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December 13, 2017

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

2017AP200 State of Wisconsin v. Vincent D. Cosey (L.C. # 2006CF70)

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

Vincent D. Cosey appeals from an order denying his WIS. STAT. § 974.06 (2015-16)[1] postconviction motion that sought a new trial on the grounds that newly discovered evidence showed a violation of his constitutional right to a jury pool that was a fair cross-section of the community. Based upon our review of the briefs and record, we conclude at conference that this

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

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Because Cosey has failed to show a sufficient reason why he did not raise this claim in his direct appeal, his claim is procedurally barred. We affirm.

BACKGROUND

In 2006, the State charged Cosey with first-degree intentional homicide and possession of a firearm by a felon. After voir dire, Cosey's counsel moved to strike the jury panel because there was "not one African American person that was brought on the panel" and that therefore "this is not a jury of Mr. Cosey's peers." The court asked if counsel had "a prima facie showing that the panel was not chosen according to law?" Counsel responded that she did not "have any evidence" to offer "regarding how the panel was chosen," but only that "within the panel itself that was seated there were no African Americans." The State argued that the defense had not shown any "intent to keep certain members or classes off of the jury" or "any racially-motivated reason for the make-up of the panel."

The court noted that "the law requires a prima facie showing that the panel was not selected according to law" or that a class of persons was systematically excluded from jury service. Because Cosey made "[n]o such showing," the court denied the motion to strike.

After a five-day trial, the jury found Cosey guilty on both charges. Cosey appealed, arguing that the evidence was insufficient to support the convictions. We disagreed and affirmed. ***State v. Cosey***, No. 2008AP2167-CR, unpublished slip op. (WI App May 20, 2009).

In 2010, Cosey appealed a circuit court order denying his pro se WIS. STAT. § 974.06 postconviction motion. He argued, among other things, that the trial court erred by allowing

tainted jurors to remain on the jury and that his counsel was ineffective for failing to move to strike the tainted panel. The tainting was allegedly caused by comments of a prospective juror. We summarily affirmed. ***State v. Cosey***, No. 2010AP1884, unpublished op. and order (WI App Oct. 11, 2012).

In 2016, Cosey filed a second pro se WIS. STAT. § 974.06 postconviction motion seeking a new trial. He asserted that his constitutional rights were violated because the jury was not "drawn from a fair cross-section of Racine County." Specifically, no African Americans were seated on the jury panel. He contended that he had "newly discovered evidence that this underrepresentation of African-Americans is systematic." Cosey submitted documents purportedly showing that only 3% of the overall jury pool was African American. Citing census data, Cosey asserted that the voting age population of African Americans for Racine County was 8.77% in 2000 and 11.13% in 2010.

At the motion hearing, the court noted that Cosey's claim "probabl[y]" was procedurally barred because it "should have been raised on the direct appeal." Because it was a constitutional issue, the court nonetheless chose to address it.

The court pointed out that Cosey's trial counsel had argued that the jury panel was unfair "given the percentage of African-American persons in Racine County." But Cosey had failed to make a prima facie case that the panel was not selected according to law or that African Americans were systematically excluded. "The only thing that was shown at the time was that that particular array did not have a substantial number of African-American citizens …. That doesn't meet the standard of the law." The court essentially concluded that nothing had changed

since the time of trial, as Cosey still could not show that African Americans were systematically excluded from the jury pool.[2] The court denied the motion and Cosey appeals.

DISCUSSION

Standard of Review

Whether a defendant's postconviction motion is procedurally barred is a question of law, which we review de novo. ***State v. Allen***, 2010 WI 89, ¶15, 328 Wis. 2d 1, 786 N.W.2d 124.

Procedural Bar

Under WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), a defendant challenging a conviction must raise all grounds for relief in one motion. Section 974.06(4) provides as follows:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

[2] The circuit court stated that the defendant has to make a prima facie showing that a group was systematically "and intentionally" excluded. Cosey argues that the court erred by requiring a showing of intentional, in addition to systematic, exclusion. A defendant need not show that the exclusion was intentional. ***Duren v. Missouri***, 439 U.S. 357, 368 n.26 (1979). The United States Supreme Court has stated that, unlike equal protection challenges that require a showing of intent, "systematic disproportion itself" shows a violation of the fair cross-section requirement. ***Id.***; *see also* ***United States v. Weaver***, 267 F.3d 231, 237 (3d Cir. 2001). However, the circuit court's reference to "intentional" does not affect our analysis because Cosey had not made a prima facie showing that any exclusion was systematic.

Defendants are not entitled to pursue a succession of postconviction remedies; there must be "finality in our litigation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. The statute was not designed to allow a convicted defendant to "raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later." ***Id.*** A defendant must consolidate all claims of error in one motion or appeal, absent a "sufficient reason" for failing to do so. ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756.

As noted, Cosey's trial counsel moved to strike the jury panel for the same reason that Cosey now seeks a new trial: the jury pool did not fairly reflect the African-American make-up of the county. After denying the motion, the trial court specifically noted that the claim was "preserved for purposes of appeal." Cosey did not, however, raise the issue in either his direct appeal or first postconviction motion.

The Sufficient Reason Exception to the Procedural Bar

Cosey appears to concede that the general issue regarding the lack of African Americans in the jury pool was known and discussed prior to trial and could have been included in his direct appeal. Cosey argues, however, that there is newly discovered evidence that supports his claim. This new evidence, Cosey asserts, constitutes a sufficient reason for not raising the claim in his direct appeal.

