COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP301 **Cir. Ct. No. 1996CF964623**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES D. TOWNS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. James D. Towns appeals *pro se* from an order denying his postconviction motion brought under WIS. STAT. § 974.06 (2007-08).[1]

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

The circuit court concluded 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 agree and affirm.

BACKGROUND

¶2 In 1996, Towns and several accomplices participated in the armed burglary of a residence. According to the criminal complaint, Towns shot and killed one of the residents who was fleeing from the scene. The State filed an information charging Towns with first-degree reckless homicide and armed burglary.

¶3 Towns pled guilty to armed burglary. He contested the charge of first-degree reckless homicide, but he waived a jury trial in favor of a trial to the court. Towns also stipulated to the truth of the allegations in the criminal complaint and to a number of other facts and exhibits. Towns confirmed his understanding that the sole issue would be whether he was guilty of first-degree reckless homicide or second-degree reckless homicide. After the court accepted Towns's stipulations, the matter proceeded immediately to trial. Towns was the sole witness. The circuit court found Towns guilty of first-degree reckless homicide.

¶4 Towns's appellate counsel filed a no-merit report in this court. Towns did not file a response. We accepted the no-merit report and summarily affirmed Towns's convictions. *See* ***State v. Towns***, No. 1997AP2081-CRNM, unpublished slip op. (Wis. Ct. App. Dec. 8, 1998) (***Towns I***).

¶5 Ten years later, Towns filed the postconviction motion underlying this appeal. Towns asserted that his trial counsel was ineffective and that his postconviction counsel failed to raise that claim and therefore was ineffective in turn. Towns also asserted that the circuit court violated his due process rights when it accepted his stipulations and his waiver of the right to a jury trial. Towns demanded a new trial on the charge of first-degree reckless homicide. The circuit court rejected Towns's postconviction claims as procedurally barred, and Towns appeals.

DISCUSSION

¶6 "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." ***Escalona-Naranjo***, 185 Wis. 2d at 185. Thus, claims that could have been raised in a direct appeal or in an original postconviction motion are procedurally barred in later litigation unless the prisoner offers a sufficient reason for failing to raise the issues earlier. ***Id.*** at 181-82.

¶7 The bar to serial litigation also applies when the direct appeal was conducted pursuant to the no-merit procedures of WIS. STAT. RULE 809.32. *See* ***Tillman***, 281 Wis. 2d 157, ¶¶19-20. A defendant may not raise issues that could have been raised in the no-merit proceeding if the no-merit procedures were followed and the court has sufficient confidence in the outcome of the prior proceeding to warrant application of the procedural bar under the particular circumstances of the case. ***Id.***, ¶20. Whether an appeal is procedurally barred by a prior no-merit proceeding is a question of law that we review *de novo*. ***Id.***, ¶14.

¶8 Towns has not demonstrated any procedural inadequacy in his no-merit appeal. Our discussion in ***Towns I*** reflects that the no-merit review

included a full and thorough examination of the record. We analyzed the issues that counsel raised in the no-merit report, and we also discussed issues that counsel did not examine. We explained why none of the issues provided any basis for further appellate proceedings. Our summary affirmance of Towns's convictions thus "carries a sufficient degree of confidence warranting the application of the procedural bar." *See* ***Tillman***, 281 Wis. 2d 157, ¶20.

¶9 Because Towns's no-merit appeal warrants confidence in the outcome, Towns must demonstrate that he had a "sufficient reason" for failing to raise his current claims earlier. *See* ***id.***, ¶19. In an effort to meet that burden, Towns points to a psychologist's report that he filed with his postconviction motion. The report memorializes the results of a psychological assessment conducted in 1993 when Towns was fifteen years old. Relying on the report, Towns asserts that he "suffers from mental health issues and has a learning disability." In Towns's view, the report provides a sufficient reason to permit him to pursue further postconviction litigation. We disagree.

¶10 The psychologist's report reflects that Towns carries a diagnosis of "impulse control disorder." The psychologist further concluded that Towns has "a learning disability problem, but it is moderate only." The report also reflects that Towns's intelligence classification is "bright normal." The report provides no basis for concluding that Towns could not submit his current claims during the no-merit proceeding.

