COURT OF APPEALS DECISION DATED AND FILED

May 11, 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. 2009AP2143

Cir. Ct. No. 1990CF902946A

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARCEIA COLEMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Garceia Coleman, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion for a new trial. The circuit

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

court determined that the motion was procedurally barred by ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, because Coleman failed to raise the issues in his motion in response to a prior no-merit report. Coleman contends ***Tillman*** is inapplicable because, in the no-merit process, appellate counsel and this court missed the issues he now raises. Coleman thus believes that, under ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893, he has a valid reason for not raising the issues previously and can escape the procedural bar. We reject Coleman's argument and affirm the circuit court.

¶2 In 1990, Coleman and co-defendant John Balsewicz were charged with and tried jointly on charges of first-degree intentional homicide and robbery, as parties to a crime. A jury convicted the duo in May 1991. Coleman was sentenced to life imprisonment with a parole eligibility date in 2065 for the homicide, with an additional ten years' imprisonment, consecutive, for the robbery. Coleman appealed.

¶3 Counsel filed a thirty-three-page no-merit report in August 1992, to which Coleman responded. Counsel raised multiple issues, including sufficiency of the evidence, while Coleman raised issues that included a complaint of ineffective assistance of trial counsel. We concluded, upon our independent review of the record, that no other issues of arguable merit existed, and we affirmed Coleman's judgment of conviction in December 1993.

¶4 Coleman took no further action until July 2009, when he filed a *pro se* motion for a new trial under WIS. STAT. § 974.06. His essential claim is that trial counsel was ineffective for failing to call four witnesses to testify and postconviction counsel was ineffective for failing to preserve the issue. As noted,

the circuit court rejected the motion as barred by ***Tillman***. The court also noted that the motion was too conclusory to merit relief. Coleman appeals.

¶5 All grounds for relief under WIS. STAT. § 974.06 must be raised in a petitioner's original, supplemental, or amended motion. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Issues that could have been, but were not, raised in an earlier motion may not be raised in a later motion absent a "sufficient" reason for failing to raise them. ***Id.*** An earlier motion includes a prior direct appeal. ***Id.*** at 181. Whether the ***Escalona*** procedural bar applies is a question of law which we review *de novo*. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶6 When a defendant's direct appeal is decided through the no-merit procedure, *see* WIS. STAT. RULE 809.32, that appeal "may serve as a procedural bar to a subsequent postconviction motion and ensuing appeal which raises … issues that could have been previously raised." ***Tillman***, 281 Wis. 2d 157, ¶27. When reviewing whether the ***Escalona*** bar applies following a no-merit appeal, we "must pay close attention to whether the no merit procedures were in fact followed." ***Tillman***, 281 Wis. 2d 157, ¶20. If we discover that appellate counsel and this court missed an issue of arguable merit, the ***Escalona/Tillman*** bar is inapplicable because the defendant has been deprived of a complete examination of the record to which he or she is entitled. ***Fortier***, 289 Wis. 2d 179, ¶27. This deprivation constitutes a "sufficient reason" for failing to raise an issue previously. ***Id.***

¶7 The practical effect of ***Tillman*** and ***Fortier*** is that, in determining whether ***Escalona*** operates as a procedural bar following a no-merit appeal, we must attempt to review the merits of the underlying motion. Here, Coleman's

WIS. STAT. § 974.06 motion alleges a "denial of my constitutional right to representation by competent counsel[,]" the "abridgement of a right guaranteed by the constitution or laws of this state[,]" and:

> Ineffective assistance of postconviction counsel when postconviction counsel failed to assert a claim of ineffective assistance of trial counsel; when he failed to discover/notice that trial counsel failed to investigate or call to trial to testify witness[es] James C. Blank, Detective Dennis Murphy, John H. Balsewicz, Detective Edward Liebrecht, and failed to submit their statements, reports/records as evidence; in a ss. 974.02 motion before the trial court.

¶8 A postconviction motion must set forth material facts that would allow the reviewing court to "meaningfully assess" a defendant's claims. ***State v. Allen***, 2004 WI 106, ¶¶18, 21-22, 274 Wis. 2d 568, 682 N.W.2d 433. Coleman's motion does not identify what information the uncalled witnesses could have or would have testified to or why that testimony would have been important to his case. He thus fails to demonstrate any prejudice from counsel's failure to call these individuals. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶9 Although Coleman attempts to elaborate on his claim in his brief,[2] our review of the postconviction motion is confined to the four corners of the motion. *See* ***State v. Love***, 2005 WI 116, ¶27, 284 Wis. 2d 111, 700 N.W.2d 62;

[2] Coleman uses his brief to raise additional issues not included in the postconviction motion. These include poor cross-examination by trial counsel and deprivation of the presumption of innocence through counsel's attempt to convince the jury to convict on a lesser-included offense. We generally do not consider issues raised for the first time on appeal, ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), and we see no reason to deviate from that rule here.

Allen, 274 Wis. 2d 568, ¶23. Even if we considered Coleman's arguments as contained within the brief, however, his claim of ineffective assistance of trial counsel remains too conclusory. He suggests the witnesses who should have been called would confirm Coleman's "version of facts," but he does not adequately establish what information the witnesses would have testified to, nor does he meaningfully assert what his version of the facts is, other than to say he did not rob the victim.[3] Simply claiming an attorney should have done something differently, without sufficient factual assertions, establishes neither deficient performance nor prejudice.

¶10 Given the conclusory nature of Coleman's postconviction motion, he fails to establish that an issue of arguable merit was overlooked by counsel or this court in the no-merit process, and we are not persuaded that there was any breakdown in the procedure, as cautioned by ***Fortier***. Coleman has thus failed to offer a sufficient reason for failing to previously raise, in response to the no-merit

[3] For instance, Coleman suggests the detectives could have "elaborated on the accounts" of two witnesses, but does not explain what this means or how it would benefit him. It is also beyond the realm of plausibility for Coleman to imply that he would have had any success eliciting any testimony, much less exculpatory testimony, from his co-defendant during their joint trial.

In addition, we observe that Coleman has included in his appendix documents that are not a part of the circuit court record. Coleman may not use the appendix to supplement the record. *See* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

report, the issues he currently raises in his postconviction motion.[4] The circuit court correctly determined the motion is barred by ***Tillman*** and ***Escalona***.[5]

By the Court.—Order affirmed.

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

[4] We note that Coleman did see fit to raise *other* ineffective assistance arguments in his response to the no-merit report.

[5] In his reply brief, Coleman asserts that the State previously conceded that procedural bars did not prevent an appeal by co-defendant Balsewicz following the denial of his *pro se* WIS. STAT. § 974.06 motion. Balsewicz's first appeal following his conviction was not a no-merit and, in any event, the dispositive issue in Balsewicz's *pro se* appeal was related to the circuit court's failure to hold an appropriate competency hearing, an issue not present in Coleman's case. *See* ***State v. Balsewicz***, No. 1999AP0676, unpublished slip op. at 11 (Wis. Ct. App. May 23, 2000). Balsewicz's case is factually and procedurally distinct.