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DISTRICT IV

March 12, 2015

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

2013AP2084-CR

State of Wisconsin v. Albert L. Howard (L.C. # 2005CF930)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Albert Howard, pro se, appeals a circuit court order that denied Howard's motion for a new trial based on a claim of newly discovered evidence. 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 (2013-14).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In November 2005, Howard was convicted of first-degree sexual assault of a child, following a jury trial. The State Public Defender appointed counsel to represent Howard, and counsel pursued a no-merit appeal on Howard's behalf. We affirmed Howard's conviction after our independent review of the record revealed no issues with arguable merit. Howard then moved for postconviction DNA testing under WIS. STAT. § 974.07, which the circuit court denied. In May 2009, Howard filed a motion for postconviction relief under WIS. STAT. § 974.06. R-81. The circuit court denied the motion, and we affirmed on appeal. Howard moved again for postconviction DNA testing, which the circuit court denied, and we affirmed on appeal. In May 2013, Howard moved for a new trial based on newly discovered evidence. The circuit court denied the motion. Howard appeals.

“To prevail on a claim for newly discovered evidence, a defendant must first prove by clear and convincing evidence that ‘(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.’” *See State v. Love*, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (quoted source omitted). The defendant must also show “[a] reasonable probability of a different outcome”; that is, “a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant’s guilt.” *Id.*, ¶44 (quoted source omitted; alteration in original).

Here, Howard argues that he discovered in February 2009 that the victim’s biological material had never been in the custody of the government and that the biological material had

been destroyed prior to trial. He argues that the State committed a *Brady*² violation by failing to disclose to the defense that the victim's biological material was never in the government's possession and had been destroyed prior to trial. He argues that his due process rights were violated when the State used evidence of the victim's test results at trial when the State had not performed its own testing of the material, and without providing Howard the opportunity to challenge that evidence through additional testing. Howard argues that, had he known that the victim's biological material had been destroyed prior to trial and had not been in the government's possession, he would have been able to successfully argue for the court to exclude that evidence at trial and, as a result, he would not have been convicted. We conclude that Howard's arguments are procedurally barred.

In Howard's direct appeal, we addressed the issues identified in the no-merit report, namely, sufficiency of the evidence to support the conviction and the circuit court's exercise of discretion at sentencing. We concluded that the evidence at trial—including a videotaped interview of the child victim, in which she reported having genital-to-genital contact with a man she knew as "Little Al"; the victim's in-court identification of Howard as "Little Al"; and evidence that both the victim and Howard had tested positive for gonorrhea—was sufficient to support the jury verdict. We also concluded that there would be no arguable merit to a challenge to the court's exercise of its sentencing discretion.

We also addressed issues raised by Howard in his no-merit responses, including his claim that he was entitled to a new trial because the State committed a discovery violation by failing to

² *Brady v. Maryland*, 373 U.S. 83 (1963).

provide the defense with incubation logs concerning the tests for sexually transmitted diseases that were administered to the victim. We explained that nothing indicated the logs contained exculpatory information.

In December 2008, Howard moved for postconviction DNA testing under WIS. STAT. § 974.07. Howard sought testing of the specimen collected from the victim to determine whether that specimen contained Howard's DNA. In response, the State provided an affidavit averring that the victim's specimen was collected, tested and destroyed by a non-government clinic, and that the evidence was never in the possession of the government. The circuit court denied the motion in February 2009, explaining that Howard had failed to show that the specimen was in the government's possession, as required by § 974.07(2)(b).

In May 2009, Howard filed a motion for postconviction relief under WIS. STAT. § 974.06. He argued that the prosecutor committed misconduct by introducing evidence that the victim had tested positive for gonorrhea, contending that the evidence violated the rape shield law. Howard also argued that his trial counsel was ineffective by failing to ask the State to provide the defense with the victim's culture swab for further testing. Howard acknowledged that the defense would have been unable to obtain the material from the State for further testing, since the material had been collected, tested and destroyed by a private agency before Howard was charged in this case. He argued, however, that his trial counsel should have moved to exclude the test results because Howard was not afforded the opportunity to refute the evidence by further testing of the material. Howard argued that he had a sufficient reason for failing to raise the claims related to the test results earlier, because his postconviction counsel was ineffective by failing to pursue those claims on Howard's behalf.

The circuit court denied the motion, and we affirmed the circuit court's decision on appeal.³ We noted that all of Howard's arguments were premised on his underlying argument that the test results should have been excluded at trial, and we determined that Howard was procedurally barred from raising an evidentiary issue that could have been raised during the no-merit proceeding. *See State v. Tillman*, 2005 WI App 71, ¶¶19-20, 281 Wis. 2d 157, 696 N.W.2d 574. In applying the procedural bar, we explained that we were confident in the outcome of the no-merit proceeding and that we did not share Howard's view of the merits of the issues he sought to raise in his WIS. STAT. § 974.06 motion. *See id.* We specifically rejected Howard's argument that counsel was ineffective by failing to request additional testing of samples that had already been destroyed.

In January 2011, Howard again moved the circuit court for postconviction DNA testing under WIS. STAT. § 974.07. Howard sought to re-test the victim's and Howard's biological material, to verify the source of each specimen and that each had tested positive for gonorrhea. The circuit court denied the motion, and we affirmed on appeal. We explained that Howard had not shown that it was reasonably probable that he would not have been prosecuted or convicted absent the test results showing that both Howard and the victim tested positive for gonorrhea, in light of the victim's recorded interview and in-court testimony reporting that Howard had genital-to-genital sexual contact with her. *See* § 974.07(7)(a)2. We also noted that the material had already been tested, that Howard had not asserted new testing techniques were available, and

³ Howard also sought to appeal the circuit court's order denying postconviction DNA testing, but we determined that his notice of appeal was not timely as to that order.

that it appeared from the record before us that the evidence was not in the government's possession. *See* §§ 974.07(2)(b), (2)(c), and (7)(a)3.

The crux of Howard's argument in this appeal is that, had Howard known that the victim's biological material was collected, tested and destroyed without ever being in the government's possession, the victim's test results would have been excluded at trial and Howard would not have been convicted. However, Howard does not explain why he did not raise this argument in his May 2009 postconviction motion when he had discovered the facts underlying that argument several months earlier, during proceedings related to Howard's first motion for postconviction DNA testing. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) (when a defendant's claim for relief could have been, but was not, raised in a prior postconviction motion or on direct appeal, the claim is procedurally barred unless the defendant shows a sufficient reason for failing to previously raise it). Moreover, the underlying premise for Howard's current argument—that Howard would not have been convicted had the biological material been excluded—has already been rejected by this court. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.").

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals