COURT OF APPEALS DECISION DATED AND FILED

December 13, 2011

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. 2011AP51

Cir. Ct. No. 2004CF4037

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE N. BROOKS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Terrance N. Brooks, *pro se*, appeals from an order denying his postconviction motion. Because we conclude that his claims are procedurally barred, we affirm.

BACKGROUND

¶2 The State originally charged Brooks in 2004 with twelve offenses stemming from multiple armed robberies that occurred in the city of Milwaukee. As a result of plea bargaining, Brooks pled guilty to six armed robbery counts as party to a crime; five additional armed robbery counts and one count of arson of property other than a building, all as party to a crime, were dismissed and read in at sentencing. The State also agreed to withdraw an amended information that added three additional charges: two carjacking counts, one resulting in great bodily harm; and a second count of arson.

¶3 Brooks's appointed appellate lawyer filed a no-merit report under WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Brooks did not file a response. We concluded that the Record disclosed no arguably meritorious issues and summarily affirmed the convictions. ***State v. Brooks***, No. 2005AP3082-CRNM, unpublished op. and order (WI App Oct. 9, 2006) (***Brooks I***).

¶4 More than four years later, Brooks, proceeding *pro se*, filed a postconviction motion arguing: (1) that his trial lawyer's representation was constitutionally deficient; (2) that the circuit court erroneously exercised its discretion/committed error when it failed to dismiss the criminal complaint against him on grounds that it was defective and failed to properly conduct the plea colloquy; (3) that the circuit court lacked subject matter jurisdiction; (4) that the sentences imposed were excessive because they constituted split sentences; and (5) that the circuit court erroneously exercised its discretion in failing to articulate the bases for the sentences imposed. The circuit court concluded that Brooks's

claims were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). It denied Brooks's motion without a hearing.

DISCUSSION

¶5 The circuit court may deny a postconviction motion without a hearing when the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310–311, 548 N.W.2d 50, 53 (1996). When a defendant has had previous postconviction proceedings, a further postconviction motion is not allowed unless sufficient reason is shown for the failure to have raised the issue in the earlier proceedings. ***Escalona-Naranjo***, 185 Wis. 2d at 181–182, 517 N.W.2d at 162.[1] This procedural bar applies to issues that could have been raised in response to a no-merit report submitted by appointed appellate counsel. ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 167–168, 696 N.W.2d 574, 579. Before we apply the rule of ***Escalona-Naranjo*** to a WIS. STAT. § 974.06 motion filed after a no-merit appeal, we "consider whether the no-merit procedures (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar." ***State v. Allen***, 2010 WI 89, ¶62, 328 Wis. 2d 1, 26, 786 N.W.2d 124, 136.

¶6 Brooks has not demonstrated any procedural inadequacy in his no-merit appeal. Our discussion in ***Brooks I*** reflects that the no-merit review

[1] Brooks requests that we overrule ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We do not have the authority to overrule, modify, or withdraw language from supreme court decisions. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 255–256 (1997). "The supreme court, 'unlike the court of appeals, has been designated by the constitution and the legislature as a law-declaring court.'" ***Ibid.*** (citation omitted).

included consideration of the no-merit report along with a full and thorough examination of the Record. We specifically explained that there would be no arguable merit to challenging the validity of Brooks's pleas, the circuit court's denial of his suppression motion, or the circuit court's exercise of sentencing discretion. Our summary affirmance of Brooks's convictions "carries a sufficient degree of confidence warranting the application of the procedural bar." *See* ***Tillman***, 2005 WI App 71, ¶20, 281 Wis. 2d at 168–169, 696 N.W.2d at 580. Consequently, Brooks may not pursue the claims he now raises absent a sufficient reason for failing to raise those challenges in a response to the no-merit report. *See* ***id.***, 2005 WI App 71, ¶19, 281 Wis. 2d at 167–168, 696 N.W.2d at 579.

¶7 As best we can discern, Brooks attempts to establish a sufficient reason for failing to raise the issues he now raises by asserting, for the first time on appeal, "that he did not receive his discovery from appellate counsel [un]til[] after the no[-]merit report was filed. So not only could he not litigate an[] appeal, but he also could not rebut appellate counsel's no[-]merit report. So therefore he has not even litigated his case [un]til[] now." Because the issue of whether his appellate lawyer gave him constitutionally deficient representation was not presented to the circuit court, we decline to address it.[2] *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577, 584 (1997) (arguments raised for the first time on appeal are generally deemed waived). Brooks offers no other reason beyond this.

¶8 Brooks's failure to allege any reason in his postconviction motion, much less a sufficient reason, procedurally bars these inexplicably belated

[2] We note in passing that Brooks offers only conclusory allegations in this regard.

challenges. In addition, some of the issues Brooks raises in his postconviction motion were addressed in our prior no-merit opinion; namely, his challenges to the validity of his guilty pleas, his trial lawyer's failure to seek suppression of his inculpatory statement to police; and the circuit court's exercise of sentencing discretion. Those issues cannot be relitigated no matter how artfully they are rephrased. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991).

¶9 Finally, we wish to clarify that if Brooks had a legitimate claim that the sentences imposed were excessive, he would not be barred from seeking relief based on ***Escalona-Naranjo***. *See* ***State v. Flowers***, 221 Wis. 2d 20, 22–23, 586 N.W.2d 175, 176–177 (Ct. App. 1998) (determining that neither the procedural bar in WIS. STAT. § 974.06 nor the public policy discussion contained in ***Escalona-Naranjo*** precludes criminal defendants from seeking relief under WIS. STAT. § 973.13); *see also* § 973.13 ("In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings."). Brooks does not, however, have a legitimate claim.

¶10 On each of the six counts to which he pled guilty, the circuit court sentenced Brooks to eighteen years of imprisonment, comprised of nine years of initial confinement and nine years of extended supervision. The circuit court ordered the sentences on three of the counts to run concurrently to each other. Those sentences would then run consecutively to the sentences on the remaining three counts, which the court also ordered to run concurrent to each other. In total, Brooks was sentenced to thirty-six years of imprisonment comprised of eighteen years of initial confinement and eighteen years of extended supervision.

¶11 Brooks claims that the sentences imposed were excessive because they constituted split sentences. A split sentence, which is a sentence for conviction of a single crime imposed to run consecutively in part and concurrently in part, is prohibited by ***State v. Bagnall***, 61 Wis. 2d 297, 311–312, 212 N.W.2d 122, 130 (1973), *modified on other grounds by* ***State v. Rabe***, 96 Wis. 2d 48, 55–56, 291 N.W.2d 809, 812–813 (1980). Contrary to Brooks's contention, the fact that the sentences on three of the counts to which he pled were to run consecutively to sentences on the other counts does not result in a split sentence nor was it excessive.

By the Court.—Order affirmed.

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