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July 29, 2014

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

2013AP1794-CR State of Wisconsin v. Roy James Jones (L.C. #1995CF955367)

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

Roy Jones, pro se, appeals an order denying a motion for postconviction DNA testing and for appointment of counsel. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.[1] We summarily affirm.

This is the seventh time that Jones has sought relief from this court since his 1997 convictions on seven criminal charges for kidnapping while armed and sexually assaulting two

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

teenage girls.[2] Jones also filed at least one pro se WIS. STAT. § 974.06 motion that was denied by the circuit court and not appealed. We will not repeat the extensive facts or procedural history outlined in prior decisions.

In the present appeal, Jones continues his postconviction campaign to obtain new DNA testing. On June 5, 2013, seven months after our most recent decision affirming the denial of his request for DNA testing, Jones filed in the circuit court his latest motion for DNA testing. He sought to have various items, not entirely specified, tested at his own expense, or at the expense of his girlfriend. The circuit court denied the motion. The court found Jones failed to demonstrate how new DNA testing would be reasonably likely to produce more accurate results in this case. The court stated: "The defendant has failed to make a sufficient showing to overcome the fact that the victim identified him as her assailant and that *his* semen was found on her underwear."[3] The court also noted that, although Jones now asserted that his girlfriend would pay the cost of new DNA testing, Jones had failed to specify what items would be tested, the actual or probable cost, or his girlfriend's financial ability to bear that cost.

The circuit court properly denied the present motion. As we recognized in rejecting Jones's argument in his previous appeal, evidence collected from one victim was destroyed long ago. As a result, it is not in the government's actual or constructive possession, and is thus

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[2] *See* ***State v. Jones***, No. 1998AP685-CR, unpublished slip op. (WI App June 29, 1999); ***State v. Jones***, No. 2004AP1836, unpublished slip op. (WI App Dec. 20, 2005); ***State v. Jones***, No. 2007AP2097-CR, unpublished slip op. (WI App Sept. 23, 2008); ***State ex rel. Jones v. Pollard***, No. 2008AP2589-W, slip op. (WI App Dec. 30, 2008); ***State v. Jones***, No. 2010AP779-CR, unpublished slip op. (WI App Jan. 11, 2011); and ***State v. Jones***, No. 2011AP2572, unpublished slip op. (WI App Nov. 6, 2012).

[3] It is undisputed that the defense also had DNA testing conducted prior to trial. At trial, however, defense counsel refused to disclose or discuss the testing.

unavailable for testing. *See* WIS. STAT. § 974.07(2)(b); ***State v. Moran***, 2005 WI 115, ¶¶3, 42, 284 Wis. 2d 24, 700 N.W.2d 884. Jones insists that the State improperly failed to preserve "potential useful evidence." However, as we stated in the previous appeal: "Jones complains about the fact that this evidence is no longer available, but he was notified in December 2007 that evidence pertaining to [one victim] had been destroyed. Jones has not shown that the issue of whether certain evidence should have been destroyed years ago is relevant to the analysis of a current request for DNA testing …."

As we also observed in the previous appeal, and as the circuit court emphasized in denying Jones's current motion, Jones failed to show that new DNA testing would produce more accurate results. The possibility that new DNA testing of items pertaining to the second victim—especially hair—would be revealed as coming from a person other than Jones simply does not constitute significant evidence; certainly it would not be sufficient evidence to overcome the highly incriminating fact that Jones's semen was found on the victim's underwear. In this respect, the possibility of additional DNA testing has very limited probative value and relevance. *See* WIS. STAT. § 974.07(2)(a); ***Moran***, 284 Wis. 2d 24, ¶¶3, 42. In any event, the critical flaws in Jones's reasoning remain in his current appeal, and the arguments have already been dealt with. Quite simply, he loses again.

Jones also argues that he was denied due process because of the alleged improper destruction of evidence relating to one of the victims. That, however, is not a legitimate postconviction DNA testing issue. Rather, it is an attack on his conviction, and Jones was required to raise it in an earlier postconviction motion. *See* ***State v. Lo***, 2003 WI 107, ¶15, 264 Wis. 2d 1, 665 N.W.2d 756; *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals