COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2071 **Cir. Ct. No. 2004CF421**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANKLIN P. DELACRUZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Franklin P. Delacruz appeals pro se from an order denying his motion for postconviction relief. Delacruz's motion and appeal follow this court's summary affirmance of his convictions in response to the no-merit report his counsel filed. *See* ***State v. Delacruz***, No. 2005AP2151-CRNM,

unpublished slip op. (WI App Feb. 15, 2006).[1] We conclude that Delacruz's claim is procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. In any event, he has not established that trial counsel was ineffective. We affirm.

¶2 Delacruz, a Mexican national, was involved in a multi-vehicle accident when he crossed the median, drove southbound in northbound traffic and hit another driver head-on, killing her. A jury convicted him of one count each of homicide by intoxicated use of a vehicle and homicide by operation of a vehicle with a prohibited alcohol concentration. He received the maximum sentence, forty years, bifurcated as twenty-five years of initial confinement and fifteen years of extended supervision. Appointed appellate counsel filed a no-merit report. Delacruz contended in the response to the report that the sentence was excessive and that his trial counsel was ineffective for failing to request an alternate presentence investigation report. This court upheld the trial court's exercise of sentencing discretion, concluded that nothing in the record supported a claim of ineffective assistance of counsel, and summarily affirmed his convictions.

¶3 Delacruz filed a pro se WIS. STAT. § 974.06 (2007-08)[2] motion for postconviction relief. He sought an evidentiary hearing to address his claims that "appellate/postconviction"[3] counsel was ineffective for failing to argue that trial

[1] Although the no-merit report is not part of the record in this case, this court takes judicial notice of its contents as a previous filing in this proceeding. *See* ***State v. Fortier***, 2006 WI App 11, ¶11 n.2, 289 Wis. 2d 179, 709 N.W.2d 893.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

[3] We will use "appellate counsel," as the public defender appointed upon Delacruz's Notice of Intent to Pursue Postconviction Relief filed only a no-merit report in this court.

counsel was ineffective for recommending the maximum sentence and for failing to raise a due process claim based on the State's delayed notice to the Mexican consulate of his arrest. He also contended that the trial court failed at sentencing to properly weigh mitigating factors and other substantial factors contributing to the accident. The court concluded trial counsel was not ineffective.[4] It also concluded that its sentencing determination was proper and noted it was affirmed on appeal. The court denied the motion without a hearing. Delacruz appeals.

¶4 Delacruz contends here that the trial court's denial of his postconviction motion is reversible error. He argues that appellate counsel was ineffective for failing to raise on direct appeal trial counsel's ineffectiveness in: (1) failing to present a "***Sohn***[5] defense"; (2) failing to allege prosecutorial misconduct because the State did not notify the Mexican consulate of his arrest "without unreasonable delay"; and (3) recommending the maximum sentence.

¶5 The State urges that we reject Delacruz's appeal as procedurally barred. It is well settled that claims, including constitutional issues, 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 proceedings. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82; *see also* WIS. STAT. § 974.06(4). The bar extends to encompass properly followed no-merit proceedings if the court has "a sufficient degree of confidence" in the prior proceeding under the circumstances of the case. *See* ***Tillman***, 281 Wis. 2d 157, ¶20. The State argues

[4] The trial court therefore did not address appellate counsel's alleged ineffectiveness. As a result, we need not consider the propriety of Delacruz bringing to the trial court a claim of ineffective assistance by appellate counsel.

[5] *See* ***State v. Sohn***, 193 Wis.2d 346, 535 N.W.2d 1 (Ct. App. 1995).

that Delacruz is relaunching the same essential arguments that trial and appellate counsel were ineffective and his sentence was excessive and, even if the arguments are new, Delacruz does not explain why these claims were not or could not have been raised in his response to the no-merit report. Since the underlying facts and procedural history are undisputed, whether Delacruz's appeal is procedurally barred by our prior no-merit decision is a question of law which we review de novo. *See* ***id.***, ¶14.

¶6 As noted, Delacruz responded to the no-merit report his appellate counsel filed. He asserted that trial counsel was ineffective and that the trial court exceeded its discretion in sentencing him too harshly. After considering the report and Delacruz's response and independently reviewing the record, this court rejected his arguments and summarily affirmed the judgments of conviction. Our independent review unearthed "nothing in the record [that] would support a claim of ineffective assistance of counsel," and we saw "no arguable issue" as to the court's sentencing discretion.

¶7 We described in ***Tillman*** the multi-layered review the no-merit procedure pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 affords. ***Tillman***, 281 Wis. 2d 157, ¶¶16-17. It bears repeating here. Appellate counsel first must conscientiously examine the record. *See* ***Tillman***, 281 Wis. 2d 157, ¶16. If counsel concludes that the case is wholly frivolous, he or she must so advise the court and request permission to withdraw, supporting the request with a brief describing any arguable issues. *See* ***id.*** Counsel also must provide a copy of the brief to the defendant, who may raise in a response any points he or she chooses. *See* ***id.*** This court then decides if the case is wholly frivolous, but only after fully examining all proceedings. ***Id.*** Finally, the court's

no-merit decision sets forth the potential appellate issues and explains in turn why each has no arguable merit. ***Id.***, ¶17.

