 112, 758 N.W.2d 806 (discussing various mechanisms for reviewing claims of ineffective assistance of counsel). When the viability of a defendant's WIS. STAT. § 974.06 motion hinges on a claim that prior appellate counsel was ineffective, the defendant must make allegations in the motion 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 and 36, 274 Wis. 2d 568, 682 N.W.2d 433 (discussing pleading standard necessary to obtain a hearing on a postconviction motion).

Here, Weyker's WIS. STAT. § 974.06 motion contains a single sentence asserting that appellate counsel's failure to raise the delayed trial and amended information issues constitutes ineffective assistance of counsel. However, the motion does not explain why trial counsel was unable to appear at the scheduled trial. Without that information, the allegations are insufficient to show that trial counsel provided ineffective assistance, much less that appellate counsel did so.

We conclude that the allegations in Weyker's WIS. STAT. § 974.06 motion 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. We therefore agree with the State that ***Escalona Naranjo*** controls the disposition of this case. Weyker is procedurally barred from raising the issues set forth in his brief on appeal.

Therefore,

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