COURT OF APPEALS
DECISION
DATED AND FILED

August 09, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP959 **Cir. Ct. No. 1988CF880764**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DILLARD EARL KELLEY, SR.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. A*ffirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Dillard Earl Kelley, Sr., appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion. The circuit court denied the motion as barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Kelley also appeals from an order denying his motion for reconsideration in which he argued that the newly discovered evidence, upon which part of the postconviction motion was predicated, was not available when his earlier challenges to the conviction were litigated. The circuit court denied reconsideration on the basis of laches.

¶2 Because we agree with the circuit court that Kelley's latest postconviction motion is barred by ***Escalona*** and Kelley's contentions are without merit, we affirm the order denying the postconviction motion. We decline to apply laches to Kelley's motion for reconsideration, but affirm nonetheless, because it is not reasonably probable that a different result would be reached at a trial that would include the newly discovered evidence.

BACKGROUND

¶3 On February 15, 1985, seven people were killed when a Milwaukee apartment building burned. A criminal complaint charging Kelley with seven counts of second-degree murder (felony murder arising from arson) was filed on March 24, 1988. The complaint also charged Kelly with seven other arson-related crimes, stemming from six other fires that occurred between October 23, 1984 and August 5, 1987.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 After the State's opening statement to a jury, Kelley waived his right to a jury trial, and a court trial was held. The court found Kelley guilty on all fourteen counts, and sentenced him to 229 years imprisonment to be served consecutively to a federal 30-year sentence.

¶5 Kelley appealed the conviction and raised two issues. He challenged the sentence as excessive and contended that the circuit court's ruling that evidence of his drug-related activities was admissible as "other acts" evidence pursuant to WIS. STAT. § 904.04(2) (1985-86) was erroneous. This court rejected Kelley's arguments and affirmed the judgment of conviction. ***State v. Kelley***, No. 1990AP14-CR, unpublished slip op. (Wis. Ct. App. Aug. 16, 1990). The same attorneys represented Kelley at trial and on direct appeal.

¶6 Kelley then filed the first of several collateral attacks on his conviction. On February 24, 1993, Kelley filed a *pro se* petition for a writ of error *coram nobis* which was construed by the circuit court as a postconviction motion under WIS. STAT. § 974.06. In that motion, Kelley argued that the circuit court lost personal jurisdiction when he was transferred between state and federal custody during the pendency of the case, and that he was denied his constitutional rights to a jury trial and to confront and cross-examine witnesses against him. Kelley's latter contention was also presented in the context of the effectiveness of trial counsel. The circuit court rejected all of Kelley's contentions. On appeal, this court affirmed. ***State v. Kelley***, No. 1993AP1030, unpublished slip op. (Wis. Ct. App. March 25, 1994).

¶7 Kelley next filed a petition for a writ of *habeas corpus* with this court which was denied *ex parte*. ***State v. Kelley***, No. 1996AP870-W, unpublished slip op. (Wis. Ct. App. April 4, 1996). Kelley then filed a petition for a writ of

habeas corpus with the circuit court. The petition was dismissed and Kelley appealed. On October 21, 2003, this court summarily affirmed the circuit court's order. ***State ex rel. Kelley v. State***, No. 2002AP1495, unpublished slip op. (WI App Oct. 21, 2003).

DISCUSSION

¶8 On February 16, 2004, Kelley filed the WIS. STAT. § 974.06 postconviction motion that underlies this appeal. For ease of discussion, we will consider Kelley's arguments, both in the motion and on appeal, *seriatim*.

¶9 Kelley argues that his trial counsel was ineffective for agreeing to a bench trial and for not confronting or cross-examining the State's witnesses. That argument is virtually identical to Kelley's argument in his first WIS. STAT. § 974.06 postconviction motion.[2]

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[2] In our summary order, we summarized Kelley's contentions as follows:

> Kelley also contends that because of ineffective assistance of counsel, he was denied his rights to a jury trial, to confrontation of adverse witnesses, and to present his own witnesses. After the trial court ruled adversely to him on the issue of other crimes evidence, Kelley waived his right to a jury trial. Counsel and Kelley also agreed that the trial court should determine guilt or innocence based upon stipulated testimony and the prosecutor's summary of what other witnesses would testify to.

We rejected Kelley's arguments as follows:

> The trial court denied Kelley's ineffective assistance of counsel claim without holding an evidentiary hearing. The "petition" and supporting affidavit, however, contain only vague and conclusory allegations. Kelley alleges that he can produce witnesses to contradict the State's evidence and that his attorney had documentary evidence to contradict the prosecution's witnesses. He does not include any specific factual assertions.

(continued)

¶10 Once a matter is litigated, it cannot be relitigated in a subsequent proceeding, regardless of "how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Moreover, a defendant cannot file successive WIS. STAT. § 974.06 postconviction motions. *See* ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 271-74, 441 N.W.2d 253 (Ct. App. 1989). As the supreme court stated in ***Escalona***, "[w]e need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." ***Escalona***, 185 Wis. 2d at 185. A defendant cannot raise an argument in a second postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. *See* ***id.*** at 181-82. Even if Kelley's claims of ineffective trial counsel in this postconviction motion differ from the claims in his 1993 motion, he has not shown any reason why his latest claims could not have been raised previously.

