COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1114 **Cir. Ct. No. 1997CF975571A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRONE D. MUNSON,

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. Tyrone D. Munson, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 motion, which alleged his postconviction attorney was ineffective for failing to raise certain errors by trial counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136,

139 (Ct. App. 1996). The circuit court concluded that Munson's claims were procedurally barred. We agree and affirm the order.

BACKGROUND

¶2 In July 1998, Munson entered no-contest pleas to the ten counts charged in this case:[1] two counts of kidnapping, three counts of armed robbery, and five counts of first-degree sexual assault. Half of the counts charged Munson as party to a crime. In September 1998, Munson was sentenced to a combination of consecutive and concurrent sentences totaling 290 years' imprisonment.

¶3 A no-merit appeal was filed. In the no-merit report, counsel identified four possible issues: whether Munson's pleas were knowing and voluntary; whether an adequate factual basis existed for the pleas; whether the circuit court properly exercised its sentencing discretion; and whether trial counsel provided adequate assistance. Munson responded to the no-merit report, claiming trial counsel coerced his plea, that he advised trial counsel he did not understand the plea questionnaire, and that there was "not effective assistance of counsel" because it was "too difficult" for his attorney to defend him. We summarily affirmed the judgment of conviction. *See* ***State v. Munson***, No. 1999AP1301-CRNM, unpublished slip op. (WI App Aug. 14, 2000).

¶4 On April 10, 2009, Munson filed a motion for postconviction relief under WIS. STAT. § 974.06. He alleged that postconviction counsel was ineffective for failing to claim that: (1) trial counsel was ineffective for failing to

[1] Munson also pled no contest to one count of armed robbery in a companion case. That case is not at issue in this appeal.

seek suppression of Munson's statements to police, coercing his plea, and failing to seek a private presentence investigation report and character witnesses for sentencing; (2) the plea colloquy was invalid and his plea was not knowing, intelligent, and voluntary; and (3) the circuit court's sentence was an erroneous exercise of discretion.

¶5 The circuit court denied the motion. It concluded that to the extent Munson was raising claims previously decided by this court, those claims were barred by ***State v. Walberg***, 109 Wis. 2d 96, 103, 325 N.W.2d 687, 691 (1982). The circuit court also concluded that to the extent Munson was making new claims, those new claims were barred by ***State v. Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 171–172, 696 N.W.2d 574, 581, because Munson had failed to raise them in response to the no-merit report. Munson appeals.

DISCUSSION

¶6 On appeal, Munson essentially renews the arguments made in his WIS. STAT. § 974.06 motion. He asserts that the plea colloquy was deficient and his plea was not knowing, intelligent, or voluntary, and that the circuit court erroneously exercised its sentencing discretion. Munson also asserts he is not barred from claiming postconviction counsel was ineffective for failing to raise ineffective-assistance-of-trial-counsel claims.

¶7 The types of claims for relief that can be brought under WIS. STAT. § 974.06 are limited to those of constitutional or jurisdictional character. *See* § 974.06(1); ***State v. Evans***, 2004 WI 84, ¶33, 273 Wis. 2d 192, 215, 682 N.W.2d 784, 795. Issues that were, or could have been, raised in a prior direct appeal or postconviction motion may not be raised in a subsequent § 974.06 motion absent a "sufficient reason" for not raising the issues previously. *See* § 974.06(4); ***State v.***

Escalona-Naranjo, 185 Wis. 2d 168, 181–182, 517 N.W.2d 157, 162 (1994). Further, a § 974.06 motion "'must not be used to raise issues disposed of by a previous appeal.'" ***State v. Lo***, 2003 WI 107, ¶23, 264 Wis. 2d 1, 13, 665 N.W.2d 756, 761 (quoting ***Peterson v. State***, 54 Wis. 2d 370, 381, 195 N.W.2d 837, 845 (1972)).

¶8 Munson's current claims relating to the plea colloquy, adequacy of his plea, and the circuit court's sentencing discretion were expressly raised, addressed, and adjudicated in the no-merit appeal. As the circuit court correctly noted, Munson may not re-raise those issues in a new WIS. STAT. § 974.06 motion. *See* ***Lo***, 2003 WI 107, ¶23, 264 Wis. 2d at 13, 665 N.W.2d at 761. We will not address them further.

¶9 Munson's remaining claim is that postconviction counsel was ineffective for failing to challenge trial counsel's effectiveness. To the extent this is a new claim, the circuit court ruled that new claims were barred by ***Tillman*** because Munson had not raised them in his no-merit response. *See* ***Tillman***, 2005 WI App 71, ¶27, 281 Wis. 2d at 171–172, 696 N.W.2d at 581. However, Munson's claim that postconviction counsel was ineffective appears to be less an actual critique of postconviction counsel's performance and more an attempt to establish a "sufficient reason" for his failure to previously raise his ultimate argument: that trial counsel was ineffective.

