COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP574 **Cir. Ct. No. 2000CF190**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL L. CHOUINARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Daniel Chouinard appeals from an order denying his postconviction motions. We affirm.

¶2 In September 2002, Chouinard pleaded no contest to, and was convicted of, one count of second-degree sexual assault of a child. In September 2003, he was sentenced to seven years of initial confinement and twenty-three years of extended supervision. His postconviction counsel filed a motion to add sentence credit to the judgment of conviction, which was granted. Counsel then filed a no-merit appeal under WIS. STAT. RULE 809.32 (2005-06).[1] In February 2006, we concluded that no arguable issues were presented by the record in this case. In February 2007, Chouinard filed three pro se motions on the same day in circuit court. These were captioned as a postconviction motion under WIS. STAT. § 974.06 (using a preprinted form), a motion to withdraw plea, and a motion for postconviction discovery. The circuit court denied the motions, and Chouinard appeals.

¶3 The State argues that these motions are barred because Chouinard has not shown a sufficient reason for not raising his current claims in his earlier no-merit appeal. This argument relies on WIS. STAT. § 974.06(4), as interpreted by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). That opinion held that, when a defendant has already had a postconviction motion or appeal under WIS. STAT. RULE 809.30, the bar of § 974.06(4) applies unless the defendant shows, in the words of the statute, a "sufficient reason" for not having raised the motion's claims in the earlier postconviction motion or appeal. ***Id.*** at 181-82.

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

¶4 The State's argument fails to recognize that the ***Escalona-Naranjo*** bar is not absolute. ***State v. Tillman***, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574; ***State v. Fortier***, 2006 WI App 11, ¶¶23-27, 289 Wis. 2d 179, 709 N.W.2d 893. In ***Tillman***, we held that when a defendant's postconviction issues have been addressed by the no-merit procedure, the defendant may not later raise those issues or other issues that could have been raised in the no-merit appeal, absent the defendant demonstrating a sufficient reason for failing to raise those issues previously. 281 Wis. 2d 157, ¶19. However, we further cautioned that this bar is not "ironclad," and that in considering whether to apply the procedural bar of ***Escalona-Naranjo*** in a given case, trial and appellate courts must pay close attention to whether the no-merit procedures were in fact followed, and must also 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. ***Id.***, ¶20.

¶5 In ***Fortier***, the defendant's motion under WIS. STAT. § 974.06 raised an issue not discussed in the no-merit report by counsel or identified by this court in our no-merit decision. 289 Wis. 2d 179, ¶23. We concluded that because of these failings by counsel and this court, the no-merit procedure was not properly followed, and the bar of § 974.06(4) should not be applied. ***Id.***, ¶¶23-27.[2]

[2] The practical effect of ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574, and ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893, is that before we may apply WIS. STAT. § 974.06(4) and ***Escalona-Naranjo*** to bar a postconviction motion filed under § 974.06, we must first attempt at least some degree of review of the merits of the claims in the motion. While it may seem circular that we would review the merits to decide whether the merits can be reviewed, and may also suggest that the "bar" does not really exist in practice, this situation is not unique to the ***Tillman/Fortier*** no-merit context. Rather, it is the no-merit equivalent of a situation that also occurs after regular criminal appeals. That situation was well-described in an unpublished concurrence by Judge Deininger, as quoted by the supreme court in ***State v. Lo***, 2003 WI 107, ¶50, 264 Wis. 2d 1, 665 N.W.2d 756. In both regular and no-
(continued)

¶6 Because the State apparently does not appreciate the significance of ***Tillman*** and ***Fortier***, it does not discuss the merits of Chouinard's postconviction motions. As a result, this appeal is decided without useful input from the State on the dispositive issues. However, after reviewing Chouinard's briefs on appeal, the postconviction motions, and other material, we conclude that the order denying the motions is properly affirmed.

