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 No. 2008AP2874 **Cir. Ct. No. 1999CF4928**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE D. WILKS,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Eugene D. Wilks appeals from a postconviction order summarily denying his motion for a new trial. We conclude that our decision on direct appeal, in which we determined that there was no arguable merit to pursue plea withdrawal, precludes our consideration of the issues Wilks now

raises about plea withdrawal; the alleged defects in the arrest warrant and his claim of self-defense have already been decided. Therefore, we affirm.

¶2 Wilks entered a no-contest plea to first-degree reckless homicide; the trial court imposed a thirty-year sentence.[1] On direct appeal, Wilks's appellate counsel filed a no-merit report. Wilks personally moved this court to extend his response deadline. Notwithstanding our granting Wilks an extension, he did not respond to the no-merit report. This court affirmed the judgment on appeal.[2] *See* ***State v. Wilks***, No. 2003AP3070-CRNM, unpublished slip op. (WI App Oct. 28, 2004).

¶3 Approximately four years later, Wilks sought a new trial, moving to challenge the arrest warrant, to withdraw his plea, and alleging the ineffective assistance of trial counsel for failing to raise an issue of self-defense that Wilks characterizes as the impossibility of his shooting the victim. The arrest and self-defense issues are largely subsumed in the plea withdrawal issue. The trial court summarily denied the motion as procedurally barred. Wilks appeals.

¶4 To avoid ***Escalona***'s procedural bar, Wilks 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

[1] A no-contest plea means that the defendant does not claim innocence, but refuses to admit guilt. *See* WIS. STAT. § 971.06(1)(c) (1999-2000); *see also* ***Cross v. State***, 45 Wis. 2d 593, 599, 173 N.W.2d 589 (1970).

[2] This court directed the trial court to modify the judgment of conviction to correct a clerical error in the judgment that is unrelated to the issues Wilks now raises in this appeal. We then affirmed the judgment as modified. *See* ***State v. Wilks***, No. 2003AP3070-CRNM, unpublished slip op. at 2, 7. (WI App Oct. 28, 2004).

motions following no-merit appeals. *See* ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574. 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). 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*).

¶5 Wilks refers to the ineffective assistance of his trial and appellate counsel as his reason for failing to raise these issues previously. Although we generally require more factual specificity to overcome ***Tillman***'s procedural bar than that referenced by Wilks, we address Wilks's issues in the context of our earlier decision in which we independently reviewed the record to search for issues of arguable merit prior to affirming the judgment of conviction. *See* ***Anders v. California***, 386 U.S. 738, 744-45 (1967). In reviewing our decision on direct appeal, we are satisfied that we followed the no-merit procedure in determining that further proceedings would lack arguable merit. *See* ***Tillman***, 281 Wis. 2d 157, ¶20.

¶6 We explicitly reviewed and explained our determination that Wilks's no-contest plea was valid, and also explained why plea withdrawal specifically, and further proceedings to challenge his no-contest plea generally would lack arguable merit. *See* ***Wilks***, No. 2003AP3070-CRNM, unpublished slip op. at 2-4. Our explicit review of a plea withdrawal issue and our implicit review of challenging the plea in any other respect demonstrate that we considered and

rejected the arguable merit of challenging the plea. *See* ***id.*** We decline to consider a challenge to the no-contest plea again. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (we will not revisit previously rejected issues).

¶7 The challenges to the arrest warrant and to trial counsel's alleged failure to advise Wilks about the feasibility of self-defense are largely subsumed and waived by Wilks's no-contest plea. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983) (by entering a guilty plea, a defendant waives the right to challenge nonjurisdictional defects and defenses). Insofar as Wilks's plea did not waive his challenge to the arrest warrant, he has not included the warrant in the appellate record; therefore, we are unable to assess that challenge. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993) (it is appellant's obligation to ensure that all documents required for appellate review of the issues raised are included in the appellate record). Insofar as Wilks's self-defense claim is concerned, first, he must demonstrate how that claim differs from the claim we considered on direct appeal. *See* ***Wilks***, No. 2003AP3070-CRNM, unpublished slip op. at 4. Second, if his claim differs, he must succeed in withdrawing his no-contest plea in order to claim self-defense. *See* ***Riekkoff***, 112 Wis. 2d at 122-23. Until Wilks obtains plea withdrawal, there is no legally consequential reason to evaluate his self-defense claim.

By the Court.—Order affirmed.

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