COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3033 **Cir. Ct. No. 2002CF6979**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM EDWARDS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. William Edwards, *pro se*, appeals from orders denying his second WIS. STAT. § 974.06 motion and a motion for reconsideration. Williams asserts the circuit court improperly applied the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), to foreclose his

motion. We agree with the circuit court that Edwards's § 974.06 motion is procedurally barred and, therefore, we affirm the orders.

BACKGROUND

¶2 In 2003, Edwards pled guilty to five counts of armed robbery, while concealing identity, as party to a crime. He was sentenced to thirteen years' initial confinement and ten years' extended supervision on each count, with all five sentences running concurrently. Appellate counsel filed a no-merit report, to which Edwards did not respond. This court summarily affirmed the judgment of conviction on January 31, 2005.

¶3 In September of 2005, Edwards filed a *pro se* WIS. STAT. § 974.06 motion, alleging six bases for relief. The circuit court rejected the motion as barred by both ***Escalona*** and ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, because Edwards could have raised his claims of error in response to the no-merit report. Edwards appealed, and we affirmed. *See* ***State v. Edwards***, No. 2005AP2459, unpublished slip op. (WI App Dec. 5, 2006). Specifically, we noted that the no-merit procedures had been followed and that Edwards "provide[d] no reason as to why he failed to file *any* response to the no-merit report[.]"[1] ***Id.***, ¶¶11–12. Edwards's petition for supreme court review was denied.

¶4 In October of 2009, Edwards filed another *pro se* WIS. STAT. § 974.06 motion, seeking "review on the merits of the issues" therein. The motion

[1] Under WIS. STAT. § 974.06(4), the procedural bar applies unless the defendant has a sufficient reason for failing to raise an issue previously. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 164 (1994).

alleged that trial and postconviction counsel were ineffective for failing to correct the circuit court's reliance on inaccurate information and other errors at sentencing.[2] Attempting to explain why these issues had not been raised on direct appeal, Edwards alleged "ineffectiveness of postconviction or appellate counsel in failing to raise … an issue on the defendant's direct appeal" and counsel's "failure to raise an arguably meritorious issue in a no-merit report[.]" Edwards cited ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681–682, 556 N.W.2d 136, 139 (Ct. App. 1996), and ***State ex rel. Panama v. Hepp***, 2008 WI App 146, 314 Wis. 2d 112, 758 N.W.2d 806 (per curiam).

¶5 The circuit court denied the motion. It explained that while ***Rothering*** acknowledges that ineffective assistance of postconviction counsel in failing to raise an issue may be "sufficient reason" to avoid the ***Escalona*** bar, ***Rothering*** does not recognize the *defendant's* failure to raise an issue as sufficient reason. Thus, because Edwards failed to raise the issues from his 2009 motion either in response to the no-merit report or in his 2005 motion, the 2009 motion was procedurally barred.

¶6 Edwards sought reconsideration, directing the court's attention to the previously cited ***Panama***, which he argued "determined that since trial, postconviction, and appellate counsel failed to preserve, present and argue an issue in the no-merit report, the issues may be raised directly to the circuit court under

[2] These other errors included an alleged violation by the circuit court of Edwards's right to remain silent and an erroneous setting of restitution.

the claim of ineffective assistance[.]" The circuit court rejected Edwards's interpretation of ***Panama*** and denied the motion to reconsider.[3] Edwards appeals.

DISCUSSION

¶7 On appeal, Edwards phrases the issue as: "Can a defendant seek collateral review, if he did not file a response to his no-merit report filed by counsel pursuant to Wis. Stat. § 809.32?" The answer to the question is, generally, "No." Under WIS. STAT. § 974.06(4), a defendant is obligated to raise all claims for relief in his "original, supplemental or amended motion." An "original, supplemental or amended motion" includes the first direct appeal. *See* ***Escalona***, 185 Wis. 2d at 184–185, 517 N.W.2d at 163–164. This bar also applies if the direct appeal was a no-merit appeal. *See* ***Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d at 171–172, 696 N.W.2d at 581.

¶8 ***Tillman*** does not always apply, however: when a "joint breakdown in the process" leads to the no-merit process not being followed, we do not necessarily invoke the ***Tillman*** bar against a subsequent postconviction motion. *See* ***Panama***, 2008 WI App 146, ¶16, 314 Wis. 2d at 120–121, 758 N.W.2d at 810–811; ***State v. Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 191–192, 709 N.W.2d 893, 899.

[3] The issue in ***Panama*** was whether, after ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893, a *habeas corpus* petition pursuant to ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992), was still an available avenue for ineffective-assistance-of-appellate-counsel claims or whether, as the State argued, a WIS. STAT. § 974.06 motion was the sole remedy. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶¶2–3, 314 Wis. 2d 112, 114, 758 N.W.2d 806, 807 (per curiam).

¶9 Edwards fails to establish that the ***Fortier*** exception to ***Tillman*** exists in this case. ***Fortier*** saves a case from ***Tillman*** only if there is a "joint breakdown" in the no-merit procedure. This requires that both appellate counsel and this court miss a potential issue of arguable merit. Edwards's appellate brief does not present any discussion of a failure of the no-merit process.[4] That is, Edwards never identifies any potential issues of arguable merit that this court, or even appellate counsel, failed to identify and pursue. We do not abandon our neutrality to develop a party's arguments, *see* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244–245, 430 N.W.2d 366, 369 (Ct. App. 1988), and issues inadequately briefed may not be considered, ***State v. Pettit***, 171 Wis. 2d 627, 646–647, 492 N.W.2d 633, 642 (Ct. App. 1992). Edwards fails to demonstrate that ***Fortier*** applies, leaving the ***Tillman*** bar intact.

¶10 Even if the ***Fortier*** exception did apply, and the ***Tillman*** bar was not invoked, ***Escalona*** and WIS. STAT. § 974.06 would still bar Edwards's current claims. Discounting the no-merit report and Edwards's failure to respond, the present motion remains procedurally barred because the issues in it could have been raised in the 2005 *pro se* motion. Edwards offers no explanation, much less sufficient explanation, for his failure to include his current issues in his previous quest for relief. "Ineffective assistance" of counsel, as claimed by Edwards, might in some cases explain a defendant's failure to respond to an issue in a no-merit response, or occasionally even explain a failure to file any response at all. Ineffective assistance does not, however, explain Edwards's own failure to

[4] Edwards complains that the circuit court, in reviewing the 2009 motion, failed to inquire whether the no-merit process had been followed. However, this court previously ruled that the correct procedures had been followed. *See supra*, ¶3.

sufficiently raise all grounds for relief in his 2005 motion. For that reason, the 2009 motion is procedurally barred. The circuit court properly denied the motion and reconsideration.[5]

By the Court.—Orders affirmed.

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

[5] The State perceives Edwards to be raising an additional argument—that procedural bars should not apply because he was unaware of the consequences of failing to respond to the no-merit report. To the extent Edwards proffers his ignorance as an explanation for his failure to reply to the no-merit report, it fails for two reasons. First, Edwards does not show that this lack-of-knowledge argument was ever raised in the circuit court. This court ordinarily will not consider issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140, 145 (1980). Second, it is a completely conclusory allegation, unsupported by any evidentiary proof.

Additionally, Edwards appears to blame the clerk of this court for failing to advise him of the perils of not responding to a no-merit report. However, our clerk does not dispense legal advice.