COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1445 **Cir. Ct. No. 2001CF1816**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RODERICK HARRIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Roderick Harris, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 postconviction motion. Because Harris did not demonstrate a sufficient reason for failing to raise his claims in response to the no-merit report filed in the appeal from his judgment of conviction, we affirm.

BACKGROUND

¶2 In 2001, Harris pled guilty to four counts of armed robbery with threat or use of force and entered ***Alford***[1] pleas to two additional counts. Following Harris's conviction, a no-merit appeal was filed. Harris did not file a response. After independently reviewing the record, we summarily affirmed the judgment. *See* ***State v. Harris***, No. 2002AP2070-CRNM, unpublished op. and order (WI App Jan. 8, 2003).

¶3 In 2008, Harris filed a petition in the circuit court seeking a determination of eligibility for the earned release program. The circuit court denied the petition.

¶4 In 2009, Harris filed a petition for a writ of *coram nobis* based on ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, challenging the circuit court's imposition of a DNA surcharge. The circuit court construed Harris's filing as a motion to vacate the DNA surcharge and denied it.

¶5 In 2012, Harris moved for postconviction relief under WIS. STAT. § 974.06, alleging that his trial lawyer gave him constitutionally deficient representation in a number of ways and that the criminal complaint was fundamentally defective. The circuit court denied Harris's motion without a hearing, explaining that Harris had not set forth any reason why he failed to raise the issues in response to the no-merit report that was filed.[2]

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[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[2] In addition, the circuit court referenced Harris's filing of a petition for a writ of *coram nobis* and concluded that there was no reason Harris could not have raised the issues in that petition. Because Harris's failure to set forth a sufficient reason for not raising the issues in (continued)

DISCUSSION

¶6 When Harris filed his WIS. STAT. § 974.06 motion, he had already had a no-merit appeal. Thus, he had to establish in his § 974.06 motion that he had sufficient reason for not raising the claims in his prior appeal. *See* ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 171–172, 696 N.W.2d 574, 581 (under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and WIS. STAT. § 974.06(4), a prior no-merit appeal may serve as a procedural bar to a subsequent postconviction motion and ensuing appeal which raise the same issues or other issues that could have been previously raised).

¶7 Whether a defendant offered the circuit court a sufficient reason to avoid the procedural bar of WIS. STAT. § 974.06(4), is a question of law subject to *de novo* review. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 648, 794 N.W.2d 920, 924, *review denied*, 2011 WI 86, 335 Wis. 2d 148, 803 N.W.2d 850. We determine the sufficiency of Harris's reason by examining the four corners of the postconviction motion. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 576, 588, 682 N.W.2d 433, 437, 443 (***Allen II***).

> Whatever reason the defendant offers as a "sufficient reason"—ignorance of the facts or law underlying the claim, an improperly followed no-merit proceeding, or ineffective assistance of counsel—the defendant must allege specific facts that, if proved, would constitute a sufficient reason for failing to raise the issues in a response to a no-merit report. If a defendant fails to do so, the circuit court should summarily deny the motion.

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response to the no-merit report is an adequate basis on which to affirm, we need not address this alternative rationale. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

State v. Allen, 2010 WI 89, ¶91, 328 Wis. 2d 1, 33–34, 786 N.W.2d 124, 139 (***Allen III***).

¶8 Before the rule of ***Escalona-Naranjo*** is applied to a WIS. STAT. § 974.06 motion filed after a no-merit appeal, the court should "consider whether the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar." ***Allen III***, 2010 WI 89, ¶62, 328 Wis. 2d at 26, 786 N.W.2d at 136.

¶9 In his postconviction motion, Harris did not allege that the no-merit procedure was not followed or that the proceedings were faulty, or otherwise provide any excuse for his failure to bring his postconviction claims to the court's attention in previous proceedings. Without such allegations, we assume the process was in fact followed. *See* ***id.***, 2010 WI 89, ¶82, 328 Wis. 2d at 31, 786 N.W.2d at 138.

