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July 12, 2016

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

2015AP2048 State of Wisconsin v. Rafael N. Bouldin (L.C. # 2009CF4154)

Before Kessler, Brennan and Brash, JJ.

Rafael N. Bouldin, *pro se*, appeals from an order of the circuit court that denied his WIS. STAT. § 974.06 (2013-14)[1] motion without a hearing on the grounds that it was procedurally barred. 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. We summarily affirm the order.

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

In July 2010, a jury convicted Bouldin of armed robbery, and the circuit court sentenced him to thirteen years' imprisonment. He had a direct appeal in which counsel filed a no-merit report, and Bouldin filed a response. This court ultimately affirmed Bouldin's conviction. *See* ***State v. Bouldin***, No. 2011AP1615-CRNM, unpublished slip op. & order (WI App July 30, 2013). In August 2015, Bouldin filed the underlying motion for postconviction relief. The circuit court denied the motion as procedurally barred under ***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. Bouldin sought reconsideration, which was also denied. Bouldin appeals.

"It is well-settled that a defendant must raise all grounds for relief in his or her original, supplemental or amended motion for postconviction relief." ***State v. Fortier***, 2006 WI App 11, ¶16, 289 Wis. 2d 179, 709 N.W.2d 893 (citing WIS. STAT. § 974.06 and ***Escalona***, 185 Wis. 2d at 181-82). The phrase "original, supplemental or amended motion" also encompasses a direct appeal. *See* ***State v. Lo***, 2003 WI 107, ¶32, 264 Wis. 2d 1, 665 N.W.2d 756. This includes no-merit appeals. *See* ***Tillman***, 281 Wis. 2d 157, ¶27. "[A] defendant may not raise issues in a subsequent § 974.06 motion that he [or she] could have raised in response to a no-merit report, absent a 'sufficient reason' for failing to raise the issues earlier in the no-merit appeal." ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 786 N.W.2d 124.

In some circumstances, ineffective assistance of postconviction counsel may constitute sufficient reason for not raising an issue. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 678, 556 N.W.2d 136 (1996). A sufficient reason may also exist if appellate counsel or the appellate court fails to properly follow the no-merit procedure. *See* ***Allen***, 328 Wis. 2d 1, ¶64. However, "a defendant must do more than identify an issue of arguable merit

that the court of appeals did not discuss." *See* ***id.***, ¶83. He must do something to undermine our confidence in the decision, like identifying an issue of "obvious merit." *See* ***id.***

Bouldin believes that two meritorious claims were overlooked in his prior no-merit appeal. He claims he was arrested for armed robbery without a warrant or probable cause, and he complains that a probable cause determination was not made within forty-eight hours of his warrantless arrest. Bouldin claims, as "sufficient reason," that postconviction counsel was ineffective for failing to raise these "meritorious" claims with the circuit court before filing the no-merit notice of appeal and that this court subsequently failed to identify the issues in its independent review. We conclude, however, that the circuit court properly denied Bouldin's motion.

For one thing, Bouldin does not identify "a reason why the failure of postconviction counsel to bring a postconviction motion prevented him from raising the issue in response to the no-merit report." ***Id.***, ¶87. Bouldin raised at least four issues in his response to counsel's no-merit report; he does not tell us why the two issues he now identifies were not among them.[2]

Moreover, Bouldin appears to acknowledge that postconviction counsel would have had to frame the issues as claims of ineffective assistance of trial counsel. But in order for postconviction counsel's failure to raise those issues to constitute a sufficient reason for Bouldin not raising them, he would have to show that trial counsel actually was ineffective. *See* ***State v.***

[2] Bouldin asserts that he did not receive a complete copy of the record, as counsel was required to provide under WIS. STAT. RULE 809.32(1)(d), until April 26, 2013, well after the no-merit report and response were filed. However, this case had been remanded to resolve a factual dispute between Bouldin and appellate counsel over the scope of that record, and the circuit court on remand ultimately determined that counsel had provided Bouldin with copies of everything that counsel had to turn over. Bouldin was then given an opportunity to file a supplemental response, which he did on May 20, 2013.

Ziebart, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. However, Bouldin has not developed any argument on appeal regarding the substance of his "meritorious" issues.[3] We do not consider undeveloped arguments.[4] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

In short, Bouldin has not shown a sufficient reason for his failure to raise the arrest and probable cause issues during his prior no-merit appeal. The circuit court appropriately applied the procedural bar. *See* ***Lo***, 264 Wis. 2d 1, ¶14 (application of a procedural bar is a question of law we review *de novo*).

IT IS ORDERED that the order is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals

[3] Bouldin asks this court to take judicial notice of the allegations and arguments in his postconviction and reconsideration motions and to accept them "as appellant's complete argument raised hereto in this brief." Arguments on appeal may not be incorporated by reference to other material. *See* ***Bank of America NA v. Neis***, 2013 WI App 89, ¶11 n.8, 349 Wis. 2d 461, 835 N.W.2d 527. Thus, to the extent Bouldin may have made arguments in the motions that he has not expressly made on appeal, we will not consider them.

[4] In any event, Bouldin's issues do not appear meritorious. The record indicates that although police did not have a warrant to arrest Bouldin on suspicion of armed robbery, there were two other active warrants on which he was arrested. Because this was not a warrantless arrest, there was no need for a probable cause determination within forty-eight hours. *See* ***State v. Golden***, 185 Wis. 2d 763, 768, 519 N.W.2d 659 (Ct. App. 1994) (citing ***County of Riverside v. McLaughlin***, 500 U.S. 44, 55-58 (1991)). Even if a ***Riverside*** violation did occur, the remedy is typically suppression of evidence obtained from the violation; dismissal is not required unless the State's delay was intentional and hampered preparation of a defense. *See* ***Golden***, 185 Wis. 2d at 769. As noted, Bouldin develops no arguments on the actual merits of his claims.