> He does not identify the witnesses nor include affidavits from them. Furthermore, he provides no information about the alleged documentary evidence. Likewise, his claim that the prosecutor concealed exculpatory evidence is made without any attempt to establish what evidence was conceded. The materials filed by Kelley are so inadequate that an evidentiary hearing was not required.
>
> Counsel's decision to dispense with examination of witnesses gives us pause, as it did the trial court. Before accepting the waivers, the trial court made a lengthy record on the waiver of a jury trial and the waiver of testimony. Counsel had strategic reasons for recommending the waivers and those reasons were explained to the court. Additionally, Kelley acknowledged that he had discussed the waivers with counsel, that he understood counsel's reasoning, and that he agreed to the procedure.

¶11 Kelley next argues that the circuit court lacked jurisdiction over him because he was not indicted by a grand jury. That argument is meritless.[3] While a prosecution may be commenced by the filing of an indictment by a grand jury pursuant to WIS. STAT. § 968.06 (1987-88), indictment is not the sole method of commencing a criminal prosecution. A prosecution also may be commenced by the filing of a criminal complaint. WIS. STAT. § 967.05(1)(a) (1987-88); *see also* ***State v. Smith***, 131 Wis. 2d 220, 238, 388 N.W.2d 601 (1986). In this case, a criminal complaint was filed on March 24, 1988. No jurisdictional defect existed.

¶12 Kelley also argues that his double jeopardy rights were violated when he was convicted of both second-degree murder (felony murder) and arson. We disagree.[4] Kelley's argument is premised upon a misunderstanding of the facts. Kelley was not convicted of the separate crime of arson in relation to the February 15, 1985 fire. Only the second-degree murder convictions stem from that incident. Kelley's other arson-related convictions arise from other fires occurring in a nearly three-year time span. No double jeopardy violation exists.

¶13 Kelley's final argument rests upon three assertions that he believes constitute newly discovered evidence: (1) James Wren, who Kelley describes as an "eyewitness" to the February 15, 1985 fire, was in jail on that date; (2) a private detective who investigated the arsons on behalf of an insurance company was not licensed in Wisconsin; and (3) arson was not the cause of the February 15, 1985

[3] We note that, like the circuit court, we could invoke ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) and not address this argument. Because the argument is patently without merit, we choose to dispose of the issue directly.

[4] As noted in n.3, *supra*, ***Escalona*** could be invoked. Again, we choose to address the merits of Kelley's contention.

fire. Kelley seeks to avoid the procedural bar of ***Escalona*** by asserting that he did not discover the evidence until after the completion of his first postconviction motion. He also asserts that he did not discover the evidence earlier because of ineffectiveness of counsel and "governmental interference."[5]

¶14 A new trial may be granted based on newly discovered evidence only if the defendant proves by clear and convincing evidence that: (1) the evidence came to the defendant's knowledge after trial; (2) the defendant has not been negligent in seeking to discover it; (3) the evidence is material to the issue; and (4) the evidence is not merely cumulative to that which was introduced at trial. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the defendant satisfies those four criteria to the requisite degree of proof, then the question becomes "whether a reasonable probability exists that a different result would be reached in a trial." ***Id.*** In determining whether there is a reasonable probability of a different result, the court must determine whether there is a reasonable probability that a jury would have a reasonable doubt as to the defendant's guilt. ***Id.*** at 475.

¶15 For purposes of this opinion, we assume that Kelley has satisfied the initial four criteria. Therefore, we turn directly to whether there is a reasonable

[5] The circuit court initially rejected Kelley's newly discovered evidence contention because "all of the evidence cited is shown to be from 1985 and, hence, not 'new.'" Kelley moved for reconsideration, arguing that he did not obtain the evidence until he hired a private investigator in 1994. The circuit court denied reconsideration on the ground of laches, holding that Kelley's ten-year delay in filing the motion was "unreasonable and prejudicial under any reasonable view." *See* ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). We decline to apply laches, but affirm nonetheless, on alternative grounds. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (circuit court order will be upheld if record supports result irrespective of the circuit court's rationale).

probability of a different result at a new trial. We agree with the State that Kelley's newly discovered evidence does not meet that test.

¶16 James Wren did not testify, nor was there any reference to Wren's observations or statements at trial. Because there is no evidence that the court's finding of guilt was based on Wren, his whereabouts on the date of the fire are immaterial.

¶17 The fact that a private investigator involved in the case was not licensed in Wisconsin is similarly immaterial. Kelley concedes that the investigator was licensed, presumably in Illinois. The lack of a Wisconsin license does not create a reasonable probability that a jury would have a reasonable doubt as to the Kelley's guilt.

¶18 Lastly, Kelley asserts that the February 15, 1985 fire was not caused by arson. Kelley relies in part on a report by a State Crime Laboratory chemist, prepared shortly after the fire, who did not find "volatile hydrocarbons and/or accelerant residues" on four pieces of debris tested after the fire. The report, however, also states that the finding "did not preclude the possibility that such residues were present at an earlier time." Kelley also relies on police reports that suggested that one of the victims used the burners on the gas stove to heat the house.[6] We agree with the State that none of the evidence cited by Kelley eliminates arson as the cause of the fire. Moreover, Kelley ignores the evidence of guilt that was presented to the court, including Kelley's inculpatory statement, made to an undercover officer, that Ed Clayton had burned the building for him.

[6] All of these police reports date from shortly after the fire. Therefore, Kelley cannot show that he did not possess this evidence until after trial.

Kelley has not shown there was a reasonable probability that a jury would have a reasonable doubt as to his guilt.

By the Court.—Orders affirmed.

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