COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2013

Diane M. Fremgen
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. 2011AP1804 **Cir. Ct. No. 2006CF2026**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CASSANDRA COWSER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Cassandra Cowser, *pro se*, appeals from an order denying her WIS. STAT. § 974.06 (2011-12)[1] postconviction motion without a

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

hearing. The circuit court denied Cowser's motion because it determined that the issues therein had already been litigated or were otherwise procedurally barred. We affirm.

BACKGROUND

¶2 In April 2006, Cowser was charged with one count of first-degree intentional homicide. After she smoked crack cocaine with the victim, he forced her to perform oral sex at knifepoint as payment for the drugs. When he lowered the knife, Cowser grabbed it and stabbed him 170 times. When the victim's body went limp, Cowser panicked even though he was still breathing. She cleaned her hands, and his hands and mouth, with bleach. She also disposed of the knife in a sewer and her bloody clothing elsewhere, then went to work.

¶3 Cowser initially pled not guilty. Her original attorney was replaced; substitute counsel, after meeting Cowser, thought she should be seen by the jail psychiatrist, Dr. Donald Stonefield. Stonefield diagnosed Cowser with post-traumatic stress disorder (PTSD), and she changed her plea from not guilty to not guilty by reason of mental disease or defect (NGI).

¶4 The circuit court appointed Dr. John Pankiewicz to evaluate Cowser. He concurred with the PTSD diagnosis but could not support the NGI plea. Defense counsel then hired another doctor, Laura Campbell, who also diagnosed Cowser with PTSD. Unlike Pankiewicz, Campbell opined that Cowser was unable to appreciate the wrongfulness of her actions at the time of the homicide. According to Cowser's postconviction motion, counsel did not share Campbell's report with Cowser and instead persuaded her to resolve the case with a guilty plea to a reduced charge.

¶5 Cowser pled guilty to one count of second-degree reckless homicide. On August 24, 2007, she was sentenced to the maximum possible sentence of twenty years' initial confinement and ten years' extended supervision. Her appellate counsel filed a no-merit report, to which Cowser responded. We affirmed the judgment of conviction. *See* ***State v. Cowser***, No. 2008AP2779-CRNM, unpublished slip op. & order (WI App Dec. 28, 2009).

¶6 Cowser filed the underlying WIS. STAT. § 974.06 motion in April 2011. She alleged that trial counsel was ineffective in three respects: (1) failing to submit Stonefield's evaluation report to the circuit court; (2) failing to challenge Pankiewicz's report with Campbell's; and (3) advising her to withdraw her NGI plea and plead guilty. The circuit court denied the motion without a hearing. It concluded that Cowser was raising issues already litigated in the no-merit appeal, so those issues could not be revisited. To the extent Cowser was raising new issues, the circuit court concluded they were procedurally barred because Cowser had not sufficiently explained why she had not raised them in her no-merit response. Cowser appeals.

DISCUSSION

¶7 "It is well-settled that a defendant must raise all grounds for relief in his or her original, supplemental or amended motion for postconviction relief." ***State v. Fortier***, 2006 WI App 11, ¶16, 289 Wis. 2d 179, 709 N.W.2d 893 (2005) (citing WIS. STAT. § 974.06 and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994)). Grounds for relief that were "finally adjudicated, waived or not raised in a prior postconviction motion … may not become the basis for a new postconviction motion, unless there is a 'sufficient reason' for the failure to allege or adequately raise the issue in the original motion." ***Fortier***, 289

Wis. 2d 179, ¶16 (citations omitted). The phrase "'original, supplemental, or amended motion'" also encompasses a direct appeal. *See* ***State v. Lo***, 2003 WI 107, ¶32, 264 Wis. 2d 1, 665 N.W.2d 756 (citation omitted).

¶8 The ***Escalona*** procedural bar also applies to no-merit appeals. "[W]hen a defendant's postconviction issues have been addressed by the no merit procedure … the defendant may not thereafter again raise those issues[.]" ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. In addition, "a defendant may not raise issues in a subsequent § 974.06 motion that he [or she] could have raised in response to a no-merit report, absent a 'sufficient reason' for failing to raise the issues earlier in the no-merit appeal." ***State v. Allen***, 2010 WI 89, ¶4, 328 Wis. 2d 1, 786 N.W.2d 124.

