

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 27, 2010**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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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. 2009AP1060**

**Cir. Ct. No. 2006CF6121**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROY K. COLLINS,**

**DEFENDANT-APPELLANT.**

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

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Roy K. Collins appeals from an order summarily denying his WIS. STAT. § 974.06 (2007-08)<sup>1</sup> postconviction motion, which he filed after we affirmed his conviction in his no-merit appeal. We conclude that Collins's postconviction motion is procedurally barred because Collins fails to allege a sufficient reason for not previously raising issues or for renewing previously decided issues, as required by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) and *State v. Tillman*, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574. Therefore, we affirm.

## BACKGROUND

¶2 Collins, along with two co-actors, committed a robbery-homicide in which Jermaine Page was robbed and Ezra Coleman was shot and killed. Collins fled to Tennessee but was ultimately apprehended. Pursuant to a plea agreement, Collins pled guilty to one count of felony murder as a party to the crime, and one count of being a felon in possession of a weapon was dismissed. He was given a bifurcated sentence of thirty years, comprised of twenty-one years of initial confinement and nine years of extended supervision.

¶3 Following his conviction and sentencing, Collins sought a direct appeal and was appointed postconviction counsel. Pursuant to WIS. STAT. § 809.32, postconviction counsel filed a notice of no-merit appeal and subsequently filed a no-merit report on Collins's behalf. Postconviction counsel identified two issues that might arguably support an appeal but subsequently concluded that the claims lacked merit and filed a no-merit report to that effect.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

The identified issues were: (1) whether the plea was entered knowingly, voluntarily and intelligently; and (2) whether the trial court erroneously exercised its sentencing discretion. Collins filed a response to the no-merit report, raising an additional issue: whether the plea agreement was breached at sentencing.<sup>2</sup> Postconviction counsel then filed a supplemental no-merit report discussing the alleged breach of the plea agreement. This court affirmed Collins's conviction, citing our agreement with postconviction counsel's description and analysis of the issues and independently concluding that pursuing those issues would lack arguable merit. *See State v. Collins*, No. 2008AP157-CRNM, unpublished slip op. (WI App Sept. 19, 2008). On January 13, 2009, the Wisconsin Supreme Court denied Collins's petition for review.

¶4 In March 2009, Collins filed the *pro se* motion for postconviction relief that is the subject of this appeal. The motion sought relief on grounds that postconviction counsel was ineffective for not arguing that: (1) the guilty plea was not knowingly, voluntarily and intelligently entered; (2) the trial court erroneously exercised its sentencing discretion; (3) there was insufficient evidence to sustain Collins's conviction; and (4) trial counsel was ineffective because he failed to file and pursue suppression motions, seek relevant discovery material and seek dismissal of the criminal complaint. The circuit court denied the motion on grounds that it was procedurally barred under *Escalona* and *Tillman*. *See Escalona*, 185 Wis. 2d at 181-82 (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent defendant

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<sup>2</sup> Collins also briefly responded to the no-merit report's discussion of the severity of his sentence, asserting that the issue was moot because the trial court should first address the merits of Collins's assertion that the State breached the plea agreement.

articulating a sufficient reason for failing to raise the claims in the earlier proceeding); *Tillman*, 281 Wis. 2d 157, ¶19 (no-merit procedure precludes successive postconviction motions raising the same or other issues absent the defendant demonstrating a sufficient reason for failing to raise those issues through counsel or in a no-merit response). This appeal follows.

## DISCUSSION

¶5 On appeal, Collins presents essentially the same arguments he made in his postconviction motion.<sup>3</sup> At the outset, we reject Collins’s arguments that his guilty plea was not knowingly, voluntarily and intelligently entered and that the trial court erroneously exercised its sentencing discretion. Those two issues were discussed in the no-merit reports and were considered on their merits by this court on direct appeal. Collins cannot relitigate those issues again. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (“A motion under [WIS. STAT. § 974.06], is not a substitute for a direct appeal. A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.”) (citation omitted).

¶6 The remaining issues (concerning sufficiency of the evidence and trial counsel ineffectiveness) were not raised in the no-merit report, in Collins’s response to the no-merit report or by this court after we conducted our independent review. To overcome the *Escalona* bar to successive postconviction and appellate proceedings, a defendant must articulate a sufficient reason for

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<sup>3</sup> To the extent Collins raises new issues not presented to the trial court, we decline to address them. *See State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed waived).

having failed to raise the issue or issues in the earlier postconviction or appellate proceedings. *Id.*, 185 Wis. 2d at 181-82. The ineffective assistance of postconviction counsel can be a sufficient reason to avoid *Escalona*'s procedural bar. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996).

¶7 Whether *Escalona* bars a postconviction claim is a question of law entitled to independent review. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Before applying that bar in a situation where there has been a prior no-merit decision, this court “must pay close attention to whether the no merit procedures were in fact followed. In addition, the court must consider whether that procedure, even if followed, carries a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case.” *Tillman*, 281 Wis. 2d 157, ¶20 (footnote omitted).

