COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2124 **Cir. Ct. No. 2000CF3224**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID CLAUDIO,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine and Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. David Claudio appeals from an order summarily denying his postconviction motion for plea withdrawal, and from a related order denying his motion for leave to file a supplemental motion. We conclude that

Claudio's motion for plea withdrawal, even as supplemented, does not allege a sufficient reason to overcome the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994) and ***State v. Tillman***, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574.[1] Therefore, we affirm.

¶2 In 2000, Claudio pled guilty to attempted first-degree intentional homicide with a dangerous weapon, as a party to the crime. The trial court imposed a fifty-five-year sentence, comprised of forty- and fifteen-year respective periods of initial confinement and extended supervision. Appellate counsel filed a no-merit report, to which Claudio did not respond. This court affirmed the judgment of conviction. *See* ***State v. Claudio***, No. 2001AP2100-CRNM, unpublished slip op. at 1 (WI App Jan. 16, 2002). In 2004, Claudio filed a *pro se* postconviction motion pursuant to WIS. STAT. § 974.06 (2003-04), which was summarily denied as procedurally barred by ***Escalona***. Although Claudio appealed from that order, this court dismissed that appeal for his failure to pay the filing fee or to seek to waive that fee. In 2006, Claudio filed a petition for a writ of habeas corpus, alleging the ineffective assistance of appellate counsel, pursuant ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992), which we denied *ex parte*. *See* ***Claudio v. Kingston***, No. 2006AP213-W, unpublished slip op. at 2 (WI App Mar. 2, 2006).

¶3 Claudio now files another postconviction motion pursuant to WIS. STAT. § 974.06 (2005-06), which the trial court summarily denied as procedurally

[1] The procedural bar referenced in these two cases is the same; we therefore use the case names interchangeably when referring to ***Escalona***'s procedural bar, or ***Tillman***'s procedural bar. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994); ***State v. Tillman***, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574.

barred by ***Escalona*** and ***Tillman***.[2] Claudio then filed a motion for leave to file a supplemental motion, to add reasons as to why his motion overcomes ***Tillman***'s procedural bar. The trial court denied the motion, rejecting his additional reasons for failing to previously raise this issue. It is from these two recent postconviction orders that Claudio appeals.

¶4 Claudio moved for postconviction plea withdrawal, alleging that the prosecutor breached the plea bargain. The prosecutor did not recommend a specific number of years for sentencing as agreed, but then compared Claudio's culpability to that of his co-defendant, and urged the trial court to impose a comparable sentence. Claudio now claims that by comparing his culpability to that of his co-defendant, the prosecutor was essentially recommending a particular sentence, and in doing so, breached the plea bargain.

¶5 To avoid ***Escalona***'s procedural bar, Claudio 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 have been previously raised." ***Tillman***, 281 Wis. 2d 157, ¶27. We extended ***Escalona***'s applicability to postconviction motions following no-merit appeals. *See* ***Tillman***,

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

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).

¶6 Initially, Claudio alleged that postconviction counsel's failure to challenge trial counsel's effectiveness for failing to object to the prosecutor's breach at sentencing was his reason for failing to previously raise this issue. In his motion for leave to supplement his postconviction motion, Claudio added two more reasons: (1) this was a complicated legal issue that he (Claudio) did not understand, and that was "covertly" presented by the prosecutor; and (2) the court of appeals neglected its obligation to independently review the record in a no-merit appeal. *See* ***Anders v. California***, 386 U.S. 738, 744-45 (1967); ***State v. Fortier***, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 709 N.W.2d 893. We conclude that none of these reasons overcome ***Tillman***'s procedural bar.

¶7 First, if postconviction counsel was ineffective for failing to challenge trial counsel's effectiveness, Claudio does not explain why he did not raise this issue in response to the no-merit report. He also does not explain why he did not raise this issue in his 2004 *pro se* postconviction motion.

¶8 Second, if the prosecutor's sentencing presentation constituted a breach of the plea bargain, Claudio should have been aware of that alleged breach at sentencing. If not, Claudio certainly was or should have been aware of that alleged breach by the time of his no-merit appeal.

¶9 Third, this court fulfilled its obligation when it independently reviewed the record during its no-merit review. *See* ***Anders***, 386 U.S. at 744-45; ***Claudio***, No. 2001AP2100-CRNM, unpublished slip op. at 2-3. We expressly determined that Claudio's guilty plea was valid. *See* ***Claudio***, No 2001AP2100-CRNM, unpublished slip op. at 2. In order to do so, we independently reviewed the transcript of the plea hearing. We also reviewed the transcript of the sentencing hearing. *See* ***id.*** at 2-3. If we had determined that the prosecutor's sentencing presentation had breached the parties' plea bargain, we would have, at minimum, ordered further briefing on the potential issue of a breach; the type of breach Claudio alleges is not too sophisticated or "covert[]" for this court to have discovered while independently searching the record incident to our ***Anders*** obligation. *See* ***Anders***, 386 U.S. at 744-45.

¶10 Claudio has not alleged a sufficient reason for failing to previously raise the issue of plea withdrawal for an alleged breach of the plea bargain on direct appeal, in his previous *pro se* postconviction motion, or in his petition for a writ of habeas corpus challenging appellate counsel's effectiveness. If Claudio believed that the prosecutor had breached the plea bargain, he should have realized that the prosecutor had done so at the sentencing hearing, shortly thereafter, or certainly by the time of his appeal. Claudio previously filed a *pro se* postconviction motion where he also failed to raise this issue. None of the reasons that Claudio alleged (even those he alleged belatedly in his motion for leave to supplement his postconviction motion) are sufficient to overcome ***Tillman***'s procedural bar. We are confident that the no-merit procedures were followed. *See* ***Tillman***, 281 Wis. 2d 157, ¶20; ***Fortier***, 289 Wis. 2d 179, ¶27. This court independently reviewed the record searching for arguably meritorious issues incident to Claudio's no-merit appeal. *See* ***Anders***, 386 U.S. at 744-45. We

expressly reviewed the transcripts of the plea and sentencing hearings. *See* ***Claudio***, No. 2001AP2100-CRNM, unpublished slip op. at 2-3. An arguable breach of the plea bargain is an obvious issue that would have been apparent to an appellate court.

By the Court.—Orders affirmed.

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