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DISTRICT IV

March 19, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP392 State of Wisconsin v. Richard H. Redman (L.C. # 2009CF228)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Richard Redman, pro se, appeals a circuit court order that denied Redman's motion for postconviction relief under WIS. STAT. § 974.06 (2013-14).[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In May 2009, Redman was convicted of second-degree sexual assault based on his no-contest plea. The State Public Defender appointed counsel to represent Redman, and counsel pursued a no-merit appeal on Redman's behalf. We identified potential issues and directed counsel to file a response. Counsel then informed us that he had determined that there was an issue of arguable merit to pursue and that Redman wished to pursue it.

Accordingly, we rejected the no-merit report. Counsel filed a motion to modify Redman's sentence to a risk reduction sentence. The circuit court denied the motion, and counsel pursued a second no-merit appeal. We accepted the no-merit report and affirmed the judgment of conviction. We noted that counsel informed us that, after we dismissed the first no-merit appeal, Redman chose not to seek plea withdrawal. We determined that the only remaining issues were those relating to sentencing, and thus we declined to address Redman's discussion of various ways in which his plea may have been flawed. We concluded that any challenge to Redman's sentence would lack arguable merit.

In December 2013, Redman filed the WIS. STAT. § 974.06 motion underlying this appeal. Redman argued that (1) police had illegally arrested him in his residence without a warrant; (2) his statements to police were illegally obtained because they were the product of the illegal arrest, were obtained after Redman invoked his right to counsel, and were involuntary because Redman was intoxicated when he made them; (3) Redman's trial counsel was ineffective by failing to challenge the legality of Redman's arrest and the admissibility of statements Redman made to police, failing to challenge the admission of the victim's recorded statement, and failing to explain the elements of the crime to Redman; (4) Redman's postconviction counsel was ineffective by not raising those issues in postconviction proceedings; and (5) Redman's plea was not knowing, intelligent and voluntary based on defects in the plea colloquy and Redman's lack

of understanding of the information that should have been provided. The circuit court rejected Redman's arguments as procedurally barred.

An issue which could have been raised in a prior postconviction motion or on direct appeal cannot be the basis for a subsequent postconviction motion under WIS. STAT. § 974.06 unless there is a sufficient reason for failing to raise the issue earlier. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). The procedural bar of ***Escalona-Naranjo*** may be applied to a defendant whose direct appeal was a no-merit appeal under WIS. STAT. RULE 809.32, so long as the no-merit procedures were in fact followed and the record supports a sufficient degree of confidence in the result. ***State v. Allen***, 2010 WI 89, ¶62, 328 Wis. 2d 1, 786 N.W.2d 124; ***State v. Tillman***, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574.

Our review of the file in ***State v. Redman***, 2011AP2202-CRNM, unpublished slip op. (WI App Dec. 14, 2012), shows that Redman chose not to pursue plea withdrawal despite being made aware of that option. Additionally, it shows that the no-merit procedures were properly followed and supports our confidence in the outcome of the no-merit appeal.

Counsel's second no-merit report acknowledged the potential issue of a defective plea colloquy, but stated that Redman had chosen not to seek plea withdrawal. Redman responded to counsel's no-merit report, challenging the validity of both his plea and the sentence imposed by the circuit court. Redman asserted that his plea was not knowing, intelligent and voluntary because the circuit court did not advise Redman of the constitutional rights he waived by entering his plea or the effect of the read-in charges. During a telephone conversation with his counsel, Redman expressly stated that he did *not* wish to withdraw his plea, but rather sought

resentencing. Counsel then filed a supplemental no-merit report stating that counsel had discussed with Redman his option to pursue plea withdrawal, and that Redman had informed counsel that he did not wish to seek to withdraw his plea given the risks associated with that course of action. Counsel submitted a supporting affidavit attesting to those facts.

This court then engaged in an independent review of the record and issued a decision explaining that, because Redman had decided not to pursue plea withdrawal, the only remaining issues were those related to sentencing. We determined that a challenge to Redman's sentence would lack arguable merit. Our opinion further indicated that our review of the record disclosed no other potential issues for appeal. *See* ***Allen***, 328 Wis. 2d 1, ¶¶81-83 (noting this court is not required "to specifically identify and reject the nearly infinite number of issues without arguable merit" but rather may discuss only the most "obvious" potential issues, or those specifically identified by counsel or the appellant). Nothing in our current review of the record undermines our confidence in those conclusions. Therefore, under ***Tillman***, it is appropriate to apply the requirements of ***Escalona-Naranjo*** to Redman's current postconviction motion. *See* ***Tillman***, 281 Wis. 2d 157, ¶27, 696 N.W.2d 574 ("[A] prior no[-]merit appeal may serve as a procedural bar to a subsequent postconviction motion and ensuing appeal which raises the same issues or other issues that could have been previously raised.").

Redman argues that the circuit court should have exercised its discretion not to apply the procedural bar. *See* ***Tillman***, 281 Wis. 2d 157, ¶20 (circuit court has discretion whether to apply the procedural bar). He contends that his claims involved constitutional issues that are cognizable under WIS. STAT. § 974.06, and that the circuit court did not adequately explain its decision to apply the procedural bar. We are not persuaded.

First, Redman provides no authority for the proposition that a circuit court need provide a detailed explanation as to why the court decides to apply the procedural bar to successive postconviction motions. In any event, here, the circuit court reviewed the procedural history of this case, including the no-merit proceedings, in determining that Redman's claims are all procedurally barred. The court observed that Redman's claims had either been fully adjudicated or were barred because Redman provided no explanation for why he did not bring those claims earlier. We agree with the circuit court, and conclude that Redman's claims related to the validity of his plea and the assistance of counsel are procedurally barred.[2] *See* ***id.***, ¶27 (no-merit appeal, if properly conducted, serves as a procedural bar to subsequent postconviction motion); ***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.").

[2] Redman also argues on appeal that he was sentenced based on inaccurate information as to the number of his prior convictions. However, that issue was raised for the first time on appeal and thus is not properly before us. Moreover, even if Redman had properly raised that issue in his motion, we would conclude the issue is also procedurally barred. Redman raised the issue of the number of his prior convictions in his no-merit response. Counsel asserted in his supplemental no-merit report that he had investigated the number of Redman's prior convictions and determined that the number of Redman's prior convictions had been accurately represented to the court. We concluded that any challenge to Redman's sentence would lack arguable merit.

Additionally, to the extent that Redman is asserting that ineffective assistance of postconviction counsel is a sufficient reason for his failure to raise his claims earlier, we reject that argument as well. While ineffective assistance of postconviction counsel may constitute a "sufficient reason as to why an issue which could have been raised on a direct appeal was not," ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996), and a failure to raise an issue in a no-merit report may sometimes constitute ineffective assistance of postconviction counsel, ***State ex rel. Panama v. Hepp***, 2008 WI App 146, ¶18, 314 Wis. 2d 112, 758 N.W.2d 806, Redman fails to explain why he did not raise those issues himself in his no-merit response.

Next, Redman argues that reversal is warranted in the interest of justice under WIS. STAT. § 752.35. He relies on the arguments set forth above to assert that there has been a miscarriage of justice. We disagree. We exercise our discretion to reverse in the interest of justice only in extraordinary cases, and Redman has not convinced us that such extraordinary circumstances exist here.

Finally, Redman argues that the circuit court failed to explain why it did not appoint counsel for Redman under WIS. STAT. § 974.06(3)(b). Under § 974.06(3)(b): "If it appears that counsel is necessary and if the defendant claims or appears to be indigent, [the court shall] refer the person to the state public defender for an indigency determination and appointment of counsel under ch. 977." Here, the circuit court's decision made clear that it determined that Redman's claims were procedurally barred, and thus counsel was not necessary. Redman has not persuaded us that the circuit court was required to more fully explain its decision not to refer Redman to the state public defender.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals