COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1518 **Cir. Ct. No. 1991CF911618A**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT ALAN HEIMERMANN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER and TIMOTHY G. DUGAN, Judges. *Affirmed.*

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

¶1 PER CURIAM. Scott A. Heimermann appeals from an order denying his motion for postconviction relief and an order denying his motion for reconsideration. Heimermann argues that the trial court erred in that it did not

properly consider the information submitted by Heimermann as newly discovered evidence that would result in a different outcome at trial. Because Heimermann's claims have been raised in previous appeals and are procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we affirm.

BACKGROUND

¶2 In 1992, Heimermann was sentenced to two consecutive life sentences after a jury found him guilty of two counts of first-degree intentional homicide as party to a crime. At trial, he argued that he was innocent as he only went along with the crime because he was afraid of his co-defendant's connections to the police and mafia and was, therefore, afraid to turn him in. In his various appeals Heimermann has argued that his co-defendant was a government agent and set him up, that the government and police department are setting him up, and that the police covered up the murder investigation to protect his co-defendant, who was an informant.

¶3 Since Heimermann's conviction, he has filed more than twenty postconviction motions. Previously, Heimermann filed two WIS. STAT. § 974.06 (2005-06) motions,[1] numerous motions requesting a new trial, a malpractice lawsuit against his trial attorney, and petitions for writs of *habeas corpus*.

¶4 In May 2007, Heimermann filed a postconviction motion requesting a new trial, appointment of counsel, and postconviction discovery to search

[1] Heimermann's first WIS. STAT. § 974.06 motion was filed on August, 9, 1992. His second § 974.06 motion was filed on September 24, 1996.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

through the files of the Milwaukee Police Department. He contends that these files contain evidence that was deliberately withheld and that this evidence constitutes "newly discovered evidence" entitling him to a new trial, in that it would lead to a different outcome.

¶5 Specifically, Heimermann argues that he has recently discovered evidence that the Milwaukee Police Department arrested and released Muhammad "T.C." Binwalee in March 1989, five months before he was killed by Heimermann's co-defendants, even though Binwalee was wanted by authorities in Illinois and the FBI had issued a warrant for his arrest. Heimermann contends that Binwalee's arrest and release is evidence of the Milwaukee Police Department's overall conspiracy to frame him for the murder of Binwalee and Binwalee's associate.

¶6 The trial court denied Heimermann's motion, ruling that his "claim of newly discovered evidence does not pass muster, that he is not entitled to postconviction discovery, and that his petition for postconviction relief is conclusory and without the requisite factual support." The trial court found that Heimermann was not entitled to postconviction discovery under ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999), because he did not show that the evidence was consequential to an issue in the case or that the result of the proceeding would have been different. The trial court also found Heimermann's theories and conclusions to be "implausible and based on nothing more than speculation." Heimermann appeals.

DISCUSSION

¶7 On appeal, Heimermann argues that the trial court did not properly consider his new evidence and that a reasonable probability exists that a different

result would be reached in a new trial. The State argues that the trial court correctly denied Heimermann's motion for a new trial based on newly discovered evidence and asks the court to impose sanctions for a frivolous appeal. As noted above, the trial court ruled that Heimermann's motion did not provide enough support to grant him postconviction relief.

¶8 In reviewing whether a claim based on a statute is procedurally barred, this court reviews the case *de novo*. ***Minuteman, Inc. v. Alexander***, 147 Wis. 2d 842, 853, 434 N.W.2d 773 (1989). A reviewing court may uphold a lower court's decision "on a theory or on reasoning not presented to the lower court." ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).

¶9 WISCONSIN STAT. § 974.06 requires a "prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation." ***Escalona***, 185 Wis. 2d at 185. A court may consider issues not raised in a prior motion if the court finds "that a 'sufficient reason' exist[ed] for either the failure to allege or to adequately raise the issue in the original, supplemental or amended motion." ***Id.*** at 181-82.

¶10 The evidence and theory Heimermann now claims to have found could have been, and has been, brought up during earlier appeals. The evidence Heimermann claims to have recently discovered occurred in 1989, months before the crime he was convicted and sentenced for was committed, and two years before his trial. Heimermann argues that this evidence shows the Milwaukee Police Department and one of its detectives released Binwalee from custody because they wanted to build a case against Binwalee and his gang, and this action

then led to Heimermann being framed for a murder by the same parties. In previous appeals, Heimermann argued that he is the victim of a conspiracy by federal and local law enforcement officials to frame him for this crime,[2] and that the Milwaukee Police Department knew about Binwalee's Illinois and FBI warrants but was more interested in helping a confidential informant, who was also Heimermann's co-defendant, learn from Binwalee about drug trafficking and other crimes taking place in Wisconsin. Throughout his trial and subsequent postconviction motions and appeals, Heimermann has attempted to argue his case in numerous ways, and his current argument does not differ substantially from theories he has put forth before.[3]

¶11 Under ***Escalona***, claims which could have been raised in a prior postconviction motion or appeal and were not are procedurally barred unless a sufficient reason for failing to raise the issue is presented. ***Escalona***, 185 Wis. 2d at 185. The information Heimermann identifies as new evidence existed before his trial and could have been discovered and argued before now. Heimermann does not provide a sufficient reason for failing to raise the issue before now.[4]

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[2] The trial court dismissed Heimermann's motion, and the dismissal was upheld by this court.

[3] During his appeal, Heimermann filed with this court a letter pointing to supplemental authority. Heimermann claims that ***State v. Edmunds***, 2008 WI App 33, ___ Wis. 2d ___, 746 N.W.2d 590, supports his claim that he is entitled to a new trial because he has discovered new evidence of corruption in the Milwaukee Police Department. However, because Heimermann has argued before that the police are corrupt and responsible for framing him for a murder, and because the evidence he has presented is insufficient to support such a claim, he is not entitled to a new trial under ***Edmunds***.

[4] Heimermann argues that he was unable to produce the evidence before now because it was being withheld by the State and the Milwaukee Police Department. However, there is no evidence that Heimermann or his counsel have sought this information before now, or that they were denied access to this information.

¶12 In its brief, the State asks us to impose sanctions on Heimermann to prevent him from filing more frivolous appeals. Under WIS. STAT. § 809.25(3),[5] this court has the power to sanction a party for filing a frivolous appeal. While we agree that Heimermann has filed numerous motions and appeals that have lacked merit, at this time we will not impose sanctions.

[5] The full text of WIS. STAT. § 809.25(3) reads:

> FRIVOLOUS APPEALS. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section. A motion for costs, fees, and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, no later than the filing of the cross-respondent's brief. This subsection does not apply to appeals or cross-appeals under s. 809.107, 809.30, or 974.05.
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> (b) The costs, fees and attorney fees awarded under par. (a) may be assessed fully against the appellant or cross-appellant or the attorney representing the appellant or cross-appellant or may be assessed so that the appellant or cross-appellant and the attorney each pay a portion of the costs, fees and attorney fees.
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> (c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:
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> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
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> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

By the Court.—Orders affirmed.

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