¶10 The State concedes that, as a general legal principle, ineffective assistance of postconviction counsel sometimes constitutes a sufficient reason for

a defendant's failure to raise an issue in a prior motion or appeal.[2] *See* ***Rothering***, 205 Wis. 2d at 682, 556 N.W.2d at 139. The State asserts, however, that the issue of trial counsel's performance was implicitly reviewed by this court in the no-merit appeal and, under ***Lo***, cannot be re-raised.[3] The State also claims that: (1) the ***Escalona/Tillman*** bar applies, and (2) Munson ultimately cannot prevail on his ineffective-assistance claims.

¶11 We agree with the State that the ***Escalona/Tillman*** bar applies. Appellate counsel specifically raised two issues regarding trial counsel's effectiveness in the no-merit report, to which Munson *could have* responded or upon which he *could have* elaborated. *See* ***Escalona***, 185 Wis. 2d at 185, 517 N.W.2d at 164. The no-merit response provides a criminal defendant the opportunity "to raise any points that he chooses." ***Anders v. California***, 386 U.S. 738, 744 (1967). Munson did not avail himself of that opportunity.

¶12 We also agree that Munson fails to demonstrate ineffective assistance of counsel. To prove ineffective assistance, a defendant must show both that his attorney performed deficiently and that counsel's deficiency was prejudicial. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 587, 682 N.W.2d 433, 442. To demonstrate postconviction counsel was ineffective for failing to challenge trial counsel's performance, a defendant must show that trial counsel

[2] For example, claims of ineffective assistance of trial counsel generally cannot be reviewed on appeal unless preserved by postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677–678, 556 N.W.2d 136, 137 (Ct. App. 1996).

[3] Our no-merit opinion in Munson's appeal noted only that "our review of the record reveals no basis for a claim of ineffective assistance of [trial] counsel." While presumably we reviewed Munson's case for any and all possible ineffective-assistance claims, the specific issues appellate counsel raised in the no-merit report were whether trial counsel properly advised Munson of the consequences of his plea and Munson's possible lack of confidence in counsel.

actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 480, 673 N.W.2d 369, 375.

I. Motion to Suppress

¶13 Munson first claims trial counsel was ineffective relative to a motion to suppress.[4] Munson had given incriminating statements to police, detailing his involvement in the crimes charged. Trial counsel filed a motion to suppress on January 14, 1998, asking the trial court "to review the mental, emotional and physical state of the defendant at the time that the statements were taken[.]"[5] For whatever reason, the motion was never heard.

¶14 The State asserts that Munson has waived any challenge associated with the suppression motion, as a valid guilty plea waives all non-jurisdictional defects and defenses, including challenges based on alleged constitutional violations. *See* ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302, 303 (Ct. App. 1994). While this is also a generally true legal principle, WIS. STAT. § 971.31(10) creates an exception permitting appellate review of orders denying motions to suppress following guilty or no-contest pleas. Liberally construing Munson's postconviction motion, *see* ***State v. Love***, 2005 WI 116, ¶29 n.10, 284 Wis. 2d 111, 125 n.10, 700 N.W.2d 62, 69 n.10, we could say his argument is actually that trial counsel was ineffective for failing to preserve the issue by obtaining a ruling on the suppression motion. However, Munson's postconviction

[4] At one point, Munson argues that counsel could have at least moved to suppress his statements—counsel did, in fact, make such a motion.

[5] The motion also alleged the statements were taken in violation of ***Miranda v. Arizona***, 384 U.S. 436 (1966), although Munson signed acknowledgements that he had been advised of, and was waiving, his ***Miranda*** rights.

motion does not allege sufficient facts to show he is entitled to relief. *See* ***Allen***, 2004 WI 106, ¶12, 274 Wis. 2d at 579, 682 N.W.2d at 438 (pleading requirements for postconviction motions).

¶15 To be admissible, Munson's statements to police had to be voluntary. *See* ***State v. Hoppe***, 2003 WI 43, ¶¶33–36, 261 Wis. 2d 294, 308–309, 661 N.W.2d 407, 413–414. "Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." ***Id.***, ¶37, 261 Wis. 2d at 309, 661 N.W.2d at 414. What constitutes coercive conduct varies from defendant to defendant. *See* ***id.***, ¶40, 261 Wis. 2d at 310, 661 N.W.2d at 415.

¶16 The only improper police conduct Munson alleged was that "police were telling him that unless he gave a statement he would be placed in prison."[6] He complains this was coercive because he was only seventeen years old and he was drunk at the time of his arrest. *See* ***ibid.*** (defendant's mental status a factor in determining whether police conduct improper). However, Munson's allegation of police coercion is vague and conclusory. He does not allege any specific words spoken by any specific actors at any particular time or in any particular place, nor does he allege how such a statement by the police coerced him into giving his statements.

¶17 Munson's assertion that he was intoxicated at the time of his statements is likewise conclusory. The written statement noted that Munson

[6] In his brief, Munson alleges additional coercive measures, like putting him in a holding cell with his codefendants to get them to fight, or giving Munson cigarettes even though he was under eighteen. However, we review only the allegations within the postconviction motion, not any additional allegations in the brief. ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 588, 682 N.W.2d 433, 443.

denied being under the influence of drugs or alcohol. In his reply brief, Munson explains he did not tell police he was impaired because he feared being in more trouble, but this is simply incongruous with a companion notation that Munson admitted daily alcohol and marijuana use. Further, assuming Munson was intoxicated at the time of his arrest, 7:30 p.m., the first statement-generating interview did not begin until after midnight. Munson alleges no facts that would establish his intoxication at the time of his interview.

