



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

December 29, 2015

To:

Hon. Daniel L. Konkol
Circuit Court Judge
Safety Building Courtroom, # 502
821 W. State St.
Milwaukee, WI 53233-1427

John Barrett
Clerk of Circuit Court
Room 114
821 W. State St.
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Nancy A. Noet
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Jeremy C. Perri
First Asst. State Public Defender
735 N. Water St., #912
Milwaukee, WI 53203

Jermaine Smith 394890
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2014AP2520

State of Wisconsin v. Jermaine Smith (L.C. # 2003CF156)

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

Jermaine Smith appeals an order denying his motion for a new trial. He argues that the circuit court erred when it concluded that his motion was procedurally barred. 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 affirm the order of the circuit court.

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

In 2003, a jury convicted Smith of first-degree intentional homicide for shooting a woman in the head during a robbery at her home. On direct appeal, Smith's conviction was affirmed. In 2007 Smith filed a motion pursuant to WIS. STAT. § 974.06 alleging that his appellate counsel was ineffective, which the circuit court denied. Smith filed the motion that is the subject of this appeal in the circuit court on October 1, 2014, seeking a new trial. In this motion, he argues that he is entitled to a new trial on the grounds that his trial counsel was ineffective for failing to call a witness whose testimony would have supported the defense theory that a co-defendant was the shooter.

In the postconviction decision, the circuit court found that Smith had not set forth a sufficient reason for failing to raise his claim during his direct appeal or in his prior WIS. STAT. § 974.06 motion, as required by *State v. Escalona-Naranjo*, 185 Wis. 2d 169, 178, 517 N.W.2d 157 (1994). That is correct. Smith's motion does not provide any reason for the failure to raise his claim during his two previous appeals, and he therefore has not done what he has to do to get past the procedural bar.

Smith argues that this court should employ its discretionary reversal power under WIS. STAT. § 752.35, which states:

In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

At Smith's jury trial, the State introduced evidence of Smith's confessions to police and to a witness, along with eyewitness testimony that corroborated details of those confessions. Smith's trial counsel called witnesses including a jail inmate who testified that Smith's co-defendant had confessed to the inmate that he had committed the murder. Nothing in this record indicates that the controversy in this case, which was the identity of the shooter, has not been fully tried. We discern nothing in this record that would justify discretionary reversal under WIS. STAT. § 752.35.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals