COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 8, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2782

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

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross Respondent,

v.

FREDRIC KARL SAECKER,

Defendant-Respondent-Cross Appellant.

APPEAL and CROSS-APPEAL from an order of the circuit court for Buffalo County: DANE F. MOREY, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The State appeals and Fredric Saecker cross-appeals a postconviction order granting Saecker a new trial based on newly discovered DNA evidence. The defense DNA expert testified at the postconviction hearing that Saecker cannot be the source of semen found in the victim's underwear if there was only one assailant as the victim indicated. The State argues that ***State v. Escalona-Naranjo***, 185 Wis.2d 169, 517 N.W.2d 157

(1994), bars relief on that issue and that Saecker has not met three of the five criteria for newly discovered evidence. Saecker cross-appeals from that part of the postconviction order denying relief based on ineffective assistance of counsel and insufficiency of the evidence. We affirm the order.

Saecker was found guilty of second-degree sexual assault, burglary and kidnapping. The State alleged that he took the victim from her rural home at approximately 12:30 a.m. and sexually assaulted and beat her before leaving her at the side of the road and departing on foot. At trial, the victim and her husband could not identify Saecker as the assailant and admitted that both of them identified another person in a lineup. Their physical description of the assailant did not match Saecker's in several respects. A truck driver testified that he picked up Saecker as he walked along the side of the road in the vicinity of and shortly after the attack. Saecker had blood on his hands and clothes. Saecker told the driver that he was returning from a bar in the area and explained that the blood was a result of a bar fight the night before. The State also presented several inculpatory statements about the assault made by Saecker both to other jail inmates and guards. The jury convicted Saecker and rejected his insanity plea, finding that he suffered from a mental disease or defect but that he did not lack substantial capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. The convictions were upheld on appeal.

Escalona-Naranjo does not bar consideration of Saecker's motion for a new trial on the basis of newly discovered DNA evidence because Saecker has provided sufficient reason for failing to present the DNA evidence in his previous postconviction proceedings. At the time of Saecker's initial postconviction hearings, DNA analysis was an emerging science with an unsettled legal status. At trial, both the judge and the prosecuting attorney cited the fact that DNA evidence did not have an established legal status in Wisconsin. In fact, the prosecutor argued that "DNA fingerprinting" evidence was not admissible in Wisconsin. The law review articles now cited by the State in arguing that the DNA evidence was admissible only reflect the unsettled debate on the use of this evidence at that time. Prior to Saecker's initial postconviction motion, only two published judicial opinions in Wisconsin had discussed the use of DNA testing, both in relation to questions of paternity. *See* ***State v. Hartman***, 145 Wis.2d 1, 16, 426 N.W.2d 320, 326 (1988); ***In re Paternity of J.L.K.***, 151 Wis.2d 566, 572, 445 N.W.2d 673, 675 (1989). Section 974.06(4),

STATS., and ***Escalona-Naranjo*** allow the trial court to entertain a second postconviction proceeding under these circumstances.

The trial court properly exercised its discretion when it granted a new trial based on newly discovered evidence. *See* ***State v. Vennemann***, 180 Wis.2d 81, 98, 508 N.W.2d 404, 411 (1993). The State argues that the trial court improperly exercised its discretion because the DNA evidence fails to meet three criteria for newly discovered evidence: (1) the evidence must have come to the moving party's knowledge after trial; (2) the moving party must not have been negligent in seeking to discover the evidence; and (3) it must be reasonably probable that a different result would be reached on a new trial. *See* ***State v. Sarinske***, 90 Wis.2d 14, 37, 280 N.W.2d 725, 735 (1979). The first two criteria, considered together, are satisfied due to the incipient nature of DNA evidence at the time of trial. The final criterion is satisfied when the DNA evidence is considered along with other exculpatory evidence presented at the initial trial. There, the identity of the perpetrator was a major issue. The weak identification testimony coupled with the DNA evidence provides a reasonable probability that retrial will produce a different result.

The trial court properly concluded that ***Escalona-Naranjo*** bars consideration of Saecker's challenge to the sufficiency of the evidence to support the convictions. Saecker has not demonstrated sufficient reason for his failure to raise this issue on direct appeal. In any event, we conclude that the State presented sufficient evidence to allow a jury to find him guilty beyond a reasonable doubt. *See* ***State v. Koller***, 87 Wis.2d 253, 266, 274 N.W.2d 651, 658 (1979). Because we affirm the order granting a new trial, we need not consider Saecker's assertion that his trial counsel was ineffective.

By the Court.—Order affirmed.

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