**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 10, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP1942** **Cir. Ct. No. 2010CF000573**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTONIO LAMAR TATUM,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE G. ROTHSTEIN, Judge. *Affirmed.*

Before Brennan, Brash and Dugan, JJ.

¶1 PER CURIAM. Antonio Lamar Tatum, *pro se*, appeals an order denying his collateral postconviction motion brought pursuant to WIS. STAT. § 974.06 (2013-14).[1] Because Tatum has not demonstrated a sufficient reason for failing to make his current claims in his previous no-merit appeal, he is barred from doing so in this appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Moreover, even if his arguments were not barred, Tatum's claims of ineffective assistance of trial and postconviction counsel would fail on their merits. Accordingly, we affirm the order denying postconviction relief.

## I. BACKGROUND

¶2 Tatum was convicted of one count of felony murder, committed during an armed robbery, as party to a crime. On direct appeal, his appointed appellate counsel filed a no-merit report. Tatum responded, "rais[ing] multiple concerns about his plea's validity." After conducting an independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we affirmed the judgment of conviction. *See* ***State v. Tatum***, No. 2012AP1119-CRNM, unpublished slip op. and order (WI App June 20, 2013).

¶3 In the postconviction motion underlying this appeal, Tatum argued that the circuit court relied on inaccurate information about his role in the offense and that his postconviction counsel was ineffective for not challenging trial counsel's performance. The postconviction court denied Tatum's motion without a hearing. It concluded that Tatum could have raised his claims of ineffective

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

assistance of trial counsel in his response to the no-merit report and that his arguments were therefore barred. *See* ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. The postconviction court further held that even if the arguments were not barred, Tatum had not established prejudice stemming from trial counsel's performance. This appeal follows.

## II. ANALYSIS

¶4 A defendant must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion," unless the defendant demonstrates a sufficient reason for failing to raise the issue previously. ***Escalona***, 185 Wis. 2d at 185. "Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation [that provides postconviction remedies]." ***Id.*** Moreover, this procedural bar may be applied where, as here, a prior appeal was processed under the no-merit procedure. ***Tillman***, 281 Wis. 2d 157, ¶27 ("a prior no[-]merit appeal may serve as a procedural bar to a subsequent postconviction motion and ensuing appeal which raises the same issues or other issues that could have been previously raised"). Whether Tatum's current claims are procedurally barred is a question of law we review *de novo*. *See* ***id.***, ¶14.

¶5 In his postconviction motion, Tatum argued trial counsel was ineffective for failing to interview and subpoena Craig Dansby, who would have provided information to the sentencing court that Tatum was not the shooter in the underlying felony murder.[2] Tatum further asserted that the failure to present this

[2] During the circuit court proceedings, Tatum insisted that his role was that of the getaway driver.

evidence at sentencing was highly prejudicial because it resulted in a lengthier sentence. Tatum submits that postconviction counsel was ineffective for not pursuing the issue of trial counsel's ineffectiveness.

¶6 As an excuse for not previously making these claims, Tatum argues he could not raise an unpreserved claim of ineffective assistance of trial counsel in response to the no-merit report and was instead required to wait until WIS. STAT. § 974.06 proceedings to raise his claims of ineffective assistance of trial and postconviction counsel. Tatum is wrong. There was nothing to prevent Tatum from using his no-merit response to claim that his postconviction counsel was ineffective for not challenging trial counsel's ineffectiveness. *See* ***State v. Allen***, 2010 WI 89, ¶¶3-5, 328 Wis. 2d 1, 786 N.W.2d 124.

¶7 Beyond this, Tatum does not offer any reason for why his current claims were not previously raised. There is no suggestion of impropriety during the no-merit proceedings. *See* ***Tillman***, 281 Wis. 2d 157, ¶20. Consequently, his claims are barred.

¶8 Even if we were to address the merits of Tatum's claim that his trial attorney was ineffective at the time of sentencing, the claim would fail. When an ineffective assistance of postconviction counsel claim is premised on the failure to raise ineffective assistance of trial counsel, the defendant must first establish trial counsel was actually ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. To prevail on a claim of ineffective assistance of trial counsel, Tatum was required to show that counsel was deficient and that the deficiency prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Because a defendant must show both deficient performance and

prejudice, reviewing courts need not consider one prong if the defendant has failed to establish the other. ***Id.*** at 697.

¶9 Tatum faults trial counsel for not investigating and securing Dansby's presence at the sentencing hearing to establish that Tatum was not the one who shot and killed the victim. Tatum submits that as a result of trial counsel's deficient performance, he received a longer sentence. This argument fails based on the record before us.

¶10 Prior to pronouncing its sentence, the circuit court explained its view of Tatum's role in the murder:

> *I don't know if you were the shooter. I'm not going to make any finding that you were the shooter*, but I certainly am making a finding that you were more than just a getaway driver. I suspect you were there. I suspect you knew what was going to go down. I suspect that you knew [your co-actor]'s plan that a gun was going to be used to steal $2,735 of cash and jewelry from somebody, and you willingly went along with it and somebody got killed. *Whether you were the instrument of death or not, I don't know.* A higher power than I will eventually judge that.
>
> *But your conduct after was deplorable. And for somebody who lost a brother to a homicide, for you to, number one, plan a robbery where a gun was involved and number two, to facilitate, in your story, the escape of the guy that killed somebody is absolutely deplorable, and that's what I'm going to sentence you for. Your role in this. Your role as you say.*

(Emphasis added.)

¶11 The circuit court continued: "[I]f the [Dansbys] could have identified you, you would have never got[ten] the [plea] deal. They can't identify

the shooter, so I don't know."[3] However, the circuit court also noted that "when you participate in a robbery ending in death, whether you're the shooter or, as you claim, just a getaway driver or something in between, which is what I strongly suspect it is, you are responsible for everything." The court concluded its remarks by reiterating that it was not sentencing Tatum for pulling the trigger:

> I'm sentencing you because you're involved in an armed robbery that led to the death. In my opinion, you were involved before the armed robbery, during the armed robbery and certainly after the armed robbery. I make no finding as to whether or not you were the shooter. I don't know.

¶12 The record reflects that the circuit court was aware that Dansby did not identify Tatum as the shooter. Presenting his live testimony at the hearing would not have impacted Tatum's sentence. Consequently, Tatum has not shown prejudice. *See* ***Strickland***, 466 U.S. at 694 (To satisfy the prejudice prong, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). Because his allegations are insufficient to establish the ineffectiveness of trial counsel, Tatum's derivative challenge to the effectiveness of his postconviction counsel also fails.

¶13 Insofar as Tatum also alleges that the State breached the plea agreement by accusing him of being the shooter and that trial counsel was ineffective for failing to object to the breach, these claims also fail. We previously addressed these assertions in our resolution of the no-merit appeal and will not

[3] Both Craig Dansby and his son reportedly saw the shooter.

revisit them now.[4] *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.")

*By the Court.*—Order affirmed.

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

[4] In our no-merit review, we concluded "[t]here [wa]s nothing in the record to support Tatum's claim that the plea was premised on the State not accusing him of being the shooter." *See* ***State v. Tatum***, No. 2012AP1119-CRNM, unpublished slip op. and order at 6 (WI App June 20, 2013) (footnote omitted). We continued: "If there was no actionable breach of the agreement, there was no basis for [trial] counsel to object. Counsel is not ineffective for failing to pursue a meritless objection." *See* ***id.*** at 7.