¶8 Compared to a "regular" appeal, in the no-merit procedure the defendant's trial court record receives an extra level of scrutiny. Not only does appellate counsel examine the record for potential appellate issues but a skilled and experienced appellate court does likewise and the defendant, too, is permitted to weigh in. ***Id.***, ¶18. This comprehensive inspection is why we feel comfortable applying WIS. STAT. § 974.06(4) after a defendant's postconviction issues have been addressed by the no-merit procedure under WIS. STAT. RULE 809.32. Nonetheless, if under the particular facts and circumstances of the case we lack a "sufficient degree of confidence" that the procedure was, in fact, followed, we are not bound to apply the procedural bar. ***Tillman***, 281 Wis. 2d 157, ¶20.[6]

¶9 We agree with the State that the procedural bar could be applied here. To guarantee the "sufficient degree of confidence" that Delacruz's appellate rights were protected, however, we opt not to. We therefore turn to the merits.

¶10 The first issue, then, is whether trial counsel was ineffective for failing to present what Delacruz terms a "***Sohn*** defense"—*i.e.*, that the victim's death would have occurred due to other substantial factors even if Delacruz had

[6] Delacruz also contends that ***Page v. Frank***, 343 F.3d 901, 907 (7th Cir. 2003), relieves him of the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). He misreads ***Page***'s reach. The federal court held only that the bar to successive postconviction claims set forth in WIS. STAT. § 974.06(4) and ***Escalona-Naranjo*** did not affect the availability of federal habeas corpus relief under 28 U.S.C. § 2254 (2003) to a state prisoner in federal court. ***Page***, 343 F.3d at 908-09. ***Page*** did not address nor does it affect Wisconsin courts' interpretation and application of § 974.06(4) and ***Escalona-Naranjo*** (or ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574) to prisoner litigation seeking collateral review of state court judgments of conviction.

been exercising due care and had not been under the influence of an intoxicant. *See* ***State v. Sohn***, 193 Wis.2d 346, 353, 535 N.W.2d 1 (Ct. App. 1995); *see also* WIS. STAT. § 940.09(2)(a).

¶11 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that prejudice resulted from the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). We may dispose of a claim of ineffective assistance of counsel on either ground, such that if we conclude that the defendant has failed to prove one prong, we need not address the other. ***Strickland***, 466 U.S. at 697.

¶12 This claim of ineffectiveness fails. The jury heard testimony, and defense counsel argued in closing, that the accident occurred in heavy fog and that the victim likely was exceeding the speed limit, may have been driving with her headlights off, took no evasive action and was hit by a second vehicle after Delacruz's. The court also instructed the jury that it could consider that the death would have occurred despite Delacruz's intoxication. *See* WIS JI—CRIMINAL 1189. The jury, however, was unconvinced. "Trial counsel is not ineffective simply because an otherwise reasonable trial strategy was unsuccessful." ***State v.***

Maloney, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620, *aff'd* 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436.

¶13 Delacruz next contends that defense counsel failed to raise the issue of prosecutorial misconduct because the State did not notify the Mexican consulate until two months after his arrest and the Vienna Convention requires that notice be given "without unreasonable delay." This argument likewise fails. First, Delacruz has not shown that any "delay" in notice was unreasonable or intentional. *See* ***State v. Copening***, 100 Wis. 2d 700, 714, 303 N.W.2d 821 (1981) (stating that prosecutorial overreaching must be intentional). Second, Delacruz has no standing to assert any remedy pursuant to the Vienna Convention. ***State v. Navarro***, 2003 WI App 50, ¶1, 260 Wis. 2d 861, 659 N.W.2d 487. It represents only a notice accommodation to a foreign national and dictates no substantive procedures and confers no substantive rights in a state court proceeding. ***Id.***, ¶20. We cannot fault counsel for not urging a nonexistent remedy.

¶14 Lastly, Delacruz argues that trial counsel was ineffective because he recommended the maximum sentence and failed to "effectively assur[e]" that the court considered various mitigating factors. Once more, we disagree. Defense counsel recommended a forty-year sentence to reflect the seriousness of the offense, but urged the court to bifurcate it as fifteen years' initial confinement and twenty-five years' extended supervision to reflect Delacruz's stated remorse, his lack of a prison record and the fact that his relatively recent alcohol abuse began in the wake of various family problems.

¶15 The court observed that Delacruz's own serious injuries in the accident were "about the only mitigating factor[s] this Court could think of." We are not persuaded that the result of the proceeding would have been different had

defense counsel recommended a shorter term. The trial court is not bound by sentencing recommendations. *See* ***State v. Williams***, 2000 WI 78, ¶11, 236 Wis. 2d 293, 613 N.W.2d 132. Delacruz was not prejudiced because even if counsel had recommended less time, the trial court's decision denying Delacruz's postconviction motion indicates that the sentence likely would have been the same. The court deemed defense counsel's recommendation an "attempt[] to argue for a sentence a court could reasonably consider … as opposed to losing credibility and requesting an unrealistic sentence which a court would undoubtedly not accept." Counsel was not ineffective as to the sentence he recommended.

¶16 Because trial counsel was not ineffective in any of the ways Delacruz posits, it logically follows that appellate counsel was not ineffective for failing to challenge trial counsel's performance.

By the Court.—Order affirmed.

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