

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 18, 2009

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 No. 2008AP2654

Cir. Ct. No. 2000CF946

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES A. ADDISON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM W. BRASH, Judge. *Affirmed.*

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

¶1 PER CURIAM. James A. Addison appeals from an order denying his WIS. STAT. § 974.06 (2007-08)¹ postconviction motion. The trial court denied

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Addison's motion as procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

¶2 In 2000, Addison pled no contest to one count of first-degree reckless homicide and to one count of first-degree reckless endangerment. On the reckless homicide charge, the court sentenced Addison to a bifurcated sentence of forty years' imprisonment, comprised of thirty years of initial confinement and ten years of extended supervision. On the reckless endangerment charge, the court sentenced Addison to a bifurcated sentence of ten years, comprised of five years of initial confinement and five years of extended supervision, to run concurrent with the other sentence.

¶3 Addison appealed, and his appointed attorney filed a no-merit report. *See* WIS. STAT. RULE 809.32. Addison responded to the no-merit report. After considering both counsel's report and Addison's response, and upon our independent review of the record, we concluded there were no arguably meritorious appellate issues and affirmed the judgment of conviction. *State v. Addison*, No. 2003AP735-CRNM, unpublished slip op. (WI App Oct. 20, 2003) (*Addison I*).

¶4 On September 22, 2008, Addison, acting *pro se*, filed a WIS. STAT. § 974.06 motion for postconviction relief. In the motion, Addison argued that his trial attorney was ineffective for not introducing, at sentencing, the criminal record of the homicide victim, Andre Love, and for not rebutting Love's "family's portrayal of his character." Addison also argued that his postconviction counsel was ineffective for not challenging the effectiveness of trial counsel and, therefore, the procedural bar of *Escalona-Naranjo* should not be applied. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App.

1996) (Ineffective assistance of postconviction counsel may be sufficient cause to overcome the procedural bar of *Escalona-Naranjo*.) The trial court denied Addison’s motion because he had not raised the issues in response to counsel’s no-merit report. Addison appeals.

¶5 WISCONSIN STAT. § 974.06(5) and *Escalona-Naranjo* require a defendant to raise all grounds for postconviction relief in his or her original motion or appeal. The reason for this is that we need finality in our litigation. *Escalona-Naranjo*, 185 Wis. 2d at 185. Accordingly, when we are presented with postconviction motions raising issues either previously raised or which could have been raised in a previous motion or appeal, we hold that the claims are procedurally barred absent a sufficient reason for failing to raise them previously. *See id.* Moreover,

when a defendant’s postconviction issues have been addressed by the no merit procedure under WIS. STAT. RULE 809.32, the defendant may not thereafter again raise those issues or other issues that could have been raised in the previous motion, absent the defendant demonstrating a sufficient reason for failing to raise those issues previously.

State v. Tillman, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574 (citation omitted). And, “[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶6 The procedural bar of *Escalona-Naranjo* “is not an ironclad rule” and in considering whether to apply it when the prior appeal was taken under WIS. STAT. RULE 809.32, we “pay close attention to whether the no merit procedures were in fact followed.” *Tillman*, 281 Wis. 2d 157, ¶20; *see also State v. Fortier*,

2006 WI App 11, ¶¶23-27, 289 Wis. 2d 179, 709 N.W.2d 893 (procedural bar not applied when no-merit counsel and this court did not discuss an arguably meritorious issue). Additionally, we “must consider whether [the no-merit] procedure, even if followed, carries a sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case.” *Tillman*, 281 Wis. 2d 157, ¶20.

¶7 With those standards in mind, we turn to Addison’s no-merit appeal and his postconviction arguments.

¶8 At sentencing, the victim’s mother, father, and sister spoke about the impact of their son’s death. Love’s mother described her son as “fun loving, caring, respectful ... [and] [h]ard working.” Love’s father called his son “a fine human being.” Love’s sister described Love as “like the peacemaker of our family He hated to see us argue.”

¶9 In his postconviction motion, Addison contended that his attorney should have introduced evidence of Love’s criminal record, which Addison contends showed Love to be the “enforcer” of a motorcycle gang. That evidence, according to Addison, would have countered the “favorable portrayal” of Love’s character offered by his parents and sister. Addison went on to point out that the circuit court, in its sentencing remarks, alluded to the “peacemaker” remark when it suggested that Love was acting in a similar role when he was killed.²

² According to the criminal complaint, Addison and another man, Terry Nash, were involved in an ongoing dispute. A confrontation took place, and Love, who had been with Nash, “got between” Addison and Nash. Love was killed when Addison fired his gun.

¶10 In the response that Addison filed to counsel’s no-merit report, he also challenged the effectiveness of his trial attorney. Among other things, he complained that his trial attorney did not adequately investigate the possibility of asserting self-defense as a theory of defense.³ *Addison I*, unpublished slip op. at 4. Addison’s current complaint about trial counsel’s performance is little more than a reformulation of that same argument. Addison contends that his attorney should have introduced evidence that would have painted Love as an individual with a criminal record and ties to a motorcycle gang—facts that arguably would have bolstered a claim of self-defense.

¶11 Whether Addison’s trial attorney was ineffective for not adequately preserving a self-defense argument was considered in Addison’s no-merit appeal. Issues previously considered on direct appeal cannot be reconsidered on a motion under WIS. STAT. § 974.06. *State v. Brown*, 96 Wis. 2d 238, 241, 291 N.W.2d 528 (1980); *see also Escalona-Naranjo*, 185 Wis. 2d at 181-82. The record shows that Addison raised a substantially similar argument in his no-merit response and this court considered the argument and concluded that it lacked

³ Addison’s response contained the following:

The facts of the instant cause of action disclose that: (1) Addison was at home, (2) he noticed that his car had been moved my [sic] someone from in front of his home, (3) fearing something suspicious, he retrieved his handgun and went outside where he observed his car down the road, (4) he moved his car back in front of his house, (5) upon getting out of the car, another car had pulled in front of him and four black males got out of the car and started making threatening gestures and acts in [an] attempt to retrieve something from their waist belt as they were moving toward him, and (6) fearing for his life, he reached and obtained his handgun from his pocket and started shooting.

arguable merit.⁴ Therefore, the no-merit procedures were followed and do carry a sufficient degree of confidence to warrant the application of the procedural bar. The trial court did not err when it denied Addison’s postconviction motion based on *Escalona-Naranjo* and *Tillman*.

By the Court.—Order affirmed.

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

⁴ We recognize that the supreme court has granted review in *State v. Allen*, No. 2007AP795, a case raising the following issues, according to the Wisconsin Supreme Court Table of Pending Cases:

Where a defendant fails to raise a potential claim in response to a no-merit report, what additional showing, if any, is necessary to constitute “sufficient reason” authorizing that defendant to raise the claim in a subsequent motion under Wis. Stat. § 974.06?

[and]

Does requiring a defendant to respond to a no-merit report with arguable claims that were overlooked by appointed counsel and barring the defendant from ever raising any claim not so raised, conflict with the right to counsel on direct appeal?

Because we conclude that Addison raised an argument in his no-merit response that is substantially similar to the argument raised in his postconviction motion, the instant facts are distinguishable from those pending before the supreme court.

