

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 2011

A. John Voelker
Acting 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. 2009AP1227

Cir. Ct. No. 2006CF2540

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARY E. FREEMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
DIANE M. NICKS, Judge. *Affirmed.*

Before Vergeront, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Mary Freeman appeals an order denying her WIS. STAT. § 974.06 (2007-08)¹ postconviction motion. The circuit court denied the motion without a hearing, concluding that the motion was procedurally barred because the issues were addressed or could have been raised in a previous postconviction motion and no-merit appeal. The court concluded that Freeman failed to establish sufficient reason for not raising the issues in the earlier proceedings. Freeman argues that newly discovered evidence and ineffective assistance of postconviction counsel constitute sufficient reasons for allowing further postconviction proceedings. Because we conclude that Freeman’s motion established neither newly discovered evidence nor ineffective assistance of postconviction counsel, we affirm the order denying the postconviction motion.

BACKGROUND

¶2 The complaint initially charged Freeman with first-degree reckless injury by use of a dangerous weapon and misdemeanor bail jumping. The complaint alleged that Freeman stabbed Frederick Williams in the chest, causing an injury that would have killed Williams but for medical intervention. Williams also sustained three lacerations on the back of his left hand and another laceration on his right forearm. A police report stated that a witness, Shaun Lafferty, told Detective Alix Olson that he saw Freeman “swinging the big silver knife and I saw blood, but could I tell you I saw penetration? No. She got him at least once; I saw blood on his upper-left chest area.... Fred had no weapon that I saw.... I didn’t see Fred stab himself.”

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

¶3 At the preliminary hearing, Williams testified that Freeman picked up a knife and “poked” him in the chest with it. She then came at him swinging the knife, striking his hands. Dr. Lee Faucher, Williams’ treating physician, described Williams’ injuries as a life-threatening chest wound and other injuries to his hands.

¶4 Pursuant to a plea agreement, Freeman pled no contest to second-degree reckless injury by use of a dangerous weapon. The plea agreement also disposed of unrelated traffic offenses and the bail jumping charge was dismissed. The state agreed to recommend probation on the reckless injury charge. The State also agreed not to bring additional bail jumping charges based on Freeman’s contact with Williams and Lafferty in which she attempted to persuade them to support her defense that Williams stabbed himself. At the plea hearing, Freeman denied stabbing Williams. However, when the court inquired whether Freeman wished to withdraw from the plea agreement, Freeman answered “No.” Freeman then agreed that the court could rely on the facts recited in the complaint as the factual basis for the plea. The court accepted the no contest plea and imposed a stayed sentence of three years’ initial confinement and two years’ extended supervision, and placed Freeman on probation for five years.

¶5 Freeman filed a postconviction motion to withdraw her no-contest plea, claiming her trial counsel was ineffective for persuading her to plead no contest. Freeman testified that her counsel told her that she could plead no contest and later have a trial on appeal. Her trial attorney denied the allegation. Counsel indicated that Freeman’s position was that Williams stabbed himself, and she concluded that no jury would believe Freeman’s story. She reached this conclusion after reviewing the medical records, which she believed indicated wounds on Williams back, and researching the blood patterns described in police

reports. Counsel indicated she was willing to take the case to trial if Freeman continued to profess innocence. The circuit court denied Freeman's postconviction motion, describing her testimony as "ridiculous," "implausible," "incredible," and "preposterous."

¶6 Freeman's postconviction counsel then filed a no-merit report with an appendix that included police reports and a diagram depicting the location of Williams' wounds. Freeman filed voluminous responses noting that the diagram indicated Williams' wounds were isolated to his chest, hands and arm, with no wound to his back, as suggested by Freeman's trial counsel at the postconviction hearing. Freeman contended that her trial attorney misrepresented Williams' wounds and the inconclusive blood splatters and advised Freeman to accept the plea agreement without examining the discovery materials. Freeman also accused the prosecutor of covering up Williams' blood alcohol content.

¶7 This court accepted the no-merit report and entered a summary order concluding there was no issue of arguable merit that Freeman could raise on appeal or in a second postconviction proceeding. This court specifically considered Freeman's allegations that she did not knowingly, voluntarily and intelligently enter her pleas due to her medication, pressure from her trial attorney and her attorney's failure to adequately investigate her defense. We concluded there was no arguable basis for challenging the circuit court's finding that Freeman's trial counsel was not ineffective.

