COURT OF APPEALS DECISION DATED AND FILED

June 21, 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. 2010AP569

Cir. Ct. No. 2000CF6272

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. BURNS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael D. Burns, *pro se*, appeals from an order denying his postconviction motion for an "evidentiary hearing and to call witnesses." We conclude the denial was proper and we affirm.

¶2 In February 2001, Burns was convicted following a court trial on one count of first-degree sexual assault of a child, and sentenced to fifteen years' initial confinement and ten years' extended supervision. His conviction was based largely on the trial court's acceptance of victim A.K.'s testimony and rejection of Burns's son's testimony that he had actually committed the assault. Burns appealed, seeking a new trial based on newly discovered evidence, arguing trial counsel was ineffective, and asserting that the verdict was not supported by sufficient evidence. This court summarily affirmed. *See* ***State v. Burns***, No. 2002AP1045-CR, unpublished slip op. and order (WI App Dec. 5, 2002).

¶3 In August 2003, Burns filed a *pro se* postconviction motion, which was denied as "merely a rehash of everything that was previously presented[.]" Burns did not appeal. He filed another *pro se* postconviction motion in August 2006. He alleged postconviction counsel had been ineffective for failing to raise ineffectiveness of Burns's first and second trial attorneys. The motion was denied. Burns appealed and this court affirmed. *See* ***State v. Burns***, No. 2006AP2150, unpublished slip op. (WI App Apr. 29, 2008).

¶4 Burns filed his latest postconviction motion in December 2009, alleging two pieces of newly discovered evidence. The first is a "sworn affidavit" from Steven Drakos, which Burns asserted showed that A.K. told Drakos that she knew Burns did not assault her. The second piece is a transcript of a "recorded phone conversation" from 2003 that Burns had with A.K.'s father, in which the father read a letter from A.K.'s sister. Burns alleged that A.K.'s sister's letter stated that A.K. knew that it was not Burns who assaulted her. Burns requested a new trial or evidentiary hearing in the interests of justice.

¶5 The circuit court denied the motion. It said that even assuming that Burns had met the first four criteria relating to newly discovered evidence, he could not meet the fifth criterion: showing a likelihood of a different result. The circuit court explained that the Drakos affidavit was premised on double hearsay and that the phone call was premised on multiple levels of hearsay and actually contained only other people's conclusions, not a recantation.[1] Burns appeals.

¶6 On appeal, Burns raises multiple issues, most of which we decline to consider for four reasons. First, any argument or issue in Burns's briefs that does not address the circuit court's ruling on the Drakos affidavit or the phone call/letter evidence is an argument currently being raised for the first time on appeal.[2] We need not consider such arguments. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

¶7 Second, we are limited by the four corners of Burns's motion when determining its sufficiency. *See* ***State v. Love***, 2005 WI 116, ¶27, 284 Wis. 2d 111, 700 N.W.2d 62. Burns's motion seeks a hearing based only on the affidavit and phone call.

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[1] Although not expressly referenced in the motion, Burns had also attached a letter from his son, dated 2001, wherein the son claimed to have assaulted A.K. The circuit court rejected any argument based on the letter as previously raised.

[2] These first-on-appeal issues include, as best we can discern: trial counsel's failure to investigate A.K.'s identification of Burns, any relationship between his son and A.K., the son's statement placing him at the scene of the assault, A.K.'s description of her assailant's chapped lips and bad breath, and discrepancies between the pains she complained of and her sexual assault exam results; trial counsel's failure to secure Burns's other son as a witness, to introduce A.K.'s prior inconsistent statements, and to file a suppression motion based on A.K.'s allegedly weak identification of Burns; counsel's recommendation that Burns waive a jury trial; an issue regarding the admission of polygraph results; the lack of physical evidence, corroborating eyewitnesses, or reliable evidence supporting the verdict; the trial court's pretrial exclusion of certain evidence regarding A.K.; prosecutorial misconduct; and "obvious judicial bias" and "overwhelming misconduct" of the "lower court."

¶8 Third, even disregarding ***Wirth*** and ***Love***, most of Burns's issues as contained within his briefs are also procedurally barred because they were or could have been raised in the prior postconviction motions or appeals. Burns does not explain why the majority of these issues were not previously raised or why they are being raised again, so the issues are barred by WIS. STAT. § 974.06(4) (2009-10),[3] and ***State v. Escalona-Naranjo***, 185 Wis. 2d 968, 185, 517 N.W.2d 157 (1994).

¶9 Fourth, issues that were previously raised *and decided* in the prior proceedings cannot be relitigated, no matter how Burns repackages them.[4] *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Accordingly, Burns is left with only two issues that he can arguably raise on appeal: whether the Drakos affidavit and whether the phone call entitle him to an evidentiary hearing or new trial.

