COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2009

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 Nos. 2008AP663
2008AP664
2008AP665

Cir. Ct. Nos. 1999CF1892
1998CF2857
1999CF2211

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE N. BURKETT,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Andre N. Burkett appeals from a consolidated order summarily denying his postconviction motion.[1] We conclude that Burkett is procedurally barred from raising and renewing issues he should have raised on direct appeal. Therefore, we affirm.

¶2 In Milwaukee County Circuit Court Case No. 1998CF2857, a jury found Burkett guilty of attempted theft by false representation as a party to the crime; the trial court imposed a forty-two-month sentence. In Milwaukee County Circuit Court Case No. 1999CF1892, a different jury found Burkett guilty of theft by written lease and bail-jumping; the trial court imposed three- and five-year consecutive prison sentences. In Milwaukee County Circuit Court Case No. 1999CF2211, that same jury also found Burkett guilty of theft by false representation, taking and driving a vehicle without the owner's consent, and two counts of felony bail-jumping; the trial court imposed a fifteen-year aggregate sentence to run consecutively to the other sentences.[2]

¶3 In Appeal No. 2001AP1563-CRNM (the 1998 case), this court affirmed the judgment of conviction and postconviction orders after addressing the sufficiency of the evidence, the trial court's exercise of sentencing discretion, the arguable violation of Burkett's right to a speedy trial, and his entitlement to sentence credit. *See* ***State v. Burkett***, No. 2001AP1563-CRNM, unpublished slip op. (WI App Aug. 15, 2002). In his no-merit response, Burkett focused on what

[1] We consolidated these three appeals for briefing and dispositional purposes.

[2] Milwaukee County Circuit Court Case Nos. 1999CF1892 and 1999CF2211 were joined for trial.

he perceived as the speedy trial violation, and identified as problematic the sentence credit issue and the claimed ineffective assistance of counsel.

¶4 We affirmed the other two judgments of conviction that were joined for trial and consolidated on appeal for briefing and dispositional purposes. *See* ***State v. Burkett***, Nos. 2002AP1127-CRNM and 2002AP1128-CRNM, unpublished slip op. (WI App Mar. 6, 2003). In these consolidated appeals, in which Burkett also responded to the no-merit report, we addressed the following twelve potential issues: (1) the propriety of joinder notwithstanding Burkett's waiver; (2) the timing of Burkett's bail-jumping violations and his periods in custody, demonstrating that the two did not coincide; (3) Burkett's signature on the recognizance bond, evidencing his receipt of the bond conditions; (4) the appropriateness of the penalty for violating the conditions of his bond; (5) his alleged inability to return the rental car he stole because of his arrest prior to the car's return; (6) the alleged falsity of a police officer's testimony; (7) Burkett's competence to stand trial; (8) his trial counsel's failure to challenge the credibility of two witnesses by failing to elicit their admissions that they cooperated with law enforcement; (9) the sufficiency of the evidence to support the guilty verdicts; (10) the (ir)relevance of a counselor's testimony regarding Burkett's disabilities; (11) the State's improper presentation of other acts evidence without notice to Burkett; and (12) the failure to present evidence of Burkett's learning disabilities at sentencing. We ultimately concluded that none of these arguable issues warranted further proceedings, and affirmed the judgments of conviction. *See* ***id.*** at 5-11.

¶5 Several months later, Burkett moved for postconviction relief pursuant to WIS. STAT. § 974.06 (2003-04), seeking the appointment of

postconviction counsel to collaterally attack the three judgments of conviction. The trial court denied the motion. We affirmed that denial in ***State v. Burkett***, Nos. 2003AP1846 – 2003AP1848, unpublished slip op. (WI App July 15, 2005).

¶6 Burkett's current postconviction motion raises and renews issues he could have or did raise in his direct appeals.[3] He contends that: (1) he should not have had to post a signature bond because he had not been arrested, thereby compromising his bail-jumping convictions; (2) the Milwaukee County District Attorney at that time had "mistreat[ed] persons of color"; and (3) he is "factual[ly] innocen[t.]"

¶7 The trial court denied the motion because all of the issues Burkett now raises were or should have been known to him at the time of his direct appeals. His failure to raise or adequately raise these issues in his responses to the no-merit appeals procedurally bars him from raising them belatedly. *See* ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574.

¶8 To avoid ***Escalona***'s procedural bar, Burkett must allege a sufficient reason for failing to have previously raised all grounds for postconviction relief on direct appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). 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

[3] Burkett's postconviction motion is not in the appellate records. Although we could summarily affirm the consolidated order denying his motion for that reason alone pursuant to ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993), both the trial court and Burkett extensively described and discussed the motion and his allegations.

"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). Whether ***Tillman***'s procedural bar applies 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) (application of ***Escalona*** bar is reviewed *de novo*).

¶9 Both decisions affirming the judgments and orders in the context of no-merit reviews demonstrated that this court followed the procedures for independently reviewing the records; we have confidence that ***Tillman***'s procedural bar is appropriate to preclude the belated and in some instances repeated consideration of these issues. The three issues Burkett raises involve whether he was arrested incident to the bail-jumping conviction, the Milwaukee County District Attorney's alleged "mistreat[ment of] persons of color," and Burkett's claim of actual innocence.

¶10 The first issue was explicitly addressed in the section of our previous decision entitled "**Timing of Bail-Jumping Violations**." ***Burkett***, Nos. 2002AP1127-CRNM and 2002AP1128-CRNM, unpublished slip op. at 4-7. Insofar as Burkett's accusation against the district attorney is concerned, it is not only belated, but it is conclusory and thereby insufficient to entitle Burkett to an evidentiary hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Burkett also claims that he is "factual[ly] innocen[t.]" In our 2003 decision, we extensively addressed twelve issues, explaining why pursuing them further would lack arguable merit. *See* ***Burkett***, Nos. 2002AP1127-CRNM and

2002AP1128-CRNM, unpublished slip op. at 5-11. Two of the potential issues we expressly addressed were the allegedly false testimony of a police officer, and the sufficiency of the evidence supporting the verdicts. *See* ***id.*** at 8-10. We cannot fathom why Burkett would wait until recently to raise his claim of "factual innocence."

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).