¶8 In *State v. Fortier*, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 709 N.W.2d 893, this court held that when postconviction counsel and a reviewing court miss an issue of potential merit, the *Escalona/Tillman* bar does not apply because the defendant has been deprived of the full examination of the appellate record to which he or she is entitled under WIS. STAT. RULE 809.32. *Fortier* involved a contention supported by the record that the defendant's sentence was illegally raised and neither appellate counsel nor this court had noticed that error. *Id.*, 289 Wis. 2d 179, ¶27. We concluded that Fortier was not barred from raising that issue because the no-merit procedure had not been executed properly. *Id.*

¶9 In this case, Collins asserts that the reason he failed to raise additional issues on direct appeal was postconviction counsel ineffectiveness. However, Collins has not convinced us that either postconviction counsel or this

court missed an issue of potential merit relative to the two new issues Collins raises: sufficiency of the evidence to sustain his conviction and ineffective assistance of trial counsel.

¶10 Collins argues that he had “a very viable [and] meritorious claim of insufficient evidence” and that his postconviction counsel performed deficiently by failing to raise that issue on appeal. He points to evidence that bullets from two different guns were found in the victim and conflicting reports as to whether Collins fired two bullets. We reject Collins’s argument. A valid guilty plea forfeits all nonjurisdictional defects and defenses. *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. Thus, when Collins chose to plead guilty, he forfeited his right to challenge discrepancies in the evidence against him. Moreover, at the plea hearing and at sentencing, Collins admitted that he participated in the robbery that led to the shooting death of Coleman. The fact that Collins may not have been the only defendant to fire shots at Coleman does not negate the evidence supporting Collins’s conviction. Even if he had fired no shots, he would still be culpable for felony-murder as a party to the crime because he directly participated in the robbery that led to the fatal shooting. For these reasons, there was no basis for postconviction counsel to challenge the sufficiency of the evidence.

¶11 Next, Collins argues that postconviction counsel should have alleged that trial counsel was ineffective for failing to file and pursue suppression motions, seek discovery material, and seek dismissal of the criminal complaint. Trial counsel was ineffective only if his performance was deficient and that deficient performance prejudiced Collins’s defense. See *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). To prove deficient performance, it must be shown that trial counsel’s specific “acts or omissions were outside the wide range of

professionally competent assistance.” *Strickland v. Washington*, 466 U.S. 668, 690 (1984). To prove prejudice, it must be proven that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

¶12 Collins argues that his trial counsel failed to file adequate motions to suppress both his statements to police and eyewitness identification statements. However, Collins does not explain in his motion why his statements or the eyewitness statements should have been suppressed or on what merits the suppression motions would have prevailed. Thus, he has failed to establish that he was prejudiced by trial counsel’s alleged failure to file additional or more sufficient motions. *See id.*

¶13 Next, Collins claims that his trial counsel was ineffective because he failed to seek relevant discovery materials. In his postconviction motion, Collins alleged that trial counsel did not seek out a ballistics report that indicated Collins was not the sole shooter. However, Collins’s motion then proceeded to acknowledge that the ballistics report was provided to trial counsel on March 8, 2007. Collins asserted that trial counsel should have sought “additional time” (presumably to consider the report) instead of indicating that Collins would proceed with the guilty plea. We reject Collins’s arguments. The record demonstrates that both Collins and trial counsel were aware of the information in the ballistics report prior to Collins’s guilty plea. In January 2007, Collins was told by officers following his extradition from Tennessee that there was a ballistics test that indicated two different bullets. In March 2007, trial counsel was in possession of the ballistics document that indicated two different caliber bullets were removed from Coleman’s body. Collins’s undisputed knowledge of this

information prior to his guilty plea belies his self-serving assertion that he would not have pled guilty in April 2007 if trial counsel had performed differently. Further, we reject his suggestion that he would not have been found guilty of felony murder if the ballistics information had been made known. As we have explained, it is of no consequence whether Collins was the sole shooter, or a shooter at all, because he was charged as a party to the crime.

¶14 Finally, Collins claims that his trial counsel was ineffective because he failed to seek dismissal of the criminal complaint. Collins points to contradictory evidence given by his co-actor that Collins was the sole shooter. Collins suggests that because the ballistics report seems to contradict a witness's statement, the complaint should be dismissed. However, Collins does not cite to any legal authority supporting that proposition and he has not fully developed his argument. We decline to address it further, *see State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992), except to note that to the extent Collins is again challenging the sufficiency of the evidence against him, he forfeited that argument when he pled guilty.

¶15 For the foregoing reasons, we are unconvinced that either postconviction counsel or this court missed an issue of potential merit relative to the sufficiency of the evidence or trial counsel's performance. We are confident that the no-merit procedures were followed in this case and we have a "sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case." *See Tillman*, 281 Wis. 2d 157, ¶20. Therefore, we affirm the denial of Collins's postconviction motion.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.