¶10 After the time for a direct appeal has been used or expired, a new trial may be ordered if "there has been such a denial or infringement of the constitutional rights of the person as to render the judgment vulnerable to collateral attack." *See* WIS. STAT. § 974.06(3)(d); *see also* ***State v. Bembenek***, 140 Wis. 2d 248, 251-52, 409 N.W.2d 432 (Ct. App. 1987). "[D]ue process may require granting a new trial under [§ 974.06], on the basis of evidence discovered after the time for bringing postverdict motions has passed." ***Bembenek***,

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[4] These already-decided issues include, at the very least, counsel's failure to investigate A.K.'s relationship with Burns's son, the jury waiver, the son's "admission" letter stating that he assaulted A.K., the polygraph issue, A.K.'s description of her assailant's bad breath and chapped lips, and sufficiency of the evidence to support the verdict.

140 Wis. 2d at 252. However, due process does not require a new trial unless the newly discovered evidence meets at least the following five criteria:

> "(1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial."

Id. (citation omitted). Here, the circuit court concluded that even if Burns met the first four criteria, he did not fulfill the fifth.[5]

¶11 Burns never attempts to refute the circuit court's ruling that he has not shown a reasonable probability of a different result. Instead, he has only a one-sentence argument regarding his newly discovered evidence in his main appellate brief: "The newly discovered evidence now points '[A.K.] lied or miss-identified [sic]' in order to protect" Burns's son. In his reply brief,[6] Burns goes on to explain that he did not address the Drakos affidavit earlier because it had not previously come to his attention.[7] Burns also explains that he did not address the phone conversation earlier because "I needed to have it disclosed to my family number 1, and also other Lawyers did not think it was important a few years ago."

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[5] The circuit court did not, contrary to Burns's characterization, hold that he *actually* had fulfilled the first four criteria.

[6] We ordinarily do not consider arguments raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

[7] The affidavit predates Burns's postconviction motion by approximately a week.

¶12 Burns's motion asserted that the Drakos affidavit shows: "The victim 'herself' and her sister both told Mr. Steve Drakos ***to his face*** that the victim 'AND' her sister knew that the defendant Burns did not commit the crime which he has been charged with." This is wildly inaccurate. The affidavit[8] simply says that A.K.'s sister "told [Drakos] one night, her father allowed her to get drunk that Mike Burns wasn't the one who did that to her, it was his son! … She heard this information from the horse[']s mouth, meaning [A.K.]!" We agree with the circuit court that Burns has shown no reasonable probability of a different result: the affidavit contains only double hearsay, and Burns has not shown how the information would be admissible.

¶13 With regard to the phone conversation, we reject Burns's explanation for his failure to raise the matter earlier. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997) (whether defendant raises sufficient reason to avoid ***Escalona*** is question of law). The conversation with A.K.'s father allegedly happened in January 2003, at which point Burns would have been *pro se* and responsible for his own filings. His conclusory complaint that unidentified "Lawyers" thought the statement was unimportant "a few years ago" is insufficient to overcome the procedural bar. Additionally, even if Burns was entitled to time to disclose information to his family, he had at least three years between the conversation and his 2006 postconviction motion in which to do

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[8] We have serious reservations about this "affidavit." Among other peculiarities, it bears only the notary's signature and seal. It does not indicate the expiration of the notary's commission, nor does it contain a certification statement, both required under WIS. STAT. § 706.07(7)(a). We therefore do not know whether this affidavit was sworn, whether the notary was simply verifying Drakos's signature, or even whether the notary's commission was valid. Of course, our concerns go merely to the weight of the alleged evidence, not the question of its admissibility.

so. He does not explain why the conversation was not raised in 2006, so we conclude any motion on this ground is actually barred by ***Escalona***.

¶14 Even if ***Escalona*** does not bar the phone evidence, we agree with the circuit court's conclusion that Burns has failed to show a reasonable probability of a different result. Burns alleged that A.K.'s father read him a letter that A.K.'s sister "wrote to Burns stating for the first time that the victim 'KNEW' it was not Burns" who assaulted her. This description is also inaccurate. The transcription indicates that the sister wrote that she and her father "*have come to a conclusion* that [A.K.] knows it was [the son.]" At no point in the transcript did A.K.'s sister ascribe any statements directly to A.K. We therefore agree with the circuit court's conclusion that Burns fails to show a reasonable probability of a different result based on this transcription: it contains multiple levels of inadmissible hearsay and, more importantly, there is no actual recantation by the victim.[9]

¶15 Burns alternatively asks us to consider amending his sentence so that he may begin his extended supervision early. He cites no authority for us to do so, and we would decline in any event.

By the Court.—Order affirmed.

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

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[9] Burns also asks for a new trial in the interests of justice based on his son's letter. The circuit court rejected any argument based on the letter because a similar argument had been rejected in 2002. There, the trial court ruled that the letter merely repeated the son's trial testimony, which the trial court had rejected for its lack of credibility. We therefore do not believe the interests of justice require a new trial in this situation.