

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 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. 2007AP1080

Cir. Ct. No. 2000CF4323

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE LEE ELLIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
M. JOSEPH DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jimmie Lee Ellis appeals from an order summarily denying his postconviction motion. We conclude that Ellis's postconviction motion is procedurally barred for his failure to allege a reason for failing to previously raise the issues he now seeks to raise. Therefore, we affirm.

¶2 A jury found Ellis guilty of possessing between five and fifteen grams of cocaine with intent to deliver as a subsequent drug offense. The trial court imposed a twenty-year sentence, comprised of fifteen- and five-year respective periods of confinement and extended supervision, to run consecutive to any other sentence. Appellate counsel filed a no-merit report to which Ellis filed three responses. This court affirmed the judgment of conviction. *See State v. Ellis*, No. 2003AP3119-CRNM, unpublished slip op. at 9 (WI App May 23, 2005).

¶3 Ellis has filed six postconviction motions, all of which have been denied by the trial court. In his sixth postconviction motion, which is the subject of this appeal, he seeks relief pursuant to WIS. STAT. § 974.06 (2005-06), alleging a variety of claims.¹ He does not, however, allege why he failed to raise these claims in his three no-merit responses, or in his five previous postconviction motions. The trial court summarily denied his motion as procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994) and § 974.06(4). Ellis appeals.

¶4 To avoid *Escalona*'s procedural bar, a defendant must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal or in his original postconviction motion. *See Escalona*, 185 Wis. 2d at 185-86. Whether *Escalona*'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *See State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). “[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

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

have been previously raised.” *State v. Tillman*, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574. In *Tillman*, we extended *Escalona*’s applicability to postconviction motions following no-merit appeals. See *Tillman*, 281 Wis. 2d 157, ¶27. Before applying *Tillman*’s procedural bar however, both the trial and appellate courts “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.” *Id.*, ¶20 (footnote omitted). We are satisfied the no-merit procedure warrants the application of the bar in this case.

¶5 Ellis alleged no reason in his postconviction motion for failing to previously raise these issues.² Consequently, his motion is procedurally barred. See *Escalona*, 185 Wis. 2d at 185-86; *Tillman*, 281 Wis. 2d 157, ¶27.

By the Court.—Order affirmed.

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

² The reason for failing to previously raise these issues must be alleged in the postconviction motion itself to enable the trial court to initially assess the sufficiency of the alleged reason and whether to decide the substantive claim. See WIS. STAT. § 974.06(4).

