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DISTRICT IV

January 28, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP674-CR State of Wisconsin v. Daniel L. Landis (L.C. # 2005CF66)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Daniel Landis appeals an order that denied his motion for a new trial based upon newly discovered evidence or for sentence modification based upon a new factor. Landis contends that he was entitled to a hearing on his motion, and alternately asks this court to grant him a new trial in the interest of justice. After reviewing the briefs and record at conference, we conclude that

this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).[1] We affirm.

In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required, though, when the defendant presents only conclusory allegations or when the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

As a threshold matter, the State claims that the record conclusively demonstrates that Landis is not entitled to relief because the issues he raised in his postconviction motion are procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). ***Escalona-Naranjo*** holds that an issue that could have been raised on a prior appeal or in a prior postconviction motion cannot form the basis for a subsequent postconviction motion under WIS. STAT. § 974.06, unless the defendant presents a sufficient reason for failing to raise the issue earlier. ***Id.*** at 185. However, the State has presented no authority for the proposition that the ***Escalona-Naranjo*** doctrine applies to postconviction motions that were addressed to the court's inherent authority to grant new trials based upon newly discovered evidence or to grant resentencing based upon new factors, as opposed to the court's statutory authority to order new trials pursuant to § 974.06 based upon constitutional or jurisdictional errors alleged to have occurred in the original proceeding. We need not decide here whether it is appropriate to extend

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the ***Escalona-Naranjo*** doctrine to such motions, because we conclude that the allegations in Landis's motion are insufficient to warrant a hearing anyway.

Landis alleges that he was entitled to a new trial—or in the alternative, resentencing—based upon two events that occurred after his conviction in 2005. First, Landis claims that the FBI changed its official stance on the uniqueness of fingerprints due to the case of Brandon Mayfield—an Oregon resident whose fingerprint was erroneously found to be a match to that of a terrorist who blew up a train in Spain. Second, Landis alleges that the subsequent conviction of a fourth conspirator in the burglaries at issue here conflicts with testimony in his trial that there were only two or three participants in the burglaries.

The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to an issue; (4) the testimony must not merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990).

Although Landis does not specify when he learned about the alleged change in the FBI's position on the uniqueness of fingerprints, we will assume for the sake of argument that it was after his trial, given that Landis claims he learned of the change from an expert witness who had testified in the Mayfield matter in 2005. We will also assume without deciding that testimony about developments in fingerprint analysis would have been material and noncumulative, since a fingerprint matching Landis's was found on a motorcycle helmet linked to the robberies and an F.B.I agent testified at Landis's trial that a person's fingerprints "are completely unique."

However, we are not persuaded that the new evidence would have led to a different result in trial because Landis's fingerprint was far from the only evidence linking him to the robberies. Other evidence against Landis included the fact that police apprehended him with other suspects at 2:35 a.m. in a vehicle containing firearms, masks and hoods, a bulletproof vest, an army helmet, gloves, a crowbar, two-way radios and a police scanner; a cellmate's testimony that Landis had talked about his involvement with three others in a series of burglaries; and the recovery of bait money from one of the robberies in a safe to which only Landis had access.

Similarly, we are not persuaded that evidence of the conviction of a fourth suspect would have altered the outcome of the trial in light of the other evidence directly linking Landis to the burglary ring. Even if the jury was not aware of the conviction of a fourth suspect, they were already aware of the cellmate's testimony that Landis had said there were four people involved. Thus, to the extent that the jury needed to reconcile different accounts about how many people were involved, it already had an opportunity to do so and concluded that Landis was one of those involved.

Finally, we are not persuaded that a new trial is warranted in the interest of justice. The real controversy—namely, whether Landis participated in the burglary ring—was fully tried.

IT IS ORDERED that the postconviction order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals