COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2152 **Cir. Ct. No. 2004CF86**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VERNON R. DODGE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Forest County: GLENN H. HARTLEY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Vernon Dodge appeals an order denying his motion to vacate a judgment convicting him of first-degree reckless homicide. Dodge argues: (1) the State violated his right to due process by failing to preserve blood samples taken from the victim's residence; and (2) his conviction must be

vacated because the destruction of the blood samples violated his rights under WIS. STAT. §§ 968.205 and 974.07.[1] We reject Dodge's arguments and affirm.

BACKGROUND

¶2 An Information charged Dodge with one count of first-degree reckless homicide and one count of child abuse, in connection with the September 13, 2004 death of nineteen-month-old Shawnagishek Daniels.[2] At Dodge's jury trial, the State argued Dodge had beaten Shawnagishek to death. Dodge contended the infant's death was caused by injuries he sustained several days earlier when he followed his uncle, Shaun-Nebne Daniels, into the basement and fell down the stairs.

¶3 Lieutenant Alex Walrath testified that, while investigating Shawnagishek's death, he found blood on the basement stairs. He photographed the blood, and the photographs were introduced into evidence at Dodge's trial. He also took samples of the blood. However, before trial, neither Dodge nor the State requested DNA testing to determine whether the blood on the stairs belonged to Shawnagishek. During trial, Shawnagishek's mother testified she had bled on the stairs in August 2004 when she cut herself while removing carpet.

¶4 Other evidence at trial cast doubt on Dodge's theory of the case. Shaun-Nebne Daniels, the uncle, testified he did not go into the basement on the day Dodge alleged Shawnagishek followed Daniels into the basement and fell

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

[2] The record and the parties' briefs contain several different spellings of Shawnagishek Daniels' first name. For consistency, we use the spelling found in the autopsy report.

down the stairs. Both Shawnagishek's mother and sheriff's department investigators testified that Dodge told them Shawnagishek had fallen off the porch, not down the stairs, several days before he died.

¶5 Additionally, the assistant medical examiner testified Shawnagishek died from internal blood loss related to multiple large tears in the internal part of his abdomen due to blunt force trauma. The medical examiner concluded Shawnagishek died within about an hour of receiving these injuries. The child also received multiple blows to the head, and marks on the left side of his head were consistent with knuckle marks. The medical examiner testified Shawnagishek's death was a homicide, and his injuries could not have been caused by falling down a flight of stairs several days before he died. Dodge did not introduce any expert testimony contradicting the medical examiner's findings.

¶6 The jury found Dodge guilty of first-degree reckless homicide, but not guilty of child abuse. The circuit court sentenced him to thirty years' initial confinement and ten years' extended supervision. On direct appeal, Dodge's postconviction attorney filed a no-merit report, and Dodge responded to the report. We affirmed Dodge's conviction, after rejecting a number of issues raised by Dodge and his attorney and concluding, based on our independent review of the record, there were no other potential issues for appeal. Our supreme court denied Dodge's petition for review.

¶7 On February 16, 2010, Dodge moved the circuit court for DNA testing of the blood samples taken from the basement stairs, pursuant to WIS. STAT. § 974.07(7). The State initially agreed to the testing and, based on the parties' agreement, the court ordered the State to have the samples tested by the

State Crime Laboratory. Shortly thereafter, the State informed the court that the sheriff's department could not locate the blood samples.

¶8 Dodge then moved to vacate his judgment of conviction, arguing the State's failure to preserve the blood samples violated his right to due process, as well as his statutory rights under WIS. STAT. §§ 968.205 and 974.07. Following an evidentiary hearing, the circuit court denied Dodge's motion. The court found that the sheriff's department failed to follow its own evidence-handling procedures, but the failure was not "part of any conspiracy, scheme, or with malevolent intent." Consequently, the court concluded the State did not violate Dodge's due process rights. The court also determined neither §§ 968.205 or 974.07 permitted it to vacate Dodge's conviction.

DISCUSSION

I. Dodge's appeal is procedurally barred

¶9 The State argues Dodge's current challenge to his conviction is procedurally barred because he failed to raise it in his response to the no-merit report. We agree. Although Dodge argues his conviction must be vacated because the State's failure to preserve the blood samples prevented him from obtaining postconviction DNA testing, the essence of his argument is that the blood samples should have been tested before trial to see whether the blood belonged to Shawnagishek.

¶10 Dodge did not raise this argument in his response to the no-merit report. A defendant may not raise issues in a subsequent postconviction proceeding that he could have raised in response to a no-merit report, unless the defendant demonstrates a "sufficient reason" for failing to raise the issues in the

no-merit appeal. ***State v. Allen***, 2010 WI 89, ¶¶4, 41, 328 Wis. 2d 1, 786 N.W.2d 124. Dodge has not demonstrated any reason, let alone a sufficient reason, for failing to argue on direct appeal that the blood samples should have been tested before trial. He does not claim that either his trial attorney or his postconviction attorney was ineffective for failing to pursue the issue.

¶11 Moreover, an issue that has been finally adjudicated in one postconviction proceeding may not be raised again in a subsequent postconviction motion. *See* WIS. STAT. § 974.06(4). Dodge's claim that the blood samples should have been tested before trial was effectively finally adjudicated against Dodge on its merits when we determined on direct appeal that "our independent review of the record discloses no other potential issues for appeal." Consequently, Dodge's attempt to challenge his conviction in this, his second appeal, is procedurally barred.

II. The State did not violate Dodge's right to due process

¶12 Addressing Dodge's due process claim on the merits, we conclude the State did not violate Dodge's right to due process by failing to preserve the blood samples. The due process clause of the Fourteenth Amendment to the United States Constitution imposes a duty on the State to preserve exculpatory evidence. ***State v. Greenwold***, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994) (***Greenwold I***). The State's failure to preserve evidence violates a defendant's due process rights if police: (1) failed to preserve evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence that is potentially exculpatory. ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (***Greenwold II***). When reviewing a claim that

evidence was lost or destroyed in violation of due process, we independently apply the constitutional standard to the facts as found by the circuit court. ***Id.*** at 66-67.

¶13 Dodge first contends the blood samples were apparently exculpatory. To establish that evidence was apparently exculpatory, a defendant must demonstrate that the evidence "possess[ed] an exculpatory value that was apparent to those who had custody of the evidence ... before the evidence was destroyed." ***State v. Oinas***, 125 Wis. 2d 487, 490, 373 N.W.2d 463 (Ct. App. 1985) (emphasis omitted). It is not enough to allege the evidence had the possibility of being exculpatory. ***Id.*** In other words, evidence does not have apparent exculpatory value if analysis of the evidence would have provided "'simply an avenue of investigation that might have led in any number of directions.'" ***Hubanks v. Frank***, 392 F.3d 926, 931 (7th Cir. 2004) (quoting ***Arizona v. Youngblood***, 488 U.S. 51, 57 n.* (1988)).

¶14 Here, the blood samples' exculpatory value would not have been apparent to the sheriff's department before the samples were lost or destroyed. Our reasoning in ***State v. Parker***, 2002 WI App 159, 256 Wis. 2d 154, 647 N.W.2d 430, is instructive. After Parker was convicted of delivery of marijuana, he filed a postconviction motion arguing the State violated his due process rights by failing to preserve an audiotape that Parker alleged would have demonstrated a drug transaction did not occur. ***Id.***, ¶¶2-4. We rejected Parker's argument, reasoning the tape's exculpatory value could hardly be considered apparent, given that both Parker and his attorney reviewed the tape before trial and declined to introduce it as evidence. ***Id.***, ¶15. We concluded, "A defendant may not sit back while evidence is available and then argue for a new trial on the grounds that evidence is no longer available to him or her." ***Id.***

¶15 Like Parker, Dodge knew before trial that the blood sample evidence existed. However, he did not seek to have the samples tested until nearly four years after he was convicted. Dodge does not explain why the samples' exculpatory value should have been apparent to the sheriff's department, when it evidently was not apparent to Dodge himself.[3] As in ***Parker***, Dodge cannot now argue that the destruction of the blood samples entitles him to a new trial, given that he made no effort to have the samples tested while they were available to him.

¶16 Furthermore, based on the evidence introduced at trial, the sheriff's department had no reason to believe the blood samples were exculpatory at the time they were lost or destroyed. Although Dodge argued at trial that Shawnagishek died from injuries he had sustained several days earlier when he fell down the basement stairs, the circuit court found that the evidence did not support Dodge's theory. Dodge suggested Shawnagishek had followed his uncle into the basement, but the uncle testified he never went into the basement on the day in question. Shortly after the child's death, Dodge told investigators the child had fallen off the porch, not down the basement stairs. The medical examiner testified Shawnagishek's injuries were sustained mere hours before his death and were inconsistent with falling down a flight of stairs. Shawnagishek's mother testified the blood on the stairs belonged to her. Dodge has not pointed to any evidence of cuts or abrasions on the child that could have resulted in the blood found on the basement stairs. There was simply no evidence at trial supporting Dodge's theory that Shawnagishek's death was caused by a fall down the basement stairs.

[3] Again, Dodge does not claim that his trial attorney was ineffective for failing to have the samples tested before trial or that his postconviction attorney was ineffective for failing to raise the issue in the no-merit report on direct appeal.

