

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2007

David R. Schanker
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 Nos. 2005AP2280
2005AP2281**

**Cir. Ct. Nos. 2003CF18
2003CF601**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FRANK N. HAYES,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Frank N. Hayes appeals from a postconviction order summarily denying his motion for plea withdrawal and other relief.¹ The

¹ There was one consolidated order entered, disposing of both circuit court cases.

issues are whether Hayes's postconviction claims are procedurally barred and if not, whether the criminal complaint was defective, and whether the trial court at sentencing erroneously exercised its discretion and violated the terms of the parties' plea bargain. We conclude that these issues are procedurally barred because they either were decided on direct appeal, or not raised in response to the no-merit report. Therefore, we affirm.

¶2 Hayes pled guilty to attempted theft, attempted robbery by force, and burglary. The trial court imposed a seventeen-year aggregate sentence comprised of eight- and nine-year respective aggregate periods of initial confinement and extended supervision. Hayes's appellate counsel filed a no-merit report to which Hayes elected not to respond. This court considered the report, independently reviewed the appellate records, and affirmed the judgments as slightly modified after ordering an amendment inconsequential to these appeals. *See State v. Hayes*, Nos. 2004AP303-CRNM; 2004AP304-CRNM, unpublished slip op. at 7 (WI App July 28, 2004).

¶3 To avoid the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), which requires a sufficient reason for failing to raise all postconviction challenges on direct appeal or in defendant's original, supplemental or amended postconviction motion, Hayes alleges that he was unable to previously raise these claims because they were "[i]nadequately [r]a[i]s[ed] by [a]ppellate [c]ounsel." Whether *Escalona*'s procedural bar applies to a postconviction claim is a question of law entitled to independent review. *See State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶4 In a no-merit appeal, this court is obliged to independently review the appellate record to search for every arguably meritorious issue regardless of

whether that potential issue was identified in appellate counsel’s no-merit report, or in the appellant’s response to that report. *See Anders v. California*, 386 U.S. 738, 744-45 (1967). In affirming the judgments (as modified) on direct appeal, we addressed the potential challenges to the validity of Hayes’s guilty pleas, and ultimately concluded that “[t]he record thus belies any claim that Hayes’ guilty pleas were involuntary or unknowing, or that they were not supported by an adequate factual basis.”² *Hayes*, Nos. 2004AP303-CRNM; 2004AP304-CRNM, unpublished slip op. at 5. We also expressly addressed the potential challenges to the sentences and concluded that “[n]o basis exists to disturb the sentences imposed by the trial court.” *Id.* at 6.

¶5 Hayes alleges that the issues he raised by postconviction motion were inadequately raised on direct appeal. His reason is insufficient because in a no-merit appeal, unlike a conventional appeal, the appellate court is obliged to independently review the record to search for arguably meritorious issues, which would obviate any potential problem that may have arisen from appellate counsel having inadequately raised those issues.³ *See Anders*, 386 U.S. at 744-45. The fact that we accepted the no-merit report and affirmed the judgments of conviction (as modified) suggests that the alleged defectiveness of the complaint and the alleged breaches of the plea bargain were not arguably meritorious issues. *See*

² This independent conclusion would presumably include rejection of the allegation of the complaint’s defectiveness.

³ Had those issues been raised inadequately, the appellate court would have presumably discovered them during its independent review of the record, and if it had determined that they were even arguably meritorious, it would have unquestionably ordered further briefing at minimum, and more likely, rejected the no-merit report and ordered the appointment of new successor postconviction/appellate counsel. *See Anders v. California*, 386 U.S. 738, 744-45 (1967).

State v. Tillman, 2005 WI App 71, ¶27, 281 Wis. 2d 157, 696 N.W.2d 574. Furthermore, those potential issues are also procedurally barred because Hayes did not respond to the no-merit report.⁴ Therefore, the issues Hayes raised in his postconviction motion are procedurally barred by *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (we will not revisit previously rejected issues), or *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”). See also *Escalona*, 185 Wis. 2d at 185 (a direct (conventional) appeal may serve as a procedural bar to a postconviction motion that raises issues that could have been raised on direct appeal).

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

⁴ Hayes should have been aware of the belatedly claimed defectiveness of the complaint and the claimed breach of the plea bargain before the expiration of his no-merit response deadline. Nevertheless, he chose not to respond.

