COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP286 **Cir. Ct. No. 2006CF2708**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTIE D. BERRY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Martie D. Berry, *pro se*, appeals an order of the circuit court denying his motion for postconviction relief. Berry contends his trial counsel improperly counseled him regarding a plea offer. We agree with the circuit court that the motion is procedurally barred, so we affirm the order.

BACKGROUND

¶2 On May 26, 2006, the State charged Berry with one count of second-degree sexual assault of an unconscious victim and one count of second-degree sexual assault with the use or threat of force. The complaint alleged that on May 23, 2006, V.G. awoke to find Berry having penis-to-vagina intercourse with her, after which Berry threatened her and forced her to turn over onto her stomach so he could put his finger into her anus.

¶3 The State offered Berry a plea bargain in which, in exchange for his pleas to the two charges, the State would recommend "a lengthy period of prison that is equal in every respect to the gravity and seriousness of the offense." If Berry did not want to enter a plea, the State expected to issue additional charges.

¶4 Berry declined the plea deal. The State was permitted to add another count of second-degree sexual assault with the use or threat of force. The matter proceeded to a jury trial, and the jury convicted Berry on all three counts. The circuit court imposed consecutive sentences totaling forty-five years' initial confinement and fifteen years' extended supervision.

¶5 Berry pursued a direct appeal; his attorney filed a no-merit report to which Berry did not respond. The judgment of conviction was affirmed. *See* ***State v. Berry***, No. 2008AP1182-CRNM, unpublished slip op. & order (Mar. 6, 2009). In November 2012, Berry filed a *pro se* WIS. STAT. § 974.06 (2011-12)[1] postconviction motion, seeking a new trial because of the ineffective assistance of

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

trial counsel. The circuit court denied the motion as 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. Berry appealed but voluntarily dismissed the appeal on July 2, 2013.

¶6 Berry filed his current WIS. STAT. § 974.06 motion on January 14, 2014. He alleged that trial counsel had inadequately advised him of the advantages of the State's plea offer. He also claimed that postconviction counsel was ineffective for failing to claim ineffective trial counsel in a postconviction motion. The circuit court concluded that this motion, like Berry's prior motion, was procedurally barred by ***Escalona*** and ***Tillman***, and it denied the motion without a hearing. Berry appeals.

DISCUSSION

¶7 Whether Berry's motion alleges sufficient facts to entitle him to an evidentiary hearing is a question of law we review *de novo*. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion contains sufficient facts that, if true, show Berry is entitled to relief, the circuit court was required to hold a hearing. *See* ***id.*** If the motion does not raise such facts, if it presents only conclusory allegations, or if the record reveals that Berry is not entitled to relief, then the circuit court's decision to grant or deny a hearing was a discretionary matter. *See* ***id.***

¶8 Further, WIS. STAT. § 974.06(4) requires a prisoner to raise all grounds for postconviction relief in his or her original, supplemental, or amended motion or appeal. *See* ***Escalona***, 185 Wis. 2d at 185-86. Issues that could have been, but were not, raised previously may not be raised in a later motion absent a sufficient reason. *See* ***Tillman***, 281 Wis. 2d 157, ¶1. Although a defendant is not

required to respond to a no-merit report, "a defendant may not raise issues in a subsequent § 974.06 motion that he could have raised in [a] response[.]" ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 786 N.W.2d 124.

¶9 The ***Escalona*** procedural bar is not ironclad; there are certain exceptions. Ineffective assistance of postconviction counsel, for instance, might sometimes constitute a "sufficient reason as to why an issue which could have been raised on a direct appeal was not." *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). A failure to raise an issue in a no-merit report may sometimes constitute ineffective assistance of postconviction counsel. *See* ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶18, 314 Wis. 2d 112, 758 N.W.2d 806.

¶10 Assuming without deciding that ineffective postconviction counsel explains why Berry's poorly-counseled-plea issue was not raised in a no-merit response or counsel's no-merit report, it fails to explain why Berry did not raise the issue himself in his 2012 postconviction motion. To explain his own failure, then, Berry claims that he "lacked any understanding of the legal or constitutional bases for his claim." Berry quotes a portion of ***Escalona*** in which the supreme court wrote that WIS. STAT. § 974.06 "was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later. Rather, the defendant should raise the constitutional issues *of which he ... is aware* as part of the original postconviction proceedings." *See* ***Escalona***, 185 Wis. 2d at 185-86 (emphasis added). However, we do not perceive the supreme court to be endorsing lack of personal knowledge of applicable legal principles as a sufficient reason to explain a defendant's failure to timely raise an issue in postconviction proceedings: it is a well-established maxim that ignorance of the law does not provide a defense. *See*

Putnam v. Time Warner Cable of SE Wis., 2002 WI 108, ¶13 n.4, 255 Wis. 2d 447, 649 N.W.2d 626.

¶11 Further, Berry does not show that his motion adequately demonstrates any ignorance. *See* ***Allen***, 328 Wis. 2d 1, ¶43. He does not claim that his trial attorney[2] failed to convey the proposed plea agreement, just that it is "inconceivable as to how counsel would allow his client to proceed to trial where there's insurmountable evidence to overcome[.]" At the time of the no-merit report and his first postconviction motion, though, Berry clearly had to be aware that he was originally offered the opportunity to face sentencing on two counts of second-degree sexual assault but instead ultimately faced sentencing for three counts because he opted against the plea and went to trial. *See* ***id.***, ¶45 (defendant not entitled to relief because he failed to demonstrate that he was unaware of the factual bases for his claims at the time of his no-merit appeal).

¶12 Consequently, Berry has not shown a sufficient reason for his failure to raise his ineffective-trial-counsel claim regarding plea advice in a no-merit response or in his prior postconviction motion.[3] The circuit court properly deemed

[2] In fact, Berry had two trial attorneys; it is not even clear whether he is claiming one—and, if so, which one—or both were ineffective.

[3] We further note that Berry does not indicate whether or where he alleged that he would have accepted the State's offer. *See* ***Missouri v. Frye***, 132 S. Ct. 1399, 1409 (2012) ("To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.").

Berry also did not file a reply brief, so he did not respond to the State's observation that, at a hearing regarding whether his first trial attorney should withdraw, Berry told the circuit court that he would keep his attorney, "but I'm not giving no plea."

the motion procedurally barred, and properly exercised its discretion in denying a hearing on the motion.

By the Court.—Order affirmed.

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