

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2016

Diane M. Fremgen
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. 2015AP2251-CR

Cir. Ct. No. 2006CF537

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH J. DULL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Joseph J. Dull appeals pro se from an order denying his motion for postconviction relief. He contends that the circuit court erred in denying his motion because he showed that there was insufficient evidence to support one of his convictions. We disagree and affirm.

¶2 In 2006, Dull was convicted following a jury trial of (1) armed robbery, as a party to a crime and as a repeater; and (2) retail theft, as a repeater. The circuit court sentenced him to fifteen years of initial confinement followed by fifteen years of extended supervision.

¶3 In 2010, this court affirmed Dull's convictions. *State v. Dull*, No. 2007AP2214-CRNM, unpublished op. and order (WI App Dec. 1, 2010). In doing so, we concluded that there were no issues of arguable merit in Dull's case. Accordingly, we accepted counsel's no-merit report and relieved her of further representation.

¶4 Over four and one-half years later, Dull filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06 (2013-14).¹ Dull sought to vacate his armed robbery conviction on the ground that there was insufficient evidence to support it. Specifically, Dull maintained that the State failed to prove that he knew that his co-actor had a knife and was going to use it during their planned theft from a store. In support of his argument, Dull cited the United States Supreme Court decision of *Rosemond v. United States*, 134 S. Ct. 1240 (2014).

¶5 Following a hearing on the matter, the circuit court denied Dull's motion. The court concluded that Dull's argument was already addressed in this court's no-merit decision. This appeal follows.

¹ All references to the Wisconsin Statute are to the 2013-14 version.

¶6 On appeal, Dull contends that the circuit court erred in denying his postconviction motion. He renews the argument made in his motion and seeks a reversal of his armed robbery conviction.

¶7 “We need finality in our litigation.” *State v. Escalona–Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, any claim that could have been raised in a prior postconviction motion or direct appeal cannot form the basis for a subsequent motion under WIS. STAT. § 974.06 unless the defendant demonstrates a sufficient reason for failing to raise the claim earlier. *Escalona–Naranjo*, 185 Wis. 2d at 185. This procedural bar applies even if the direct appeal was a no-merit appeal. See *State v. Tillman*, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. Furthermore, a defendant may not again raise issues that were addressed in the no-merit decision. *Id.*

¶8 Applying these principles to the case at hand, we conclude that Dull’s postconviction motion is procedurally barred. As noted by the circuit court, the sufficiency of the evidence was already addressed in this court’s no-merit decision. We determined that the issue lacked arguable merit, as at least one witness gave testimony to support each of the requisite elements.² *Dull*, No. 2007AP2214-CRNM at 2-3. To the extent that Dull’s argument can be characterized as new, he has not demonstrated a sufficient reason for failing to raise it earlier. He certainly had the opportunity to do so, as evidenced by the multiple responses he filed to the no-merit report.³

² The victim of the armed robbery was a store clerk. At trial, she testified that Dull and his co-actor entered her store together. She further testified that Dull took money and checks from her cash register without her permission after his co-actor threatened her with a knife.

³ Dull filed two responses to the no-merit report raising a host of legal issues.

¶9 Finally, the United States Supreme Court decision in *Rosemond* does not alter our analysis. There, the court held that a defendant must have advance knowledge that an accomplice will use or carry a firearm to be convicted of aiding and abetting the federal crime of using or carrying a firearm in connection with a drug trafficking crime set forth in 18 U.S.C. § 924(c). *See Rosemond*, 134 S. Ct. at 1243, 1249-50. The court’s decision was based upon its interpretation of federal statutes, not constitutional principles. As a result, it has no bearing on whether Dull could have been found liable for armed robbery under Wisconsin’s party to a crime statute.⁴

¶10 For these reasons, we are satisfied that the circuit court properly denied Dull’s postconviction motion.

By the Court.—Order affirmed.

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

⁴ Other states examining *Rosemond v. United States*, 134 S. Ct. 1240 (2014), have reached similar conclusions. *E.g.*, *State v. Ward*, 473 S.W.3d 686, 693 (Mo. Ct. App. 2015) (“Nothing in *Rosemond*, suggests that its holding rests on any constitutional requirement or has any application to state criminal laws on accomplice liability.”); *Hicks v. State*, 759 S.E.2d 509, 514 n.3 (Ga. 2014) (noting that *Rosemond* “arose under federal law and thus does not control here.”).

