COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP767 **Cir. Ct. No. 1996CF965047**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN FITZGERALD ROWELL,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Sean Fitzgerald Rowell, *pro se*, appeals from an order denying his postconviction motion. Rowell argues that his 1997 conviction for first-degree intentional homicide should be vacated because the prosecutor filed the information at the conclusion of the preliminary examination, without

having first ordered a written transcript of the preliminary examination. We affirm on both procedural and substantive grounds.

¶2 Rowell was charged with first-degree intentional homicide in connection with the 1996 shooting of Christopher Perkins. At the conclusion of the preliminary examination, the trial court bound Rowell over for trial. The prosecutor then immediately filed an information, which Rowell's lawyer acknowledged receiving. The case was tried to a jury and Rowell was found guilty.

¶3 Rowell was sentenced to life imprisonment, with a parole eligibility date of April 25, 2022. He appealed and we affirmed his conviction, rejecting his claim that he was entitled to a new trial based on the trial court's failure to remove a juror for cause and based on newly discovered evidence. *See* ***State v. Rowell***, No. 98-1354-CR, unpublished slip op. (Wis. Ct. App. Sept. 28, 1999).

¶4 Ten years later, in February 2010, Rowell filed a *pro se* postconviction motion in Milwaukee County Circuit Court. He alleged that his conviction was unlawful because the trial court lost jurisdiction when the district attorney filed the information at the conclusion of the preliminary examination without having first reviewed a transcript of the preliminary examination. The circuit court denied Rowell's motion, without a hearing, on both procedural and substantive grounds. Specifically, it concluded that Rowell's claim was procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and that there is nothing in WIS. STAT. § 971.01 (2007–08) that

requires that a transcript be prepared prior to the filing of the information.[1] This appeal follows.

¶5 We agree with the circuit court's analysis. First, Rowell's claim is procedurally barred. A defendant cannot raise an argument in a subsequent 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. ***Escalona-Naranjo***, 185 Wis. 2d at 181–182, 517 N.W.2d at 162. Rowell's 2010 postconviction motion offered no explanation, much less a sufficient reason, why he did not raise this issue in the postconviction motion he filed as part of his direct appeal or in his direct appeal.[2] Therefore, his claim is procedurally barred. *See* ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 22, 665 N.W.2d 756, 766 ("[C]laims that could have been raised on direct appeal … are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal or in a previous § 974.06 motion.").

¶6 We also agree with the circuit court that Rowell's motion is substantively without merit. The relevant statute, WIS. STAT. § 971.01(1), provides:

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

[2] On appeal, Rowell argues that his claim should not be procedurally barred for a variety of reasons. Rowell's allegation of a sufficient reason to overcome the procedural bar must be alleged in the postconviction motion itself, not for the first time on appeal. *See* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 59, 707 N.W.2d 495, 502 (we generally do not review an issue raised for the first time on appeal). Therefore, we do not discuss the reasons he has offered on appeal.

> The district attorney shall examine all facts and circumstances connected with any preliminary examination touching the commission of any crime if the defendant has been bound over for trial and, subject to s. 970.03(10), shall file an information according to the evidence on such examination subscribing his or her name thereto.[3]

There is nothing in this statute that requires the district attorney to order and review a written transcript prior to filing an information. Indeed, WIS. STAT. § 970.05 provides that the preliminary examination "*shall be transcribed* if requested" and contemplates that such a request can be made by the district attorney, the defendant or the judge. *See* ***ibid.*** The plain language of § 971.01 does not support Rowell's motion for postconviction relief. *See* ***Pasko v. City of Milwaukee***, 2002 WI 33, ¶26, 252 Wis. 2d 1, 20–21, 643 N.W.2d 72, 81 ("When interpreting a statute, we look to the plain language. If we can determine the meaning of the statute based on its plain language, we need not look any further.") (citation omitted).

¶7 Rowell's argument that a transcript is required appears to be based on case law quoting a prior version of WIS. STAT. § 971.01. In ***Mark v. State***, 228 Wis. 377, 280 N.W. 299 (1938), the court discussed WIS. STAT. § 355.17 (1937), which provided in relevant part:

> The district attorney of the proper county shall inquire into and make full examination of all facts and circumstances connected with any case of preliminary examination as provided by law, touching the commission of any offense whereon the offender shall have been committed to jail, become recognized or held to bail, and file an information setting forth the crime committed, according to the facts ascertained on such examination *and from the written*

[3] The current language of this statute is the same as it was in 1996, when Rowell's preliminary examination was conducted.

> *testimony taken thereon*, whether it be the offense charged in the complaint on which the examination was had or not.

Mark, 228 Wis. at 383, 280 N.W. at 302 (quoting § 355.17). Rowell suggests that the phrase "written testimony taken thereon" in § 355.17 imposed on district attorneys a duty to review a transcript prior to filing an information. We are aware of no case holding that. Moreover, the language "written testimony taken thereon" was removed from the statute decades before Rowell's crime was committed. We reject Rowell's argument.

By the Court.—Order affirmed.

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