Consequently, any exculpatory value the blood samples had would not have been apparent to the sheriff's department.

¶17 At best, Dodge has shown the blood samples had the possibility of being exculpatory. As the circuit court recognized, DNA testing of the samples would have revealed one of three things: that the blood belonged to Shawnagishek, as Dodge alleged; that the blood belonged to Shawnagishek's mother, as she testified during trial; or that the blood belonged to someone else. Only one of these possibilities would have supported Dodge's theory that Shawnagishek fell down the stairs, and that possibility appears highly unlikely. A showing that evidence was merely possibly exculpatory is insufficient to establish apparent exculpatory value. *See* ***Oinas***, 125 Wis. 2d at 490.

¶18 Dodge next contends that, even if the blood samples were only potentially exculpatory, the sheriff's department acted in bad faith by failing to preserve them. *See* ***Greenwold II***, 189 Wis. 2d at 67. As Dodge points out, the circuit court found the blood samples were unavailable for testing because the sheriff's department failed to follow its own evidence-handling procedures:

> [T]hese blood samples were then taken by … the evidence [o]fficer and placed in bin F 3. This is where procedure seems to have totally fallen apart.
>
> Because we've had ample testimony that there's no way, no way that those swabs should not still be there because, given the procedures, they're only to be removed under certain conditions, and if they are … then it would be on the computer log.

Dodge argues the department's failure to comply with these procedures necessitates a finding of bad faith. We disagree. Without more, the department's failure to follow its own procedures for handling evidence demonstrates, at most,

negligence. A negligent failure to preserve potentially exculpatory evidence does not constitute bad faith. ***Id.*** at 68.

¶19 Instead, to establish bad faith, a defendant must show that police were aware of the potentially exculpatory value of the evidence they failed to preserve and acted with either official animus or a conscious attempt to suppress the evidence. ***Id.*** at 69. Here, the circuit court found the sheriff's department did not perceive that the blood samples had any exculpatory value at the time they were lost or destroyed. The court also found the loss of the blood samples was unintentional and was not part of a conspiracy or scheme. Beyond the officers' failure to follow evidence room procedures, Dodge does not point to any evidence that the department acted with official animus or consciously attempted to suppress the blood samples. For instance, Dodge does not offer any evidence that the department intentionally discarded or destroyed the blood samples. Consequently, Dodge has not met his burden of establishing that the department acted with bad faith. *See* ***id.*** at 70.

III. Dodge is not entitled to relief under WIS. STAT. §§ 968.205 and 974.07

¶20 Dodge next argues the sheriff's department's failure to preserve the blood samples violated his rights under WIS. STAT. §§ 968.205 and 974.07. He contends these violations require that his conviction be vacated. We disagree.

¶21 WISCONSIN STAT. § 968.205(2) provides:

> [I]f physical evidence that is in the possession of a law enforcement agency includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction … and the biological material is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense, the law enforcement agency shall preserve the physical evidence

> until every person in custody as a result of the conviction … has reached his or her discharge date.

Even assuming the State violated § 968.205(2), the statute does not provide any remedy for a convicted defendant in the event of a violation. *See* WIS. STAT. § 968.205; *see also* Nathan T. Kipp, Comment, *Preserving Due Process: Violations of the Wisconsin DNA Evidence Preservation Statutes as Per Se Violations of the Fourteenth Amendment*, 2004 WIS. L. REV. 1245, 1247 ("While the DNA evidence preservation statutes comprehensively detail how state law enforcement agencies must preserve biological evidence, they …. do not provide a remedy for convicted individuals in the event of violations of the statutes."). Accordingly, the State's violation of § 968.205(2) does not entitle Dodge to the relief he seeks.

¶22 Dodge also fails to explain how he is entitled to relief under WIS. STAT. § 974.07. That statute, which describes how a defendant may obtain postconviction DNA testing of evidence, only applies to evidence that is in the actual or constructive possession of a government agency. *See* WIS. STAT. § 974.07(2)(b). Here, the sheriff's department no longer possessed the blood sample evidence when Dodge filed his § 974.07 motion, so the statute does not apply.

¶23 Moreover, the only provision of WIS. STAT. § 974.07 that allows a court to vacate a defendant's conviction is subsection (10), which provides that a conviction may be vacated if the results of postconviction DNA analysis support the defendant's claim. Nothing in § 947.07 allows a court to vacate a defendant's conviction if allegedly exculpatory evidence has been lost or destroyed and, consequently, cannot be tested. Section 974.07 therefore provides no basis for vacating Dodge's conviction.

By the Court.—Order affirmed.

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