

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 2010

A. John Voelker
Acting 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. 2008AP2863

Cir. Ct. No. 2006CF1973

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

AMONDO ROMANE DUCKWORTH,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
MARTIN J. DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Amondo Romane Duckworth appeals from two postconviction orders denying his three dismissal motions.¹ We conclude that

¹ One of the postconviction orders denied two motions.

Duckworth's failure to allege a reason for failing to previously raise these issues, or to otherwise persuade us to deviate from the procedural bar of *State v. Tillman*, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574, warrants the denial of his motions. Therefore, we affirm.

¶2 Duckworth pled guilty to two counts of armed robbery with the threat of force as a party to each crime. The trial court imposed fifteen- and twenty-year consecutive sentences, comprised of ten- and twelve-year consecutive periods of initial confinement, and five- and eight-year consecutive periods of extended supervision. On the second conviction, the trial court imposed and stayed the twenty-year sentence in favor of an eight-year probationary term. Duckworth's appellate counsel filed a no-merit report; Duckworth filed three responses to that report. This court affirmed the judgment of conviction. *See State v. Duckworth*, No. 2007AP404-CRNM, unpublished slip op. (WI App Aug. 20, 2008).

¶3 Approximately sixty days later, Duckworth filed a *pro se* postconviction motion seeking dismissal because of the alleged lack of subject matter jurisdiction. Three days later, Duckworth filed a second *pro se* postconviction motion seeking dismissal on the basis of an allegedly illegal stop. The trial court denied the motions, ruling that the former was "patently without merit," while the latter was waived by Duckworth's guilty pleas, and both were waived by his failure to raise them in his multiple responses to the no-merit report. A week later, Duckworth filed his third *pro se* postconviction motion, this time seeking "dismissal" for the ineffective assistance of counsel. The trial court denied that motion, ruling that Duckworth's failure to raise that issue in his multiple responses to the no-merit report constituted waiver pursuant to *Tillman*.

Duckworth appeals from these two postconviction orders denying his three dismissal motions.²

¶4 To avoid *Escalona*'s procedural bar, Duckworth 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 “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).

¶5 Duckworth is required to allege in his postconviction motion, a sufficient reason for failing to previously raise these issues. See WIS. STAT. § 974.06(4) (2007-08);³ *Tillman*, 281 Wis. 2d 157, ¶27. Duckworth does not allege any reason in his three postconviction motions for failing to previously raise

² Subject matter jurisdiction, the alleged illegality of the stop, and the alleged ineffective assistance of counsel were the principal bases for Duckworth's three motions; however, he raised a variety of issues in each motion, such as alleged violations of the Fourth (illegal search and seizure), Fifth (illegal confession), Sixth (ineffective assistance of counsel) and Fourteenth (denial of due process of law) Amendments to the U.S. Constitution. Many of these issues were also waived by Duckworth's guilty pleas. 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).

³ Duckworth's reasons must be alleged in the postconviction motion itself to allow the trial court to evaluate their sufficiency. See WIS. STAT. § 974.06(4).

All references to the Wisconsin Statutes are to the 2007-08 version.

these issues, most notably in his three no-merit responses on direct appeal.⁴ *See* WIS. STAT. § 974.06(4); *Escalona*, 185 Wis. 2d at 185-86; *Tillman*, 281 Wis. 2d 157, ¶27. His failure to allege any reason, much less a sufficient reason, procedurally bars these inexplicably belated challenges. Duckworth alleges no reason that compels us to exempt him from *Escalona-Tillman*'s procedural bar.

By the Court.—Orders affirmed.

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

⁴ In his appellate reply brief, Duckworth claims, for the first time, that he was not required to allege a reason for this failure because: (1) this court did not follow the no-merit procedures and our affirming the judgment lacks a sufficient degree of confidence in the result to warrant the imposition of a procedural bar, citing *State v. Fortier*, 2006 WI App 11, ¶27, 289 Wis. 2d 179, 709 N.W.2d 893; and (2) appellate counsel's failure to raise these potential issues in the no-merit report constitutes a sufficient reason to avoid the procedural bar, citing *State ex rel. Panama v. Hepp*, 2008 WI App 146, 314 Wis. 2d 112, 758 N.W.2d 806 (per curiam). Duckworth is mistaken because neither *Fortier* nor *Panama* applies to his situation.

In *Fortier*, we evaluated the sufficiency of the defendant's reason for failing to previously raise the postconviction issue, determining that that issue was "indeed an issue of arguable merit." *Fortier*, 289 Wis. 2d 179, ¶24. Duckworth alleges no reason in his postconviction motions for failing to previously raise his belatedly proposed issues, nor does he persuade us that our independent review on direct appeal was not a "full" or "conscientious examination" of the record. *Id.*, ¶27. *Fortier* does not apply.

Panama addresses ineffective assistance of appellate counsel claims. *See Panama*, 314 Wis. 2d 112, ¶3. Duckworth's ineffective assistance claim is against trial counsel for failing to raise certain issues about Duckworth's mental health. *Panama*'s focus on the procedural mechanisms available to pursue an ineffective assistance of appellate counsel claim does not exempt Duckworth's belated claims from *Escalona-Tillman*'s procedural bar. *Panama* also does not apply.