Whether a defendant has presented a sufficient reason for serial litigation is a question of law that we review de novo. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920. Newly discovered evidence can constitute a sufficient reason. ***State v. Love***, 2005 WI 116, ¶51, 284 Wis. 2d 111, 700 N.W.2d 62.

To prevail on a claim of newly discovered evidence, the defendant must prove by clear and convincing evidence the following: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***Id.***, ¶43 (citation omitted); ***State v. Avery***, 213 Wis. 2d 228, 234-37, 570 N.W.2d 573 (Ct. App. 1997). If the foregoing criteria are proven, then the "circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Love***, 284 Wis. 2d 111, ¶44 (citation omitted).

The Sixth and Fourteenth Amendments to the United States Constitution grant the right to a "jury selected from a fair cross-section of the community." ***Duren v. Missouri***, 439 U.S. 357, 359 (1979); ***Taylor v. Louisiana***, 419 U.S. 522, 529 (1975). A prima facie case that the fair cross-section requirement has been violated is made by showing:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364.

The fair cross-section requirement is of "limited scope." ***State v. Horton***, 151 Wis. 2d 250, 258, 445 N.W.2d 46 (Ct. App. 1989). A defendant does not have a right to a petit (trial) jury of any particular racial composition, as a petit jury is not subject to the fair cross-section requirement. ***Lockhart v. McCree***, 476 U.S. 162, 173-74 (1986); ***Horton***, 151 Wis. 2d at 258-60.

For his newly discovered evidence, Cosey relies on two documents. One document is entitled "Juror List 1," is dated October 19, 2006, and purportedly lists the names and races of

the 100 jurors—only three of whom were African American—in the general pool from which the jury panel was selected. The other document is entitled "Random Listing of Jurors," is dated October 23, 2006 (the first day of the trial), and purportedly lists the names of the fifty-four jurors—none of whom were African American—that comprised the panel from which the petit jury was selected. Cosey asserts that these documents were first discovered after his direct appeal and were sent to him by his family in 2016.

The jury data contained in these documents do not constitute newly discovered evidence. Cosey must convincingly show that he was not negligent in seeking this data. ***Love***, 284 Wis. 2d 111, ¶43. He fails to do so. Although Cosey asserts that he was not aware of the jury data at the time of his direct appeal, that is not the question. The question is what attempts, if any, did Cosey undertake to seek out and acquire this data before his appeal? He cites no such attempts. Cosey flatly asserts that "the pool numbers and names were not available" at the time his trial counsel moved to strike the jury panel. This claim is unsupported, as there is nothing in the record that sheds any light on what jury data was available at time of trial. In any event, Cosey did not file his direct appeal until about twenty-two months later, and he does not assert that the data was still unavailable by that time. Because Cosey does not allege facts that would prove that he was not negligent in seeking this evidence, it cannot be considered as newly discovered. *See* ***id.*** For this reason, Cosey has not shown a sufficient reason to be excused from the WIS. STAT. § 974.06(4) procedural bar.

Although Cosey's failure to explain, much less prove, why he did not seek the jury data evidence earlier is dispositive, we nonetheless consider an additional reason why the jury data is not newly discovered evidence and would not make a prima facie showing of systematic exclusion. The lists of juror names and race designations do not add anything of relevance to

what was already raised. Before trial, Cosey's counsel expressly noted the absence of African Americans on the panel and the court acknowledged that fact. What was missing—and what remains missing—was any evidence that the disproportionate jury panel representation was the result of not selecting jurors according to law or of systematically excluding African Americans. *See* ***Duren***, 439 U.S. at 364.

Cosey asserts that, in a case where the defendant must show systematic exclusion, "the numbers themselves" are adequate. That is, the "plain numbers" and the jury data documents "make up Cosey's prima facie" case of systematic exclusion. This is incorrect.

In order to prove systematic exclusion of a group of jurors, the showing of a disproportionate representation on one jury array is not enough. ***State v. Pruitt***, 95 Wis. 2d 69, 76, 289 N.W.2d 343 (Ct. App. 1980). The systematic exclusion could be shown by direct testimony of the jury commissioners or by showing the disproportionate representation "over a period of time." ***Id.*** at 77. Cosey has not offered any jury commissioner testimony or evidence of the racial composition from multiple jury arrays or pools over time. Pure numbers or percentages of a single jury pool at a particular time cannot show that an exclusion of a group was systematic.[3]

[3] Cosey asserts, without explanation, that the circuit court erroneously exercised its "discretion in deciding whether to grant an evidentiary hearing on the matter." A circuit court has discretion to deny a postconviction motion without a hearing if the motion fails to allege sufficient facts or presents only conclusory allegations. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). As already discussed, Cosey did not allege facts that would, if true, provide a sufficient reason to be excused from the procedural bar. We conclude that the court acted within its sound discretion in denying the motion without an evidentiary hearing. *See* ***id.***

Because the jury data evidence was not diligently sought by Cosey and in any event fails to set forth a prima facie case of systematic exclusion, Cosey has not provided a sufficient reason as to why he did not raise his fair cross-section claim in his direct appeal. His claim is now procedurally barred. ***Escalona-Naranjo***, 185 Wis. 2d at 185.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals