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**DISTRICT III**

October 31, 2017

To:

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

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2016AP1447

State v. Don Allan Ray Dougan (L. C. No. 2002CF186)

Before Stark, P.J., Hruz and Seidl, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Don Dougan, pro se, appeals an order denying his WIS. STAT. § 974.06 (2015-16)<sup>1</sup> motion for a new trial; motion to change the venue of a new trial; WIS. STAT. § 974.07 motion for deoxyribonucleic acid (DNA) testing; and motion to inspect the container containing his oral

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

swab for tampering. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Dougan's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21.

In 2003, Dougan was convicted upon a jury's verdict of two counts of repeated sexual assault of the same child and one count of possession of a firearm as a felon. The sexual assault charges arose out of his actions, including oral sex, with Megan and Tilly,<sup>2</sup> the minor daughters of Dougan's long-time girlfriend. Dougan denied committing the sexual assaults at trial but submitted a detailed description of the crimes during the presentence investigation. The circuit court imposed consecutive sentences totaling eighty-two years' initial confinement followed by forty-three years' extended supervision. Dougan's postconviction motions were denied after a hearing.

On direct appeal, Dougan raised several challenges to the effectiveness of his trial counsel; asserted the presentence report writer violated Dougan's constitutional rights; and claimed the circuit court erroneously exercised its sentencing discretion. Relevant to this appeal, Dougan alleged his trial counsel was ineffective by failing to obtain a DNA profile from Dougan's saliva sample. Noting that a DNA profile had been developed from Dougan's blood sample, we rejected Dougan's claim on the ground that "a person's DNA is the same regardless whether it comes from that person's saliva or blood." *See State v. Dougan*, No. 2009AP950-CR, unpublished slip op. ¶9 (WI App June 2, 2010). We further noted that, during the trial, a state crime lab analyst testified that Dougan was eliminated as the source of the DNA present in the

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<sup>2</sup> Pursuant to WIS. STAT. RULE 809.86(4) (2015-16), we use pseudonyms instead of the victims' names.

crotch area of Megan's underwear. We affirmed both the judgment of conviction and the order denying Dougan's postconviction motion.

In 2011, Dougan filed a WIS. STAT. § 974.06 motion for postconviction relief alleging constitutional error, plain error, abuse of process, prosecutorial misconduct, manifest error, and vindictive prosecution. The circuit court denied the motion without a hearing. Dougan's appeal from that order was dismissed by order dated June 12, 2012, based on his failure to file a brief. In January 2016, Dougan moved for postconviction DNA testing of his saliva sample at state expense under WIS. STAT. § 974.07. The State opposed the motion, construing Dougan's argument as alleging that if Dougan had oral sex with Megan, the testing of his saliva sample should reveal the presence of Megan's DNA in Dougan's saliva. The circuit court denied the motion, agreeing with the State's interpretation of Dougan's allegation.

Dougan moved for reconsideration, clarifying that he was not alleging that testing would reveal the presence or absence of Megan's DNA in his saliva but, rather, that testing would establish his "salivary DNA" was not present on Megan or her underwear. The circuit court denied Dougan's reconsideration motion. Shortly thereafter, Dougan filed the underlying WIS. STAT. § 974.06 motion for a new trial, claiming the State violated his due process rights by failing to disclose "exculpatory" evidence consisting of his oral swab test results. Dougan contemporaneously moved for DNA testing of his oral swab pursuant to WIS. STAT. § 974.07; sought inspection of the vial containing his oral swab; and requested that any new trial be held in a venue outside of Chippewa County. The motion was denied without a hearing, and this appeal follows.

With the exception of Dougan's WIS. STAT. § 974.07 motion for DNA testing, his remaining arguments are procedurally barred under WIS. STAT. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). In *Escalona-Naranjo*, our supreme court held that “a motion under [§] 974.06 could not be used to review issues which were or could have been litigated on direct appeal.” *Id.* at 172. The statute, however, does not preclude a defendant from raising “an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his [or her] original, supplemental or amended postconviction motions.” *Id.* at 184.

We determine the sufficiency of a defendant's reason for circumventing *Escalona-Naranjo*'s procedural bar by examining the “four corners” of the subject postconviction motion. See *State v. Allen*, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. Here, Dougan's motion offered no reason, much less a sufficient reason, for failing to raise his present claims on direct appeal. Moreover, to the extent Dougan's current arguments are an attempt at repackaging his previous claim that counsel should have sought testing of his oral swab, this issue cannot be relitigated no matter how artfully it is rephrased. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Because these claims either were or could have been raised on direct appeal or in his earlier motions, Dougan is barred from raising or relitigating them now.

Turning to Dougan's WIS. STAT. § 974.07 motion for DNA testing, the statute provides that at any time after being convicted a person may move for an order requiring DNA testing of evidence that meets certain conditions, including that “[t]he evidence is relevant to the investigation or prosecution that resulted in the conviction.” WIS. STAT. § 974.07(2)(a). Here, it was established at trial that Dougan's DNA was not found on Megan. In fact, after DNA profiles were developed from Dougan's blood sample and Megan's oral swab, it was determined that

there was no foreign DNA on Megan or her underwear. Although Dougan argues that testing of his oral swab is relevant because it would show that his “salivary DNA” was not present on Megan or her underwear, the State conceded that fact at trial. To the extent Dougan attempts to make a distinction between blood DNA and “salivary DNA,” we reiterate that DNA is DNA, regardless of whether the sample came from Dougan’s saliva or his blood. Because the State conceded that Dougan’s DNA was not found on Megan, Dougan failed to establish how a DNA test of his oral swab is relevant. The circuit court, therefore, properly denied the § 974.07 motion for DNA testing.

Upon the foregoing,

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

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

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*