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DISTRICT II

March 9, 2016

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

2015AP1163 State of Wisconsin v. Andre W. Warfield (L.C. #2005CF191)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Andre W. Warfield appeals pro se from an order denying his motion for a new trial in the interest of justice. He contends his 2005 trial was fundamentally unfair because the jury pool did not represent a fair cross-section of the community. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] For the reasons that follow, he is not entitled to relief. We affirm.

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

In 2005, Warfield began serving an eighty-one-year total sentence after a jury found him guilty of kidnapping, armed burglary, conspiracy to commit armed robbery with use of force, physical abuse of a child, and seven counts of taking hostages. Each count carried a repeater penalty enhancer; the kidnapping and hostage-taking counts also carried a use-of-a-dangerous-weapon enhancer. This court affirmed his conviction on appeal. The supreme court denied his petition for review.

In 2011, Warfield filed a pro se WIS. STAT. § 974.06 motion and a petition for writ of habeas corpus. The circuit court denied the motion and petition after an evidentiary hearing. This court dismissed his appeal for failing to comply with the Rules of Appellate Procedure and court orders. The supreme court dismissed Warfield's petition for review as untimely.

Warfield then filed a motion in the circuit court for a new trial in the interest of justice under WIS. STAT. § 751.06. Warfield, an African American, contended his trial was unfair because the pool of forty-two potential jurors contained only one African American and that person was not chosen for the jury. The prosecutor filed a letter memorandum pointing out that Warfield's motion failed to make a prima facie showing that African Americans had been "systematically and intentionally excluded from jury service." *See* ***State v. Coble***, 95 Wis. 2d 717, 728, 291 N.W.2d 652 (Ct. App. 1980). The circuit court adopted the memorandum as its decision and denied the motion without a hearing. Warfield appeals.

WISCONSIN STAT. § 751.06 provides that the *supreme court* has discretion to grant a new trial in the interest of justice. It does not apply to the circuit court. A circuit court has discretion to grant a new trial in the interest of justice only under WIS. STAT. Rule 809.30 or WIS. STAT. §§ 974.02 or 974.06. ***State v. Henley***, 2010 WI 97, ¶¶63, 70, 328 Wis. 2d 544, 787 N.W.2d 350.

The time has long expired for Warfield to file a motion for postconviction relief under §§ 809.30 and 974.02, however. *See* §§ 974.02(1), 809.30(2)(b).

A motion under WIS. STAT. § 974.06 also would be to no avail, as it is subject to the procedural bar of § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Absent a sufficient reason for not doing so, a defendant must raise all grounds for relief in his or her initial postconviction motion or on direct appeal. ***Escalona-Naranjo***, 185 Wis. 2d at 185; *see* § 974.06(4). Both whether ***Escalona-Naranjo*** bars a defendant's claims and whether a sufficient reason exists for the failure to do so present questions of law we review de novo. ***State v. Kletzien***, 2011 WI App 22, ¶¶9, 16, 331 Wis. 2d 640, 794 N.W.2d 920.

Warfield did not raise the jury make-up issue in his direct appeal, WIS. STAT. § 974.06 motion, or habeas petition. He offers no reason whatsoever for his failure to bring the alleged violation to the trial court's attention. "We need finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. Warfield's claim is procedurally barred.

Even assuming for argument's sake that it were not barred, the claim cannot succeed. Warfield asserted in his motion that U.S. Census Bureau figures show that African Americans comprise 6.6% of Kenosha county's population. He rounds the percentage up to seven. Seven percent of forty-two is just under three. Thus, he argued, it was "unreasonable in the extreme" that only one was in the forty-two-person jury pool.

Warfield had to establish a prima facie violation of the fair-cross-section requirement. *See* ***Coble***, 95 Wis. 2d at 728. To do so, he had to show: (1) that African Americans are a "'distinctive' group in the community; (2) that the[ir] representation … in venires from which juries are selected is not fair and reasonable in relation to the[ir] number … in the community;

and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." ***Id.*** (citing ***Duren v. Missouri***, 439 U.S. 357, 364 (1979)).

Census Bureau figures arguably are over-inclusive because they include children and other persons ineligible for jury service. ***Davis v. Warden Joliet Corr. Inst.***, 867 F.2d 1003, 1014 (7th Cir. 1989). Absolute proportional representation is not required to satisfy the fair-cross-section requirement. ***State v. Pruitt***, 95 Wis. 2d 69, 78, 289 N.W.2d 343 (Ct. App. 1980). Warfield did not carry his burden of showing either that the jury pool was not a fair and reasonable representation in relation to the number of African Americans eligible for jury service in the community or that they were systematically and intentionally excluded from the jury selection process. *See* ***Coble***, 95 Wis. 2d at 728.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals