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DISTRICT I

April 26, 2017

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

2015AP2446-CR State of Wisconsin v. Mitchell A. Boose
(L.C. # 2007CF2496)

Before Brennan, P.J., Brash and Dugan, JJ.

Mitchell A. Boose, *pro se*, appeals from an order of the circuit court that denied his "motion to reconstruct the record" and from an order that denied his motion for reconsideration. 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 (2015-16).[1] The orders are summarily affirmed.

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[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

A jury convicted Boose of first-degree reckless homicide while armed and possession of a firearm by a felon in the 2007 shooting death of Fred Richardson. He filed a postconviction motion, which was denied. He appealed, and we affirmed. *See* ***State v. Boose***, No. 2009AP848-CR, unpublished slip op. (WI App Mar. 2, 2010).

In 2011, Boose filed a *pro se* postconviction motion pursuant to WIS. STAT. § 974.06 (2011-12). He alleged multiple ways in which he believed trial counsel had been ineffective. One of his claims was that trial counsel should have objected, based on bias, to Juror 2 continuing to serve after a potential "improper contact" was brought to the parties' attention. Specifically, Juror 2 had received a phone call from her ex-husband's sister, Shirley Booker, after the first day of trial. Booker told her that the juror's ex-husband's brother's wife, Mary Lyons, was the mother of victim Richardson, and that Lyons was distraught about Juror 2's presence on the jury.

Juror 2 was brought into chambers for individual, but on-the-record, *voir dire*. Among other things, she explained that she thought she had recognized Lyons the day before but had not spoken to her; she had never met Richardson; she typically avoided Lyons when she saw her at the ex-husband's family home; and nothing about the call or situation impacted her ability to be an impartial juror. Defense counsel asked two questions, establishing that Juror 2 had not been threatened and that it was not anyone affiliated with the defense who had called her. While the trial court was inclined to strike Juror 2, defense counsel, after consultation with Boose, objected to striking the juror. When asked, Boose personally told the trial court that he wanted the juror to stay on.

In his *pro se* motion, however, Boose argued the juror was statutorily, objectively, and subjectively biased. The postconviction court rejected the claim, as did we. *See* ***State v. Boose***, No. 2011AP2050, unpublished slip op. ¶25 (WI App Oct. 16, 2012).

In September 2015, Boose filed a motion to reconstruct the record, pursuant to ***State v. Perry***, 136 Wis. 2d 92, 401 N.W.2d 748 (1987), "so that the record can be supplemented with testimony concerning the exposure of extraneous information to the jury." Boose complained that Booker was never called to testify about what she said to Juror 2.

The circuit court denied the motion, noting that Boose was "not attempting to reconstruct the record but rather to obtain evidence in support of postconviction claims that have already been litigated. … A reconstruction hearing is not a mechanism for obtaining additional evidence to support postconviction claims that have already been litigated." The circuit court additionally concluded that a reconstruction hearing would not "provide the defendant with any meaningful evidence."

The circuit court is correct that what Boose seeks is not record reconstruction. Record reconstruction is meant to recreate parts of the record that have been lost, typically due to no fault of a defendant, *see* ***State v. DeLeon***, 127 Wis. 2d 74, 77, 377 N.W.2d 635 (Ct. App. 1985), not to create a record that never existed or to add information to an otherwise intact record. ***Perry*** and ***DeLeon*** involved situations where portions of the court reporters' notes had been lost, resulting in incomplete transcripts. *See* ***Perry***, 136 Wis. 2d at 95-96; ***DeLeon***, 127 Wis. 2d at 76. Another record reconstruction case, ***State v. Raflik***, 2001 WI 129, 248 Wis. 2d 593, 636 N.W.2d 690, involved an inadvertent failure to record a telephonic search warrant application. *See* ***id.***,

¶¶16, 32. Here, no portion of the record is missing. The information Boose seeks to "reconstruct" was never even presented to be made part of the record.

The circuit court construed Boose's motion as seeking to relitigate the matter of whether Juror 2 was biased. *See* ***State v. Faucher***, 227 Wis. 2d 700, 719, 596 N.W.2d 770 (1999) (explaining the test to be used in determining whether extraneous information reached a juror and caused objective bias). The circuit court concluded this attempt was barred by Boose's prior *pro se* motion raising juror bias, and we agree. *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.").

To the extent that Boose contends he actually has a different issue—that the question of whether extraneous information reached a juror is different than the question of whether the juror was biased—we agree with the State that the new issue is procedurally barred. A defendant is required to raise all grounds for relief in his or her original, supplemental or amended motion for postconviction relief unless sufficient reason is shown for failing to raise the issues earlier. *See* WIS. STAT. § 974.06(4); *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d

57 (1994). Boose does not explain why he did not raise his extraneous information claim in his original postconviction motion, his direct appeal, or his first *pro se* § 974.06 motion.[2]

Therefore,

IT IS ORDERED that the orders are summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals

[2] Boose claims that the case of Manuel Cucuta demonstrates he should not be barred from his current claim. *See* ***State v. Cucuta*** (***Cucuta II***), No. 2008AP1764, unpublished slip op. (WI App Nov. 17, 2009). Cucuta was convicted of two counts of first-degree intentional homicide. *See* ***id.***, ¶2. He had a postconviction motion and direct appeal, in which he did not prevail. *See* ***id.*** Cucuta then petitioned the circuit court for a writ of *habeas corpus* because of a sleeping juror. In February 2007, based on ***State v. Hampton***, 201 Wis. 2d 662, 673, 549 N.W.2d 756 (Ct. App. 1996), this court remanded Cucuta's case "for an evidentiary hearing to attempt to reconstruct the record to attempt to determine the nature, extent, and ramifications of that juror's inattentiveness." *See* ***State v. Cucuta*** (***Cucuta I***), No. 2005AP777, unpublished slip op. and order at 3 (WI App Feb. 12, 2007).

It is not clear why we treated the matter as one of record reconstruction, but it is clear that we were remanding ***Cucuta*** because of the circuit court's failure, and later refusal, to make any record related to the sleeping juror after the issue had been pointed out. That failure and refusal constituted an erroneous exercise of discretion under ***Hampton***, and development of a factual record was necessary for this court to further consider Cucuta's appeal. *See* ***Cucuta I*** at 3-4; ***Cucuta II*** at ¶2. ***Cucuta*** does not prohibit application of a procedural bar here.