

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 20, 1997

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, STATS.

NOTICE

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

No. 95-2347-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HARVEY L. SMITH,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Green County: JOHN K. CALLAHAN and DAVID G. DEININGER, Judges. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Harvey Smith appeals from a judgment convicting him on three counts of second-degree sexual assault of a child. He also appeals from orders denying his postconviction motions. He raises numerous issues regarding trial court rulings, the prosecutor's conduct and defense counsel's effectiveness. We reject his arguments and affirm.

In July 1993, the State's initial complaint charged Smith with three counts of second-degree sexual assault, allegedly committed against S.L.C. in November and December 1992. One day later, the State filed an amended complaint alleging that the assaults occurred between November 1991 and March 1992. After a subsequent preliminary hearing, the State filed an information charging three additional counts of sexual assault involving S.L.C.'s younger sister, A.L.C. Both alleged victims were Smith's stepdaughters.

At trial, Smith was not allowed to present testimony from the alleged victims' natural father that a third sister had falsely accused him of sexual assault several years previously. After four hours of deliberation, the jury informed the court in writing that it was deadlocked. The trial court notified counsel and then instructed the jury as follows:

You the jurors are competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues. You are not going to be made to agree, nor are you going to be kept out until you do agree but it's your duty to make an honest and sincere attempt to arrive at a verdict.

Jurors should not be obstinate. They should be open minded. They should listen to the arguments of others and talk matters over freely and fairly and make an honest effort to come to a conclusion on all of the issues presented to them.

The jury subsequently convicted Smith on the charges concerning S.L.C., and acquitted on the A.L.C. charges.

Before the hearing on Smith's postconviction motion, he subpoenaed the district attorney and the defense counsel who represented him at his initial appearance/bail hearing. The trial court quashed both subpoenas, and denied him postconviction relief. Smith then filed a motion for sentence modification. The trial court denied it as untimely. In this appeal, Smith argues that the trial court improperly

used its discretion by excluding testimony from the victim's natural father, by instructing the deadlocked jury and by quashing the subpoenas during the postconviction proceedings. Smith next contends that the prosecutor violated his right to due process by filing the amended complaint and adding three counts to the information. Because Smith's counsel did not object to either of those prosecutorial acts, he contends that he did not receive effective assistance of counsel. Finally, he contends that he was entitled to consideration of his sentencing motion on the merits, and that he has been denied a meaningful appeal due to delays caused by the trial court, the prosecutor and postconviction counsel.

The trial court properly excluded testimony from the victim's natural father. Smith had a right to present that material if it was relevant, material and favorable to his defense. *Green Bay Newspaper Co. v. Circuit Court*, 113 Wis.2d 411, 421, 335 N.W.2d 367, 372 (1983). Here, the trial court properly determined that the testimony was not relevant. It pertained only to the credibility of the victim's sister, who was not living with the victim when she was assaulted. It had no probative value as to the victim's credibility.

Smith has waived his challenge to the trial court's jury instruction. Trial counsel was present when the instruction was given but did not object to it. At the hearing on Smith's postconviction motion, he raised other ineffectiveness issues but failed to elicit testimony from trial counsel on those issues. We will not review questions of ineffectiveness where counsel has not had the opportunity to explain the challenged decision. *State v. Mosley*, 201 Wis.2d 36, 50, 547 N.W.2d 806, 812 (Ct. App. 1996). In any event, the instruction was innocuous because it merely asked them to make a good faith attempt to reach agreement. It did not direct them to reach a verdict or point them toward a finding of guilt.

The trial court properly quashed the two subpoenas. The subpoenaed trial counsel made only one appearance for Smith, at the initial appearance/bail hearing. Smith sought his testimony on the issue of subsequent counsel's failure to object to the amended complaint. It had no relevance to that subject. As for the district attorney's subpoena, Smith justified it with unsupported allegations that the district attorney engaged in a secret deal with a witness, withheld exculpatory evidence and engaged in a personal vendetta against Smith. The trial court need not proceed on a postconviction claim based on conclusory allegations. *Levesque v. State*, 63 Wis.2d 412, 421, 217 N.W.2d 317, 322 (1974).

Smith failed to show ineffective assistance based on counsel's failure to object to changes in the charging documents. To obtain relief based on counsel's performance, the defendant must show that counsel's errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). The complaint may be amended at any time prior to arraignment without leave of the court, unless the amendment prejudices the defendant. *State v. Wickstrom*, 118 Wis.2d 339, 348, 348 N.W.2d 183, 188 (Ct. App. 1984). Smith cannot reasonably argue that amending the complaint to change the dates of the alleged offenses, one day after the original complaint was filed, prejudiced in any way his ability to prepare a defense. As for the added counts in the information, each was based on and fully supported by the testimony of the alleged victim at the preliminary hearing. Therefore, counsel had no basis to object to the added counts. *State v. Richer*, 174 Wis.2d 231, 253-54, 496 N.W.2d 66, 74 (1993). In any event, Smith was acquitted on those added counts.

The trial court correctly ruled that Smith's motion for sentence modification was untimely. Under § 973.19(1), STATS., a defendant may move for sentence modification within ninety days after the sentence is imposed. In the alternative, the defendant may proceed under RULE 809.30, STATS. Here, more than

ninety days had elapsed after sentencing, and Smith had already exhausted his remedies under RULE 809.30, STATS. A defendant may, nevertheless, move to modify a sentence anytime after sentencing if the motion is based on new factors. *State v. Marks*, 194 Wis.2d 79, 95, 533 N.W.2d 730, 735 (1995). Smith's motion, however, did not allege new factors.

Smith has not demonstrated that resolution of the postconviction proceeding has been unduly delayed by the trial court, prosecutor or his former counsel. To the contrary, the record demonstrates that Smith's handling of his case after he decided to fire counsel and represent himself has caused most of the delay in resolving the proceeding.

By the Court.—Judgment and orders affirmed.

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

