COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2883 **Cir. Ct. No. 2003CF3557**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARVEY LEE BROWN,

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. Harvey Lee Brown appeals from an order denying his postconviction motion. The issues are whether appellate counsel was ineffective for failing "to thoroughly examine and present the is[s]ues in his no merit report," and for failing to allege trial counsel's ineffectiveness; Brown

additionally contends this court erred when it failed to remand this matter on direct appeal for a ***Machner*** hearing to litigate trial counsel's alleged ineffectiveness, and for directing appellate counsel to respond to matters that were not in the appellate record.[1] We conclude that most of Brown's allegations are procedurally barred either because they have already been decided on direct appeal, or because they should have been raised on direct appeal; appellate counsel's alleged ineffectiveness in examining and presenting the issues in the no-merit appeal is rejected because this court is obliged to independently review the record to search for every issue of arguable merit incident to the no-merit procedure, and we are empowered to extend the deadline of WIS. STAT. RULE 809.32(1)(f) (2005-06).[2] Therefore, we affirm.

¶2 A jury found Brown guilty of three counts of armed robbery with the threat of force. The trial court imposed three concurrent thirty-five-year sentences, each comprised of twenty-five- and ten-year respective periods of initial confinement and extended supervision. Brown filed a postconviction motion alleging prosecutorial misconduct that was scheduled for an evidentiary hearing. The lay witness in support of Brown's motion however, failed to appear for the hearing. The trial court denied the motion.

¶3 Appellate counsel pursued a no-merit appeal. Brown responded to counsel's report and raised concerns that were outside of the record; to understand those concerns, we directed appellate counsel to reply to Brown's response.

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[1] A ***Machner*** hearing is an evidentiary hearing to determine trial counsel's effectiveness. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 In a no-merit appeal, the appellate court is obliged to independently search the record for issues of arguable merit. *See* ***Anders v. California***, 386 U.S. 738, 744-45 (1967). Our review is not limited by those potential issues and concerns raised by counsel and by the appellant personally. *See* ***id.*** We are satisfied that we met our obligation in following the no-merit procedures. *See* ***id.***; ***State v. Tillman***, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574. It is therefore inconsequential whether appellate counsel "thoroughly examine[d] and present[ed] the is[s]ues in his no merit report."

¶5 Many of Brown's concerns involved the claimed ineffective assistance of trial counsel. We extensively addressed those concerns, and many others, and ultimately determined, incident to our obligation to independently review the record, that further proceedings would lack arguable merit. *See* ***Anders***, 386 U.S. at 744-45. We decided many of the issues Brown now renews, including whether a ***Machner*** hearing was warranted. We will not revisit those issues that we previously decided. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶6 Brown also contends that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness. Insofar as trial counsel's alleged ineffectiveness is concerned, we thoroughly reviewed and decided that issue. *See* ***State v. Brown***, No. 2006AP77-CRNM, unpublished slip op. at 3-7 (WI App Dec. 27, 2007). We will not decide it again. *See* ***Witkowski***, 163 Wis. 2d at 990. Insofar as certain instances of trial counsel's alleged ineffectiveness were not previously raised, Brown has not provided a sufficient reason for failing to raise those instances previously, particularly when trial counsel's alleged ineffectiveness was his focus on direct appeal. *See* ***Tillman***, 281 Wis. 2d 157, ¶27 (extending the applicability of the procedural bar of ***State v. Escalona-Naranjo***,

185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), to postconviction motions following no-merit appeals).

¶7 Brown also challenges this court's directive to appellate counsel to respond to concerns Brown raised in his response to the no-merit report. Appellate counsel is permitted to reply to such concerns in WIS. STAT. RULE 809.32(1)(f). Brown contends that we erred in directing appellate counsel to reply beyond the statutory deadline for doing so. We are empowered to extend that deadline. *See* WIS. STAT. RULE 809.82(2)(a). We did so to facilitate our conscientious review of Brown's judgment and postconviction order on direct appeal. *See* ***Anders***, 386 U.S. at 744-45.

By the Court.—Order affirmed.

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