¶7 Chouinard first argues that he should be allowed to withdraw his no-contest plea. He argues that he was misinformed by his trial counsel and the State of what he describes as "direct consequences" of the conviction, and thus did not understand the potential punishment. One such consequence, he argues, was the operation of the bifurcated sentence law and how it would affect the duration of his sentence. However, we have already held that a defendant's unawareness of the lack of parole and good-time eligibility under bifurcated sentencing relates to a collateral consequence, not a direct one, and therefore it is not necessary that the defendant be advised of these things. ***State v. Plank***, 2005 WI App 109, ¶13, 282 Wis. 2d 522, 699 N.W.2d 235. Chouinard also argues that he was not advised of his obligations concerning possible commitment under WIS. STAT. ch. 980 or the requirements of sex offender registration. These, too, are collateral, not direct, consequences. *See* ***State v. Myers***, 199 Wis. 2d 391, 394, 544 N.W.2d 609 (1996); ***State v. Bollig***, 2000 WI 6, ¶27, 232 Wis. 2d 561, 605 N.W.2d 199.

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merit appeals, erroneous conclusions or actions by postconviction counsel regarding the merits of an issue may later qualify as a "sufficient reason" for not raising an issue earlier.

The supreme court in ***Lo*** appeared to recognize the problems presented by current law, but did not attempt a solution. The court was "not convinced that this case is the appropriate vehicle [to resolve these problems,]" and stated that it would "defer judgment with the intent of seeking new opportunities to review the issues." ***Id.***, ¶57. As far as we know, these issues have not been resolved since that 2003 opinion.

¶8 Chouinard next argues that at the plea colloquy the circuit court failed to properly inform him of the nature of the charge, as required by WIS. STAT. § 971.08, because the court did so *after* asking him what his plea was, rather than before. Chouinard cites no authority that specifies the order in which these events must occur, and we are not aware of any. Chouinard also argues that the court failed to adequately assess his education level and psychological past. However, we are not aware of any law that permits a plea to be withdrawn on this basis. These points go to the court's understanding of the defendant during the colloquy, rather than being points that the defendant himself is required to be informed of.

¶9 Chouinard argues that the State failed to provide him with exculpatory evidence in its possession. However, this claim was properly denied because his postconviction motion lacked sufficient detail regarding this issue. It stated simply that pictures taken of him and his residence would show that he may not have been the perpetrator of this crime. The motion did not explain what he believes these photographs would have shown, or how they were relevant to the case. The motion also asserts that unspecified DNA results were contaminated because they were taken by a police dispatcher. However, this claim is not clear as to what specific exculpatory evidence Chouinard is claiming the State should have provided him, but did not.

¶10 In the portion of his brief discussing exculpatory evidence, Chouinard argues in part based on WIS. STAT. § 974.07, which relates to postconviction DNA testing of evidence. This statute was not raised in Chouinard's current motions in circuit court. His motion for postconviction discovery cited only WIS. STAT. § 971.23, which concerns pretrial discovery. We usually do not address issues that are raised for the first time on appeal, ***Wirth v.***

Ehly, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), and we see no reason to do that in this case.

¶11 Chouinard argues that the plea agreement was violated in some manner connected with sentencing. We are unable to find this issue in his postconviction motions, except for a cursory statement that "delays created an adverse effect on my sentence which violated the plea agreement." We decline to address this issue for the first time on appeal.

¶12 Chouinard argues that his constitutional right to a speedy trial was violated. In this case, Chouinard did not have a trial, because he pleaded no-contest to the charge. Instead, his brief argues that the one-year delay between his plea and sentencing caused him prejudice. However, his explanation lacks specifics. He asserts only that the delay "destroyed any plea bargain arrangements" at sentencing.

¶13 Chouinard argues that his trial counsel was ineffective. These arguments are again vague and unspecific, referring only to counsel's failure to investigate and prepare a defense, contact witnesses, or demand discovery, to counsel's misrepresentation and coercion concerning prior convictions, and to counsel's failure to challenge DNA test results. None of these arguments clearly explain how different actions by counsel could reasonably have led to an outcome other than Chouinard's no-contest plea.

¶14 Chouinard argues that the circuit court should have granted his request to withdraw his plea before sentencing. We discussed this issue in our order of February 15, 2006, accepting the no-merit report, in which we concluded that the court applied a proper legal standard and reached a reasonable decision

based on the circumstances before it. Chouinard's arguments now do not persuade us that this conclusion was incorrect.

¶15 Finally, Chouinard argues that his appellate counsel was ineffective by not raising some of the issues we have discussed above. Because we have concluded that those issues are not meritorious, Chouinard was not prejudiced by appellate counsel's not having raised these issues.

By the Court.—Order affirmed.

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