¶9 Cowser appears to be arguing that she has sufficient reason for not raising her issues earlier because postconviction counsel did not file a motion alleging ineffective assistance of trial counsel so as to preserve it for appeal. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Cowser thus believes that appellate counsel and this court failed to identify an issue of arguable merit and, thus, the no-merit procedures were not properly followed, constituting "'sufficient reason.'" *See* ***Fortier***, 289 Wis. 2d 179, ¶27 (citation omitted).

¶10 We reject Cowser's argument for two reasons. First, she has already raised her issues in the prior no-merit response. *See* ***Cowser***, No. 2008AP2779-CRNM, unpublished slip op. & order at 3 ("In her response, Cowser identifies the following concerns: (1) the trial court's reliance on the unchallenged court-

appointed competency evaluation … and (5) trial counsel's allegedly deficient performance.").[2] We addressed the issues she raised. *See* ***id.*** at 3, 6-7. Thus, with regard to her claims about the omission of Stonefield's report and the failure to use Campbell's report to challenge Pankiewicz's, those issues were already litigated and will not be revisited, even under the guise of ineffective assistance. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

¶11 Second, to the extent that Cowser's additional claim—that trial counsel was ineffective for encouraging her guilty plea—was not raised in the no-merit response, Cowser has not shown sufficient reason for failing to make this challenge previously. *See* ***Tillman***, 281 Wis. 2d 157, ¶25 (Defendant "failed to present a sufficient reason why his current 'spin' on this already adjudicated issue was not previously raised.").

¶12 Though Cowser suggests the fault is ours, "a defendant must do more than identify an issue of arguable merit that the court of appeals did not discuss." ***Allen***, 328 Wis. 2d 1, ¶83. "To satisfy the 'sufficient reason' standard, the defendant must do something to undermine our confidence in the court's decision, perhaps by identifying an issue of such obvious merit that it was an error by the court not to discuss it." ***Id.***

[2] Although the no-merit report refers to competency evaluations, it is clear that the evaluations were Cowser's NGI evaluations. At no point was Cowser's competency challenged or otherwise at issue.

¶13 Nothing in Cowser's motion suggests that there was "obvious merit" to a claim that trial counsel was ineffective for persuading her to plead guilty to a reduced charge. Cowser contends that if she had known of Stonefield's and Campbell's reports, she would not have entered a guilty plea. However, Cowser had to have known something about Stonefield's report, as that was the impetus for the NGI plea. Cowser also admits that trial counsel had explained why Stonefield would not be a good witness.

¶14 Further, Campbell's report does *not* unequivocally support an NGI plea as Cowser appears to believe. Rather, Campbell concluded, in relevant part:

> Ms. Cowser ordinarily would recognize the criminality and/or wrongfulness of stabbing someone. On the day of the instant offense, she was operating from a framework of defending herself against a sexual attack. Her frantic attempts at self-preservation, combined with her chronic, severe PTSD and *recent binge in using large quantities of crack cocaine all colluded together*. This resulted in her inability to recognize the wrongfulness of her action[.]

(Emphasis added.) Campbell's report thus suggests that Cowser's drug use played a role in the homicide, but there is nothing to suggest that Cowser's voluntary intoxication would constitute a valid defense in this case. *See* WIS. STAT. § 939.42. Accordingly, there is nothing obviously meritorious or even arguably meritorious about a claim that defense counsel was ineffective for encouraging a guilty plea to a reduced charge instead of proceeding to trial on a first-degree intentional homicide charge with questionable support for an NGI defense.

¶15 Cowser's current issues either were, or should have been, raised in her no-merit response. To the extent the issues were raised, they were addressed by the no-merit opinion. *See* ***Cowser***, No. 2008AP2779-CRNM at 3, 6-7. To the extent the issues were not raised, Cowser has failed to adequately explain why

they were not. Nothing in Cowser's motion causes us to question whether no-merit procedures were properly followed or to undermine our confidence in the no-merit process. *See* ***Allen***, 328 Wis. 2d 1, ¶62. The circuit court properly denied the motion.

By the Court.—Order affirmed.

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