COURT OF APPEALS DECISION DATED AND FILED

July 31, 2007

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. 2005AP2938 **Cir. Ct. No. 1999CF3000**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINE NELSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Antoine Nelson appeals from a postconviction order denying his motion for a new trial, alleging the ineffective assistance of postconviction/appellate counsel for failing to raise trial counsel's ineffectiveness. The issue is whether Nelson's assertion in a no-merit response that "I don't know

how to respond to a no merit report because I am not good with the law," along with his postconviction claims of ineffective assistance constitute a sufficient reason to overcome the procedural bar of ***State v. Tillman***, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574. We conclude that the no-merit procedure accommodates appellants who are unschooled in the law, and therefore, that reason, along with the claimed ineffectiveness of counsel, is not sufficient to overcome ***Tillman***'s procedural bar, which we conclude is otherwise applicable to this appeal. Therefore, we affirm.

¶2 A jury found Nelson guilty of first-degree intentional homicide with a dangerous weapon, and of attempted first-degree intentional homicide, each as a party to the crime. The trial court imposed a life sentence for the homicide, setting Nelson's parole eligibility date in 2060, and a thirty-five-year consecutive sentence for the attempted homicide. Appointed counsel pursued a no-merit appeal. In his no-merit report, appellate counsel addressed a pretrial ruling on the admissibility of evidence, the sufficiency of the evidence of Nelson's guilt, the validity of the sentences, and the trial court's postconviction order following an evidentiary hearing denying Nelson's motion for a new trial. After Nelson was served with a copy of the no-merit report and a notice from this court explaining his opportunity to respond, citing ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32(1), Nelson instead filed correspondence, asserting "I don't know how to respond to a no merit report because I am not good with the law." After considering the report, analyzing the four potential issues appellate counsel had addressed, and independently reviewing the record, we affirmed the judgment of conviction and postconviction order, concluding that it would lack arguable merit to pursue those four potential issues or any others. *See* ***State v.***

Nelson, No. 2003AP733-CRNM, unpublished slip op. at 1-5 (WI App Aug. 22, 2003) ("***Nelson I***").

¶3 In 2005, Nelson moved for postconviction relief, pursuant to WIS. STAT. § 974.06 (2005-06), challenging the effectiveness of postconviction counsel for failing to raise trial counsel's alleged ineffectiveness for failing to object to specific jury instructions and to specific parts of the prosecutor's closing argument, and appellate counsel's correlative ineffectiveness for filing a no-merit appeal despite these allegedly meritorious issues. Mindful of ***Tillman***, Nelson alleges that his lack of knowledge of the law prevented him from responding to the ***Nelson I*** no-merit report, and thus, this motion should not be procedurally barred; he requests this court to reinstate his appellate rights pursuant to WIS. STAT. RULE 809.30.

¶4 "[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 [absent a sufficient reason for failing to raise these issues previously]." ***Tillman***, 281 Wis. 2d 157, ¶27 (citing WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994)). 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). Nelson's assertion, that he was not sufficiently knowledgeable in the law, coupled with his ineffective

assistance claims, are not sufficient to overcome ***Tillman***'s procedural bar.[1] *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997) (We independently review the reason alleged to determine whether it is sufficient to overcome that procedural bar.).

¶5 Many defendant-appellants in a no-merit appeal are not knowledgeable in the law. They are eligible for appointed counsel, and presumably disagree with appointed counsel's ultimate conclusion that pursuing an adversary appeal would lack arguable merit. These are precisely the reasons that the defendant-appellant need only identify his or her criticisms in a no-merit response, rather than being obliged to comply with the formal briefing rules governing an adversary appeal. *See* ***Anders***, 386 U.S. at 744-45; ***Tillman***, 281 Wis. 2d 157, ¶¶16-18. This is also why, in a no-merit appeal, this court is obliged to independently review the record to search for every arguably meritorious issue, whereas in a conventional appeal, we only decide the issues appellant properly raises and adequately briefs. *See* ***Tillman***, 281 Wis. 2d 157, ¶¶15-18. As we explained:

> This procedure demonstrates that, in some facets, the no merit procedure affords a defendant greater scrutiny of a trial court record and greater opportunity to respond than in a conventional appeal. As with a conventional appeal, appellate counsel examines the trial court record for potential appellate issues. However, the defendant in a conventional appeal does not receive the benefit of a skilled and experienced appellate court also examining the record for issues of arguable merit. Instead, the court's role in a

[1] Insofar as the sufficiency of Nelson's reason is concerned, we focus on his unfamiliarity with the law as opposed to his ineffective assistance claims because the latter are derivative of trial counsel's alleged failures at trial, and were or should have been known shortly thereafter. His explanation for his delay in raising these claims is his unfamiliarity with the law, our focus here.

> conventional appeal is limited to addressing the issues briefed by appellate counsel. Nor, as a general rule, is the defendant in a conventional appeal permitted to separately weigh in by raising objections to counsel's brief or by raising additional issues [as is permissible in a no-merit response].

Id., ¶18.

¶6 We conclude that in ***Nelson I*** the proper no-merit procedures were followed and that the outcome carries a sufficient degree of confidence to warrant applying ***Tillman***'s procedural bar to Nelson's current postconviction motion. In ***Tillman*** we contemplated the lack of knowledge of the law of a defendant-appellant in a no-merit appeal. *See also* ***Anders***, 386 U.S. at 744-45. Apart from his unfamiliarity with the law, Nelson has not explained his delay in raising these derivative ineffective assistance issues; consequently, he has not overcome ***Tillman***'s procedural bar.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).