¶11 Towns next asserts that he has a sufficient reason to pursue his current claims pursuant to ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893. In ***Fortier***, appellate counsel and this court failed to notice during the no-merit proceeding that the record on appeal supported a meritorious claim.

Id., ¶27. Under those circumstances, we concluded that the defendant was not prohibited from raising the claim in a later postconviction motion. ***Id.*** Towns's current claims are not supported by the record, and this case is therefore nothing like ***Fortier***.

¶12 Towns's first substantive claim is that his trial counsel performed ineffectively because counsel waived Towns's right to a jury trial. The record does not support that claim. Rather, the record shows that Towns personally waived his right to a jury trial.

¶13 Pursuant to WIS. STAT. § 972.02, criminal matters are tried by a jury unless the defendant waives the jury in writing or by statements in open court. "'[T]he waiver must be 'an intentional relinquishment or abandonment of a known right or privilege.'" ***State v. Resio***, 148 Wis. 2d 687, 694, 436 N.W.2d 603 (1989) (citations and one set of quotation marks omitted).

¶14 In this case, both the circuit court and the State extensively examined Towns before the court accepted his jury waiver. Towns personally responded to the court's direct inquiry and confirmed that he wanted to waive his right to a jury trial. *See* ***State v. Livingston***, 159 Wis. 2d 561, 569, 464 N.W.2d 839 (1991) (defendant must personally waive right to jury trial). The court explained to Towns that he had the right to a jury's determination of his guilt or innocence, and that all twelve jurors would have to agree before he could be convicted. *See* ***Resio***, 148 Wis. 2d at 696-97 (court must advise defendant of unanimity requirement). Towns stated that he understood.

¶15 Towns also personally confirmed his understanding that if he waived the right to a jury trial, the circuit court alone would decide the question of his guilt, and that the only issue would be whether Towns was guilty of first-degree

reckless homicide or second-degree reckless homicide. Towns stated that no one had made any promises to induce him to give up his right to a jury trial and that he had not been threatened. In sum, the record reflects that Towns waived his right to a jury trial only after a thorough colloquy established his knowing and intentional abandonment of the privilege.[2] *See* ***id.*** at 694. This court did not overlook an arguably meritorious challenge to the jury waiver.[3]

¶16 Towns also contends that his trial counsel performed ineffectively by allowing him to enter into stipulations and give testimony that "amount[ed] to a virtual guilty plea [to first-degree reckless homicide] without a plea bargain. It was trickery." Relatedly, he contends that the circuit court improperly accepted his stipulations in violation of his due process rights because his stipulations "literally meant he was pleading guilty to first-degree reckless homicide." He asserts that this court improperly conducted its review of the trial proceedings because we overlooked these alleged errors.

[2] Under current law, a personal colloquy with the defendant must accompany a jury waiver. *See* ***State v. Anderson***, 2002 WI 7, ¶¶23-24, 249 Wis. 2d 586, 638 N.W.2d 301. ***Anderson***, however, does not govern this case. The supreme court decided ***Anderson*** in 2002, long after this court released its decision in 1998 affirming Towns's conviction. "[A] new rule of criminal procedure generally cannot be applied retroactively to cases that were final before the rule's issuance." ***State v. Lagundoye***, 2004 WI 4, ¶13, 268 Wis. 2d 77, 674 N.W.2d 526. This principle applies "in all cases involving new rules of constitutional criminal procedure on collateral review pursuant to WIS. STAT. § 974.06." ***Lagundoye***, 268 Wis. 2d. ¶14. Nonetheless, we note that the jury waiver in this case included a personal colloquy.

[3] We do not separately address Towns's assertions that his trial counsel "knew that [Towns] had psychological problems and that his academic level was equal to that of a 4th or 5th grader." Towns bases these contentions on the 1993 psychological report, and he suggests that the report serves to undermine the voluntariness of his jury waiver. Towns does not demonstrate that the 1993 report reflected his education level or his mental health status in 1996. Indeed, the record reflects that at the time of the waiver Towns had completed the tenth grade.

¶17 Both first-degree reckless homicide and second-degree reckless homicide require proof that the defendant caused the victim's death by criminally reckless conduct. *See* WIS. STAT. §§ 940.02(1), 940.06; *see also* WIS JI—CRIMINAL 1022. First-degree reckless homicide requires proof of the additional element that the defendant acted under circumstances that "show utter disregard for human life."[4] *See* § 940.02(1); *see also* WIS JI—CRIMINAL 1022**.** A fact-finder may consider whether to acquit a defendant of first-degree reckless homicide and instead convict the defendant of second-degree reckless homicide when "there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." *See* ***State v. Kramar***, 149 Wis. 2d 767, 792, 440 N.W.2d 317 (1989). In this case, Towns testified at trial in an effort to persuade the circuit court to find him guilty of only the lesser offense, but he now believes that a fact-finder cannot consider a defendant's testimony in support of a lesser-included homicide offense "unless the defendant produces other supporting evidence." Towns therefore argues that his trial counsel performed ineffectively by failing to present any probative evidence in support of Towns's defense. Towns bases his argument on ***State v. Sarabia***, 118 Wis. 2d 655, 348 N.W.2d 527 (1984). Towns misunderstands ***Sarabia***.

¶18 ***Sarabia*** discusses the special circumstances that arise when "the defendant presents wholly exculpatory testimony as to the charged offense but requests a lesser included offense instruction which is directly contrary to the defendant's version of the facts." ***Id.*** at 663. The court stated:

[4] The elements of first-degree reckless homicide pursuant to WIS. STAT. § 940.02(1), and the elements of second-degree reckless homicide pursuant to WIS. STAT. § 940.06, are the same today as they were at the time of Towns's trial. *Compare* WIS. STAT. §§ 940.02(1), 940.06 (1995-96), *with* WIS. STAT. §§ 940.02(1), 940.06 (2007-08).

> [I]t would appear to be inconsistent for the defendant to argue that he did not commit the act which forms the basis for the crime charged, but then to claim that he is entitled to an instruction on a lesser offense which could only be found had the defendant done the underlying act.

Id. ***Sarabia*** determined that when a defendant offers wholly exculpatory testimony and also requests a lesser-included offense instruction, such an instruction is proper if some evidence in the record other than the defendant's exculpatory testimony would support an acquittal on the greater offense and a conviction on the lesser crime. ***Id.***

¶19 Towns's trial strategy did not give rise to the special circumstances that concerned the ***Sarabia*** court because Towns's trial testimony was not "wholly exculpatory." *See* ***id.*** To the contrary, Towns admitted the underlying act that formed the basis for the crime charged, namely, firing a deadly shot at the victim. He testified that during the burglary he looked out of a window and saw one of the occupants of the residence running away. According to Towns's trial testimony, he drew his head back from the window and fired a shot in the direction of the victim without looking where he was shooting. He testified that he merely intended to frighten the victim and that he fired the shot with his left hand despite being right-handed. He explained that he did not go to the victim's aid because he thought that he had only shot the victim "in the butt or something." He asked the court to believe his testimony and to conclude that the circumstances did not show the "utter disregard for human life" required for a first-degree reckless homicide conviction. *See* WIS. STAT. § 940.02(1); WIS JI—CRIMINAL 1022. Thus, the record reflects that Towns's trial counsel assisted Towns in offering evidence to support an acquittal on the greater charge and a conviction on the lesser charge.

¶20 The circuit court simply did not believe Towns's trial testimony and concluded that Towns's earlier statement to the police was "much more credible." Based on that earlier statement, the circuit court found that Towns "put his head out the window and saw [the victim] running away and he fired." Therefore, the circuit court found Towns guilty of first-degree reckless homicide.

¶21 In ***Towns I***, this court correctly concluded that Towns's trial afforded him the opportunity for an acquittal on the more serious homicide charge and a conviction on the lesser-included charge. We explained that "the circuit court could have believed Towns's testimony that might have warranted a reduction in the charge to second-degree reckless homicide." ***Id.***, No. 1997AP2081-CRNM, unpublished slip op. at 3. Towns fails to demonstrate that this court overlooked any error in the conduct of the trial.

¶22 Nothing in Towns's submission demonstrates either that this court overlooked arguably meritorious claims during the no-merit proceeding, or that Towns had any other sufficient reason for failing to raise all of his grounds for relief during that appeal. The circuit court therefore correctly applied a procedural bar to prevent Towns from pursuing his postconviction motion.

By the Court.—Order affirmed.

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