COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1621 **Cir. Ct. No. 2001CF6368**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DWIGHT JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed*.

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

¶1 PER CURIAM. Dwight D. Jones appeals *pro se* from the circuit court's denial of his WIS. STAT. § 974.06 (2005-06) postconviction motion.[1] We

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

agree with the circuit court that Jones's claims were procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (postconviction claims that could have been raised in prior postconviction or appellate proceedings are barred absent a sufficient reason for failing to raise the claims in the earlier proceeding), and ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574 (the ***Escalona-Naranjo*** procedural bar applies to defendants whose direct appeal was via the no-merit procedure, as long as the no-merit procedures were in fact followed, and the record demonstrates a sufficient degree of confidence in the result). We also conclude that Jones's claims are meritless. We therefore affirm the circuit court's order.

¶2 Jones pled no contest to four counts of taking and driving a motor vehicle without the owner's consent and to one count of theft. The circuit court imposed consecutive sentences on all of the charges. Taken together, Jones was given a minimum of ten years and nine months in initial confinement and a maximum of ten years on extended supervision. Jones's appointed appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32. Jones filed a response to the report. This court, after reviewing the report and Jones's response, and upon independent review of the appellate record, concluded that there were no issues of potential merit apparent from the record. The opinion was issued in November 2003, and Jones did not petition the supreme court for review.

¶3 In 2007, Jones filed the motion that is the subject of this appeal. In his motion, Jones argued that his trial counsel had been ineffective for failing to advise him that "he could and would receive consecutive sentences upon taking the guilty plea." He also argued that the charges against him were unconstitutionally multiplicitous and that the circuit court had erroneously exercised its sentencing discretion by imposing consecutive sentences. He also

claimed that his appellate counsel was ineffective for failing to raise these and other issues in his appeal of right.[2]

¶4 The circuit court denied Jones's motion, holding that his claims of ineffective assistance of counsel and erroneous exercise of sentencing discretion were procedurally barred under ***Escalona-Naranjo***. The circuit court summarily rejected Jones's multiplicity claim because each crime involved a separate act. Finally, the circuit court held that inability to pay restitution while incarcerated did not frustrate the goals of Jones's sentences, which were punishment, deterrence, and community protection. Consequently, it rejected Jones's claim that his inability to pay restitution warranted sentence modification. Jones appeals, arguing that both his trial and appellate counsel were ineffective, that the charges against him were unconstitutionally multiplicitous, and that he was entitled to have his sentences run concurrently.

¶5 Jones argues first that his trial counsel was ineffective for failing to advise him that the circuit court could impose consecutive sentences should he plead guilty, and he further argues that his appellate counsel should have raised the issue in the no-merit report. Jones, however, was certainly aware of this issue at the time of the no-merit appeal, and he could have easily raised this issue in a response to the no-merit report. Even if Jones had raised this claim, however, the argument would have been unsuccessful. This court concluded on the basis of the record in the no-merit appeal that Jones knowingly, intelligently, and voluntarily entered his plea. The record contained a plea questionnaire and waiver-of-rights

[2] Jones also argued in his postconviction motion that his inability to pay restitution while incarcerated was a new factor warranting sentence modification. Jones does not address this issue on appeal, and we therefore will not address it further.

form signed by Jones. By that questionnaire, Jones stated that he understood the circuit court was not bound by a plea agreement and was free to impose "the maximum penalty." His counsel wrote out the maximum penalty for each count. At the plea hearing, the circuit court also questioned Jones regarding the maximum sentence he faced on each count, and Jones stated that he understood. Thus, not only is Jones's contention barred under ***Escalona-Naranjo*** and ***Tillman***, it is meritless on its face.

¶6 Similarly, Jones's claims of unconstitutional multiplicity of the charges is barred because it could have been raised in his response to the no-merit report, but was not. Jones does not articulate any reason, much less a sufficient reason, for his failure. Even so, the claim is meritless on its face because each of the car-theft charges arose out of separate incidents that occurred on different dates and involved different cars. The misdemeanor to which Jones pled guilty involved the theft of a purse, which occurred on the same date as one of the car thefts, but involved a different victim. Each charge required proof of facts that the others did not; the charges are different in fact and in law, and are therefore not multiplicitous. *See* ***Blockburger v. United States***, 284 U.S. 299, 304 (1932).

¶7 Finally, Jones argues that his appellate counsel was ineffective for failing to raise these issues in the no-merit appeal. Because Jones's arguments are meritless, he cannot establish either deficient performance by appellate counsel or prejudice. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

By the Court.—Order affirmed.

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