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DISTRICT IV

June 24, 2015

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

2014AP1310-CR

State of Wisconsin v. Glenn A. Smiley (L.C. # 2007CF29)

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

Glenn Smiley appeals an order denying his motion for postconviction discovery of documents that he argues would constitute exculpatory material. He seeks discovery of police reports of an investigation undertaken with a “see-through wall” imaging device that he claims exposed him to radiation in 1999 and 2000 in his bedroom. He argues that the report would be exculpatory because it would explain why he repeatedly sexually assaulted a child. Upon our

review of the record and the parties' briefs, we conclude at conference that the order should be summarily affirmed. WIS. STAT. RULE 809.21 (2013-14).¹

In 2007, Smiley entered a guilty plea to repeated sexual assault of the same child. According to the complaint, the victim told investigators that Smiley sexually assaulted him at Smiley's home between 1999 and 2003. When asked about these allegations, Smiley admitted to having oral sex with the victim on five occasions.

In 2008, Smiley filed a postconviction motion under WIS. STAT. RULE 809.30, and the circuit court denied the motion. In 2010, Smiley filed a pro se postconviction motion pursuant to WIS. STAT. § 974.06 and an addendum. The circuit court denied the motion following an evidentiary hearing and Smiley appealed, arguing in part that his counsel was ineffective for failing to investigate whether police violated his Fourth Amendment rights by using a device that allowed them to see through walls. This court rejected Smiley's argument on grounds that the claim was not previously raised in his postconviction motion.

In 2012, Smiley filed a public records request regarding the alleged surveillance conducted in 1999 and 2000, including information regarding the alleged see-through wall imaging device. The assistant district attorney denied the request, citing a common law exception for documents integral to the criminal investigation and prosecution process. The circuit court denied Smiley's request to review that decision.

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

In 2014, Smiley filed the present motion seeking discovery of police reports regarding the alleged surveillance and his exposure to radiation due to the see-through wall imaging device. The circuit court denied the motion and Smiley's motion for reconsideration concluding that the State has turned over all documents and other evidence to Smiley that is required by law, and there is no factual basis for the court to conclude the State possessed any previously undisclosed material concerning the alleged see-through wall imaging device. The court rejected Smiley's characterization of the State's previous response to the public records request as an admission that the material existed.

Smiley's motion for postconviction discovery fails for four reasons. First, it is procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Defendants may not bifurcate postconviction litigation into procedural and substantive motions to avoid the procedural bar. *State v. Kletzien*, 2011 WI App 22, ¶¶8-18, 331 Wis. 2d 640, 794 N.W.2d 920). Smiley could have raised the issue in his 2008 or 2010 postconviction motions, and has not established sufficient reason for his failure to do so.

Second, Smiley has not provided this court with a transcript of the May 8, 2014 hearing. It is the appellant's responsibility to ensure that a transcript of the court's ruling is made a part of the record on appeal. See *State v. Turner*, 200 Wis. 2d 168, 176 n.5, 546 N.W.2d 880 (Ct. App. 1996). In the absence of a transcript, this court must assume that the missing material supports the circuit court's rulings. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

Third, the record does not support Smiley's assertion that the State withheld information about the see-through wall imaging device. As the circuit court noted, Smiley mischaracterized

the State's response to the public records request when he argued that it was an admission that the State possessed the materials. Rather, the court appropriately noted that the State's public records response stated that it had turned over all materials to which the defendant was entitled and anything not turned over was not subject to disclosure. This assertion does not constitute an admission that such documents exist.

Fourth, and most significantly, Smiley has not established that the alleged material is exculpatory. To be entitled to postconviction discovery, the sought-after evidence must be relevant to an issue of consequence. *State v. O'Brien*, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999). Evidence is consequential only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 320-21. Smiley has not established any link between his alleged exposure to radiation and the crimes he committed.

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

Diane M. Fremgen
Clerk of Court of Appeals