COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1109 **Cir. Ct. No. 2000CF4072**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY L. RUNKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Timothy L. Runke appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 motion (2003-04).[1] Runke claims that: (1) the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

trial court erred in accepting his guilty plea; (2) his trial counsel was ineffective in advising him to plead guilty; (3) the court had not advised him that it was not bound to accept the plea terms and that trial counsel should have objected when the trial court did not provide that warning; and (4) postconviction counsel was ineffective for failing to raise the first two issues. Because Runke's claims are barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 179, 517 N.W.2d 157 (1994), we affirm.

BACKGROUND

¶2 Runke was originally charged with first-degree intentional homicide in the shooting death of James Wright. Runke entered into a plea agreement by which the single homicide charge was amended to the three lesser offenses of second-degree reckless homicide by use of a dangerous weapon, second-degree reckless injury by use of a dangerous weapon, and first-degree recklessly endangering safety.[2] The State agreed to recommend a total of thirty years' imprisonment. The trial court ultimately sentenced Runke to a total of twenty-seven years.

¶3 Runke filed a notice of appeal and postconviction counsel filed a no-merit report. The issue raised in the no-merit report was whether Runke knowingly, intelligently, and voluntarily entered his pleas. Runke filed a response to the report arguing that there would be merit to him challenging the charges as multiplicitous. This court affirmed Runke's judgment of conviction, after independently reviewing the record and concluding that the plea hearing satisfied

[2] All parties agreed to waive any postconviction or appellate challenge to the amended charges on the grounds of multiplicity.

WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 267-72, 389 N.W.2d 12 (1986), that Runke expressly waived the multiplicity issue as a part of the plea agreement, *see* ***State v. Hubbard***, 206 Wis. 2d 651, 655-57, 558 N.W.2d 126 (Ct. App. 1996), and that Runke knowingly, intelligently, and voluntarily entered his pleas. *See* ***State of Wisconsin v. Timothy L. Runke***, No. 02-1537-CRNM, unpublished slip op. (Wis. Ct. App. April 23, 2003).

¶4 In 2004, Runke moved, *pro se*, to "relieve all judgments and orders." He argued that the trial court violated WIS. STAT. § 971.08 by accepting the guilty plea without making a factual determination that he committed the crimes to which he pled guilty. The trial court denied the motion on the basis that it was procedurally barred by ***Escalona-Naranjo***. Runke's motion for reconsideration of this decision was also denied.

¶5 In April 2005, Runke filed a motion, *pro se*, pursuant to WIS. STAT. § 974.06, asserting that the trial court failed to inform him that it was not obligated to accept the plea agreement. He based his claim on ***State v. Hampton***, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14. Runke further alleged that his trial counsel was ineffective for advising him to plead guilty and for not objecting to the trial court's failure to so advise. His motion also claimed that postconviction counsel provided ineffective assistance for failing to raise these issues now asserted.

¶6 The trial court summarily denied Runke's motion on two grounds. First, Runke's motion was procedurally barred by ***Escalona-Naranjo***. Second, ***Hampton*** did not control Runke's case because it was decided after Runke's appeal was completed and it does not apply retroactively. Runke now appeals from the trial court's order.

DISCUSSION

¶7 Runke raises three issues in this case, all related to his claim that the trial court failed to inform him during the plea hearing that it was not obligated to accept the plea agreement. These issues could have been, but were not, raised in Runke's direct no-merit appeal. Accordingly, they are procedurally barred.

¶8 Runke, like all criminal defendants, is not entitled to pursue an endless succession of postconviction remedies:

> We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185. Rather, all claims must be raised in the initial appeal or postconviction motion. Due process requires only that a defendant be afforded "a single appeal of that conviction and a single opportunity to raise claims of error …." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). A defendant may avoid the procedural bar if he or she provides a sufficient reason for the failure to raise the issues in the original appeal.

¶9 Here, Runke's original appeal included a no-merit report that discussed whether his plea was knowingly, intelligently, and voluntarily entered. He filed a response to the no-merit report. Neither the no-merit report, nor his response, raised the issues he asserts in this appeal. A no-merit report is "an appeal" for purposes of the ***Escalona-Naranjo*** procedural bar. *See* ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. Because Runke failed to raise this issue in his no-merit report or response, he is procedurally

barred from raising it in the subsequent postconviction motion, which formed the basis for this appeal. In addition, Runke failed to raise this issue when he filed his 2004 *pro se* postconviction motion.

¶10 Runke argues that sufficient reasons exist to overcome the procedural bar in this case—namely, that he received ineffective assistance of postconviction counsel. We agree with Runke that ineffective assistance of postconviction counsel may constitute a sufficient reason for not raising a claim on a direct appeal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). Nonetheless, his assertion that postconviction counsel provided ineffective assistance is deficient and therefore cannot serve to overcome the ***Escalona-Naranjo*** procedural bar.

¶11 In order to succeed on an ineffective assistance claim, Runke must establish that counsel's performance constituted deficient conduct, and that such conduct prejudiced the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697. In ***Hill v. Lockhart***, 474 U.S. 52 (1985), the United States Supreme Court explained the standard applicable to establishing prejudice when the case involved a guilty plea. The Court stated that the prejudice test

> focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Id. at 59. Thus, in order to establish that postconviction counsel was ineffective for failing to raise the issues he asserts here, Runke would have had to allege that

he would not have pled guilty if the trial court would have advised him that it was not bound by the plea agreement. He did not. Moreover, Runke cannot establish he was prejudiced as a result of either trial counsel's or postconviction counsel's conduct because the trial court imposed a lesser sentence than that which the State agreed to recommend.

¶12 Runke also argues that a sufficient reason exists for his failure to raise the issue sooner because the legal basis for this claim did not exist until after his no-merit appeal was completed. We reject this claim. The Wisconsin Supreme Court did not announce a new rule in ***Hampton***, but rather made explicit the requisite that a trial court inform a defendant pleading guilty that it is not obligated to accept the plea agreement. ***Hampton***, 274 Wis. 2d 379, ¶¶2, 26-38. Accordingly, the basis for Runke's claim existed before his direct appeal efforts.

¶13 We are also not persuaded by Runke's attempt to rely on ***State v. Howard***, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), *overruled by* ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765, for this proposition. ***Howard*** is distinguishable from the instant case because in ***Howard***, the issue related to "a new substantive law." *See* ***id.*** at 287.

¶14 We further reject Runke's argument that his claim should not be barred because his 2004 *pro se* postconviction motion was not appealed to this court. His failure to pursue further appellate relief from the trial court's decision in that matter does not alter our analysis.

¶15 Finally, Runke argues that the trial court's error somehow invalidates his conviction. We disagree. Even if Runke were successful on the merits of his argument, the remedy would not be reversal of his conviction. Rather, he would be afforded an evidentiary hearing at which the burden would

shift to the State to prove that his plea was nonetheless knowing, intelligent, and voluntary. *See* ***Hampton***, 274 Wis. 2d 379, ¶46.

¶16 Based on the foregoing, we conclude Runke has not established sufficient reason for failing to raise this issue in his original appeal. Accordingly, his claims are procedurally barred.

By the Court.—Order affirmed.

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