¶10 Now, for the first time, Harris suggests that he did not understand "what a response was, and what, [or] how he should write a response," that he did not understand his lawyer's no-merit report, and that his lawyer did not respond to his requests for assistance in writing a response. Additionally, Harris argues that the issues he raised in his postconviction motion—on their face—provide a sufficient reason. He further states that "if the issues presented were issues the appellate [lawyer] should have raised but did not in the appeal process, the no[-]merit process was not properly followed and in turn, the issues presented as part of the postconviction motion cannot be barred."

¶11 As the State points out, there are a couple of problems with Harris's approach. First, relating to Harris's claimed confusion about the no-merit process:

> If Harris was confused about the content of the report or his response, he could have queried the court or expressed to it that he was confused by the process. Harris provides no evidence that he was confused at the time of the no-merit proceedings, nor does he explain why it took him almost 10 years to express his claimed confusion.[3]

Second, even if we were look past these perceived deficiencies, the fact remains that Harris needed to articulate these reasons to the circuit court in his motion and provide factual support.

¶12 In ***State v. Balliette***, 2011 WI 79, ¶¶58–59, 336 Wis. 2d 358, 345–346, 805 N.W.2d 334, 383, our supreme court set forth "the theoretical foundation for the specificity required in a [WIS. STAT.] § 974.06 motion, namely, the policy favoring finality, the pleading and proof burdens that have shifted to the defendant in most situations after conviction, and the need to minimize time-consuming postconviction hearings unless there is a clearly articulated justification for them." ***Balliette***, 2011 WI 79, ¶58, 336 Wis. 2d at 345, 805 N.W.2d at 383. The court then reiterated "a practical and specific blueprint for applying this theory: the five 'w's' and one 'h' test, 'that is, who, what, where, when, why, and how. A motion that alleges, *within the four corners of the document itself*, the kind of material factual objectivity we describe … will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim.'" ***Id.***, 2011 WI 79, ¶59, 336 Wis. 2d at 346, 805 N.W.2d at 383 (citation omitted). Harris's motion falls short.[4]

[3] In his reply brief, Harris questions what good it would have done to seek assistance from the court, noting that "the court cannot provide legal advice or direction." While this is true, an inquiry would have put both the court and Harris's lawyer on notice regarding the problem and would have allowed an opportunity to resolve it in a timely fashion.

[4] Harris, citing ***State v. Avery***, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997), *abrogated on other grounds by* ***State v. Armstrong***, 2005 WI 119, ¶162, 283 Wis. 2d 639, 704, (continued)

¶13 Contrary to what Harris seems to intimate on appeal, the circuit court was not required to rework or formulate arguments for him to determine whether he could circumvent the procedural bar of ***Escalona-Naranjo***. Additionally, the circuit court was not obligated to allow him the opportunity to amend his motion.[5] While we recognize the court's obligation to liberally construe a *pro se* litigant's motions, *see* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521–22, 335 N.W.2d 384, 388 (1983), that obligation does not extend to creating an issue or making an argument for a litigant, *see* ***Fowler v. Fowler***, 158 Wis. 2d 508, 519, 463 N.W.2d 370, 373 (Ct. App. 1990) ("The [circuit] court is not an advocate.").

¶14 As a final matter, setting aside whether such a request is proper, we conclude that Harris has not established that he is entitled to a new trial in the interest of justice under WIS. STAT. § 752.35. *Compare* ***State v. Davis***, 2011 WI App 147, ¶35 n.7, 337 Wis. 2d 688, 707 n.7, 808 N.W.2d 130, 140 n.7, *with* ***State v. Allen***, 159 Wis. 2d 53, 55–56, 464 N.W.2d 426, 427 (Ct. App. 1990) (***Allen I***).

¶15 Consequently, Harris's postconviction motion was properly denied.

By the Court.—Order affirmed.

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

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700 N.W.2d 98, 130, urges this court to waive the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We agree with the State that the waiver-waiver situation presented in ***Avery*** is distinguishable.

[5] We note that there is no indication in the record that Harris ever asked for this opportunity.