

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 2008

David R. Schanker
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. 2007AP795

STATE OF WISCONSIN

Cir. Ct. No. 1995CF952095

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON ANTONIO ALLEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Aaron Allen appeals *pro se* from a circuit court order denying his postconviction motion filed under WIS. STAT. § 974.06 (2005–

06).¹ The circuit court held that Allen’s claims of ineffective assistance by his postconviction counsel were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 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 proceeding), and *State v. Tillman*, 2005 WI App 71, ¶¶19–20, 281 Wis. 2d 157, 696 N.W.2d 574 (the *Escalona-Naranjo* procedural bar applies to defendants whose direct appeal was via the no-merit procedure, as long as the no-merit procedures were in fact followed, and the record demonstrates a sufficient degree of confidence in the result). Allen argues that neither case applies to his situation. We disagree and affirm the circuit court’s order.

¶2 In 1999, Allen was convicted of one count of armed robbery and one count of having been a felon in possession of a firearm. Allen received a thirty-seven-year prison sentence. Allen was appointed postconviction counsel, who ultimately filed a no-merit appeal on Allen’s behalf. *See* WIS. STAT. RULE 809.32. Allen did not respond to the no-merit report, and this court, upon independent review of the appellate record, concluded that there were no issues of potential merit apparent from the record. The court issued its opinion in August 2000. Allen did not petition the supreme court for review.

¶3 In 2007, Allen filed the motion that is the subject of this appeal. In his motion, he argued that postconviction counsel had been ineffective “for failing

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

to file a postconviction motion alleging that pretrial counsel was ineffective when he failed to file any motions to suppress the unlawful arrest, the illegal lineup, and the prosecution's use of defendant [*sic*] conduct prior to the lineup to show consciousness of the defendant's alleged guilt."

¶4 As noted, the circuit court denied Allen's motion, reasoning that *Escalona-Naranjo* requires defendants to "raise all issues in his or her original postconviction motion or appeal" unless they have a sufficient reason to overcome that bar. Although the circuit court acknowledged that "the ineffective assistance of postconviction counsel may be sufficient cause" for failing to raise an issue previously, see *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996), it held that because Allen "could and should have raised all of [his] issues in response to counsel's no merit report," but did not, the issues were deemed waived under *Escalona-Naranjo. Tillman*, 281 Wis. 2d 157, ¶¶19–20.

¶5 On appeal, Allen contends that his claim of ineffective assistance by postconviction counsel for failing to challenge trial counsel's performance is a sufficient reason to overcome the *Escalona-Naranjo/Tillman* bar. We disagree.

¶6 Here, nothing in Allen's WIS. STAT. § 974.06 motion suggests and nothing in the record indicates that Allen was, at the time the no-merit report was filed, unaware of the issues underlying the claims of ineffective assistance of counsel ultimately raised in his motion. Although he blames postconviction counsel for failing to raise the issues in a postconviction motion, he offered no reason as to why he was unable to articulate in a response to the no-merit report the issues he now raises as the basis for his ineffective-assistance-of-counsel claims. The simple contention that counsel could have and should have raised

these issues is not, without more, a sufficient reason to overcome the *Escalona-Naranjo/Tillman* bar.

By the Court.—Order affirmed.

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

