COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP115
2007AP402

Cir. Ct. No. 1990CF903757

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KIRBY T. MURRELL,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kirby T. Murrell appeals from a circuit court order denying his WIS. STAT. § 974.06 (2005–06)[1] postconviction motion and from an order denying his motion for reconsideration. We conclude that the circuit court did not err when it held that Murrell's motion was procedurally barred pursuant to ***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 proceedings), and ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574 (no-merit procedure precludes successive postconviction motion raising same or other issues absent the defendant demonstrating a sufficient reason for failing to raise those issues through counsel or in a no-merit response). We therefore affirm the circuit court's orders.

¶2 In 1990, Murrell was charged with first-degree intentional homicide that occurred during an armed robbery. Murrell eventually accepted a plea bargain by which he agreed to plead guilty to felony murder. The State agreed to dismiss an unrelated charge regarding the possession of a controlled substance, and also to refrain from requesting a sentence of any specific length. Ultimately, the circuit court imposed a thirty-eight-year prison sentence.

¶3 The public defender appointed postconviction and appellate counsel for Murrell, and counsel filed a no-merit report on Murrell's behalf. *See* WIS. STAT. RULE 809.32 (1991–92). Murrell was informed of his right to respond to the report, but he did not. The court, in its decision, addressed the voluntariness of

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

Murrell's plea, the circuit court's exercise of sentencing discretion, and whether any new factors existed to warrant sentence modification at that time. This court affirmed Murrell's conviction in an opinion released April 6, 1993.

¶4 Thirteen years later, Murrell filed the postconviction motion that is the subject of this appeal. By his motion, Murrell sought plea withdrawal, permission to pursue suppression of his confession, suppression of witness identifications, and a court-ordered competency examination. In support of these requests, Murrell argued that he was mentally incompetent and functionally illiterate at the time of his pleas, and that his pleas therefore were not knowing, intelligent, and voluntary. He also argued, among other things, that his statements to police had not been voluntary and that the witness identifications had been impermissibly suggestive. He maintained that his trial counsel had been ineffective for failing to pursue these issues in pretrial motions.

¶5 The circuit court denied Murrell's motion, reasoning that Murrell could have raised these issues in a response to the no-merit report, but did not, and that Murrell had failed to articulate a sufficient reason for his failure. ***Tillman***, 281 Wis. 2d 157, ¶19. Murrell sought reconsideration, arguing that neither ***Escalona-Naranjo*** nor ***Tillman*** could be applied in his case because both cases were decided after his conviction. The circuit court denied the motion. Murrell appeals from both orders.

¶6 Whether ***Escalona***'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Before applying that bar in a situation where there has been a prior no-merit decision, this court "must pay close attention to whether the no merit procedures were in fact followed. In addition,

the court must consider whether that procedure, even if followed, carries a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case." *See* ***Tillman***, 281 Wis. 2d 157, ¶20.

¶7 In ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893, this court held that when postconviction counsel and a reviewing court miss an issue of potential merit, the ***Tillman*** bar does not apply because the defendant has been deprived of the full examination of the appellate record to which the defendant is entitled under WIS. STAT. RULE 809.32. Murrell argues that ***Fortier*** controls because the facts of his case "are almost exactly the same as the facts in ***Fortier***." We disagree.

¶8 Contrary to Murrell's claim that the facts of his case are "almost exactly the same as" those in ***Fortier***, that case involved a contention supported by the record that the defendant's sentence was illegally increased and neither appellate counsel nor this court noticed that error. Consequently, the ***Escalona-Naranjo/Tillman*** bar did not apply because the no-merit procedure had not been executed properly. Here, however, Murrell's contentions regarding his mental state and his educational level at the time of his plea are conclusory in the sense that they do not demonstrate that he was unable to understand his conversations with counsel and his plea colloquy with the circuit court. This court examined the quality of the plea colloquy and concluded that the record indicated Murrell's decision to enter his plea was knowing, intelligent, and voluntary. Nothing in the record or Murrell's postconviction motion indicates that Murrell disagreed with counsel's decision to forego a suppression motion and to seek a plea agreement. Murrell specifically indicated that he was giving up defenses to the charge—such as a challenge to the voluntariness of his statements to police—and that he

understood the consequences of his plea. This court conducted a proper no-merit review and we are therefore confident that the circuit court properly applied the ***Escalona-Naranjo/Tillman*** bar in denying Murrell's WIS. STAT. § 974.06 postconviction motion.

By the Court.—Orders affirmed.

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