¶18 Assuming Munson's allegation of intoxication to be true, however, Munson does not allege that he ever advised counsel of this intoxication "defense." Based on the information available to trial counsel in the written statement, counsel would have had no objective basis for considering that intoxication might have been a factor that would render Munson's statements involuntary: "counsel is not expected to be a mind-reader." *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 621, 516 N.W.2d 362, 373 (1994).

¶19 Munson does not allege sufficient facts to establish that his statements to police were involuntary. He therefore cannot establish a basis for the statements' suppression, so any suppression motion would have been denied. Trial counsel was not deficient, nor was his performance prejudicial, for failing to pursue a legal challenge that would have been rejected. *See* ***Ziebart***, 2003 WI App 258, ¶14, 268 Wis. 2d at 480, 673 N.W.2d at 375.

II. Failure to Obtain Private Presentence Investigation

¶20 Munson also asserts that a private presentence investigation "would have shown the circuit Court a more in depth view of the Defendant's life …. The Defendant grew up with no father, and his mother was a drug addict. The Defendant was physically [and] emotionally abused, and as a young child,

molested and sexually assaulted by older women[.]" Munson contends that counsel's failure to obtain a private report meant that the circuit court was "held blind" at sentencing. Munson also appears to be claiming that a private report containing this information would have shown he used alcohol "for escape."

¶21 First, Munson does not allege this information was not already before the circuit court. While Munson asserts he has never seen the presentence investigation report and, therefore, cannot argue regarding what was or was not included, we know from the sentencing transcript that trial counsel referred to his background as "sad[,]" as "… reflected in the Presentence Report[.]" This reference suggests that much of the background information Munson thinks a private presentence investigation would have provided was already before the circuit court.[7]

¶22 To the extent Munson thought a private report would explain his drinking and somehow demonstrate a mitigating factor, the circuit court disregarded any such argument, noting Munson's "meager excuse that it was alcohol is ridiculous. It's an attempt to pass blame when it clearly falls on you." Munson also offers no explanation of how any information he thinks a private report would have contained would have changed the circuit court's sentencing decision. In any event, the court is under no obligation to rely on a presentence investigation report. *See* ***Bruneau v. State***, 77 Wis. 2d 166, 174, 252 N.W.2d 347, 351 (1977), *overruled in part on other grounds by* ***State v. Greve***, 2004 WI 69, ¶31, 272 Wis. 2d 444, 464–465, 681 N.W.2d 479, 489. Additionally, Munson addressed the court personally at sentencing and could have offered the same

[7] The presentence investigation report is not in the Record.

explanations himself, without the need for a private report. Counsel was not obligated to obtain a private presentence investigation and Munson shows no prejudice from counsel's "failure" to do so.

III. Failure to Procure Character Witnesses

¶23 Munson complains that trial counsel should have tracked down witnesses to testify about Munson's character at sentencing. In his postconviction motion, he listed over a dozen people who could have been called.[8] However, Munson has not alleged that he provided these names to counsel, or that *any* of these individuals would have agreed to testify on his behalf. Munson also fails to allege what they would have said on his behalf. Indeed, one of the witnesses Munson listed was his mother, who actually declined a chance to testify at sentencing. While Munson claims trial counsel had an obligation to investigate and find witnesses, Munson has not established there were any willing witnesses to be found. Counsel cannot be deficient for failing to find character witnesses where none appear to exist.[9]

[8] The State asserted that Munson never identified the witnesses. Although the witnesses are not specifically indentified by name in the motion, there is a "witness list" as Record Item 74, which appears to have been submitted with the postconviction motion, despite its separate number.

[9] Munson also claimed that trial counsel was ineffective for coercing his plea and for failing to ensure his plea was knowing and voluntary. This court expressly concluded in the no-merit opinion that the "record belies Munson's assertion that he was coerced" and, as noted, that there was no arguable merit to a challenge to the plea's validity. These claims cannot be re-raised, no matter how Munson rephrases them. *See* ***State v. Lo***, 2003 WI 107, ¶23, 264 Wis. 2d 1, 13, 665 N.W.2d 756, 761; *see also* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991).

SUMMARY

¶24 Certain claims of error Munson raised in his WIS. STAT. § 974.06 motion were expressly raised and adjudicated during the no-merit appeal and cannot be re-raised now. Munson's claims of ineffective assistance of trial counsel are procedurally barred by ***Escalona*** and ***Tillman***. The allegation of ineffective assistance of postconviction counsel is relevant only insofar as it attempts to provide a "sufficient reason" for Munson's failure to previously raise ineffective-assistance-of-trial-counsel claims. However, because Munson cannot show trial counsel actually was ineffective, Munson's claim of ineffective assistance of postconviction counsel fails to serve as a "sufficient reason" for circumventing the procedural bar.

By the Court.—Order affirmed.

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