¶8 Alleging newly discovered evidence, Freeman then filed motions for reconsideration of this court's order. This court denied the motions, concluding that any newly discovered evidence must first be presented to the circuit court. After the supreme court denied Freeman's petition for review, she filed the present

motion in the circuit court, again alleging her trial and appellate attorneys' failure to review the discovery materials, the prosecutor's failure to submit Williams' blood alcohol content, her trial attorney's erroneous statement that Williams sustained a stab wound to his back, her attorney's infrequent meetings with her, and forged documents. She also alleged malicious prosecution, obstruction of justice, misconduct by police and court officials, and conspiracy. The alleged newly discovered evidence consisted of police reports that were attached to the no-merit report disclosing that Williams would not be subject to probation revocation for drinking and Williams' inconsistent statements about when and where Freeman stabbed him. The motion also reiterates the issues raised in Freeman's initial postconviction motion.

DISCUSSION

¶9 The circuit court may deny a postconviction motion without a hearing when the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). When a defendant has had previous postconviction proceedings, a further postconviction motion is not allowed unless sufficient reason is shown for the failure to have raised the issue in the earlier proceedings. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). This includes all issues that were raised or could have been raised in the initial postconviction proceedings. *State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. This procedural bar also applies when the earlier postconviction proceeding resulted in a no-merit report. *State v. Tillman*, 2005 WI App 71, ¶¶2, 26, 281 Wis. 2d 157, 696 N.W.2d 574. However, if a defendant identifies an issue of such obvious merit that it undermines our confidence in the

court's decision, the procedural bar does not apply. *State v. Allen*, 2010 WI 89, ¶83, 328 Wis. 2d 1, 786 N.W.2d 124.

¶10 Freeman's postconviction motion is procedurally barred. Some of the issues raised in the motion were addressed in her earlier postconviction motion and in the no-merit report. Those issues cannot be relitigated no matter how artfully they are rephrased. *State v. Witkowski*, 163 Wis.2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶11 Freeman's motion does not establish sufficient grounds for raising any new issues. She attempts to justify additional postconviction proceedings on two grounds: newly discovered evidence and ineffective assistance of her trial and postconviction counsel.

¶12 First, Freeman's claim of newly discovered evidence fails because the evidence is not new and does not establish sufficient reason to believe she would have gone to trial if she had known of this evidence before the plea hearing. *See State v. Love*, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62. These materials were available to her counsel before the plea hearing and were used by Freeman in her response to the no-merit report. The diagram depicting Williams' injuries was cumulative evidence entirely consistent with the injuries described by Dr. Faucher at the preliminary hearing. Cumulative evidence does not meet the test for newly discovered evidence. *Id.* Evidence of Williams' blood alcohol content, the State's decision not to pursue revocation of Williams' probation based on his intoxication and Williams' prior inconsistent statements do not create reasonable doubt of Freeman's guilt. Therefore, she does not meet the criteria for newly discovered evidence. *See State v. McCallum*, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997).

¶13 Second, Freeman’s motion also fails to establish ineffective assistance of postconviction counsel as a basis for allowing additional postconviction proceedings. Postconviction counsel’s failure to focus on Freeman’s trial counsel’s error regarding the injury to Williams’ back does not undermine our confidence in the outcome of the no-merit process. Freeman benefitted from a very favorable plea agreement resulting in a stayed sentence and probation for inflicting a potentially fatal wound. Regardless of whether Williams was stabbed in the back, Freeman’s defense that Williams inflicted the wounds himself and slashed his own hands and arm to mimic defensive wounds would not be readily accepted by a jury. That defense is also inconsistent with Lafferty’s statement to police. Although the no-merit report and this court’s order do not specifically address counsel’s erroneous statement that Williams was stabbed in the back, we conclude that the no-merit procedure was properly followed because Freeman’s motion does not provide a plausible basis for concluding she would have elected to go forward with the trial but for her trial counsel’s erroneous statement.

By the Court.—Order affirmed.

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

