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June 18, 2015

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

2014AP834 State of Wisconsin v. Larry B. Hooker (L.C. # 2002CF435)

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

Larry Hooker appeals an order denying his combined postconviction motion for discovery of crime lab reports and for a new trial. The circuit court denied the motion, concluding that it was procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Hooker agues that newly discovered evidence constituted sufficient grounds for avoiding the procedural bar. Upon our review of the parties' briefs and record, we

conclude at conference that the order should be summarily affirmed. *See* WIS. STAT. RULE 809.21 (2013-14).[1]

In 2002, Hooker was convicted of arson and two counts of first-degree reckless endangering safety. The convictions were affirmed by this court, and Hooker's petition for review was denied. In 2005, Hooker filed a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel. This court dismissed the petition. Hooker then filed a motion in the circuit court under WIS. STAT. § 974.06, again requesting a new trial. The circuit court denied the motion, and this court affirmed that decision on appeal.[2] Hooker then brought the present motions seeking copies of the state crime lab reports, contending that they would show no liquid accelerant on the items sent to the crime lab, including Hooker's shirt. Those items were sent to the lab after a dog alerted to the presence of an accelerant. Hooker argues that the lab reports would have contradicted the dog handler's testimony.

The circuit court correctly concluded that Hooker's present motions were procedurally barred. A defendant is required to consolidate all postconviction claims into his/her original, supplemental or amended motion. ***State v. Lo***, 2003 WI 107, ¶31, 264 Wis. 2d 1, 665 N.W.2d 756. Issues that could have been raised on direct appeal or a prior postconviction motion may not become the basis of a subsequent motion under WIS. STAT. § 974.06, unless the court

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

[2] Hooker also filed a motion to vacate the DNA surcharge, and appealed the circuit court's decision denying that motion. This court affirmed that decision. We do not consider that postconviction motion and appeal when deciding whether the present motion and appeal violate the rule against successive postconviction proceedings set out in ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). *See* ***State v. Starks***, 2013 WI 69, ¶32, 349 Wis. 2d 274, 833 N.W.2d 146.

ascertains that a sufficient reason exists for the failure to raise the issue in the previous appeal or motion. ***Lo***, 264 Wis. 2d 1, ¶31. Hooker's previous motions and appeals, particularly his 2005 pro se motion under § 974.06, create a procedural bar because the present issues could have been raised at least in 2005.

Hooker contends that the procedural bar should not apply because lab reports would constitute newly discovered evidence and he only recently became aware of the issue in discussing his case with another inmate. To establish newly discovered evidence, Hooker must prove by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) he was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative; and (5) a reasonable probability exists that a different result would be reached in a new trial. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. Although the lab reports were material to an issue in the case, Hooker does not meet any of the other criteria. Hooker was present at a pretrial hearing at which the lab reports were discussed. Their significance was established at the trial when fire marshal Jeffrey Fennig testified regarding the dog's ability to find accelerants. Fennig testified that the dog alerted to various items including Hooker's shirt, and those items were sent to the crime lab for analysis. He testified that the crime lab did not discover any ignitable liquids except in a perfume bottle. He further testified:

> I had hoped beforehand the crime lab would; but based on the results that they couldn't find anything is indicative of the fact that it was probably present but in such a low concentration that the crime lab could not find it.
>
> In our industry, in the fire investigation industry, the standard is or the guide is if a canine makes an alert, you take a sample and you send it to the crime lab.

> If the crime lab can't confirm it, then in essence it doesn't exist; and that is because you can't put the dog on the stand here and ask the dog questions of what it smelled or what it [thought]. So we're bound by that trend in the industry, which I don't have a problem with.

Therefore, both the existence of the lab reports and their significance should have been known to Hooker before he filed his 2005 motion. In addition, the facts he intends to prove by the lab reports were cumulative of Fennig's testimony. Finally, because the jury was informed of the negative laboratory tests before it convicted Hooker, he has not established a likelihood that retrial would produce a different result. Therefore, he has not established grounds for a new trial or for postconviction discovery. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999).

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

Diane M. Fremgen
Clerk of Court of Appeals