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DISTRICT I

August 29, 2018

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

2017AP805-CR State of Wisconsin v. Timothy B. Wilks (L.C. # 1991CF912313)

Before Kessler, P.J., Brennan and Brash, 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).

Timothy B. Wilks, *pro se*, appeals an order that denied his motion for postconviction discovery and DNA testing, and an order that denied his motion for reconsideration. Upon our

review of the briefs and the record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

The State filed a criminal complaint in 1991 alleging that in 1986 Wilks committed twelve crimes, namely, four counts of first-degree sexual assault, four counts of second-degree sexual assault, two counts of armed burglary, and two counts of battery during a burglary. The victims were elderly women ranging in age from sixty-nine years old to ninety years old. In 1992, the charges proceeded to a jury trial at which the State relied substantially on scientific analysis of bodily fluids, including semen samples found at the crime scenes. The State presented testimony that Wilks's blood type and secretor status were consistent with the blood type and secretor status of the person who committed each crime.[2] The State also presented testimony about the results of DNA testing, specifically restriction fragment length polymorphism (RFLP) analysis conducted in the matter, along with statistical evidence explaining the significance of the finding that DNA obtained from the crime scenes matched Wilks's DNA profile. The jury found Wilks guilty as charged.

In January 1995, Wilks filed a postconviction motion alleging that the State failed to preserve certain DNA evidence, his trial counsel was ineffective for failing to properly prepare a

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

[2] A secretor is "a person who secretes ABO blood group substances into mucous secretions." Ray Taylor, Robert Bux and Douglas Kirk, *Forensic Pathology in Homicide Cases*, 40 AM. JUR. TRIALS 501 § 32 (1990).

defense witness who relied on DNA evidence, and the circuit court erroneously admitted other acts evidence. In November 1995, Wilks filed a supplemental postconviction motion alleging that his trial counsel improperly stipulated to the chain of custody regarding evidence used for DNA testing, failed to object to other acts evidence, and failed to object to the State's discussion of a prior crime during opening statement. The circuit court denied the motions, Wilks appealed, and we affirmed. *See* ***State v. Wilks*** (***Wilks I***), 1996AP1258-CR, unpublished slip op. (WI App June 10, 1997).

While the appellate proceedings were underway, Wilks filed a postconviction motion raising more than two dozen claims for relief, including numerous allegations that his trial counsel was ineffective in regard to the DNA evidence. His claims included allegations that trial counsel failed to: (1) challenge the validity and admissibility of the biological and DNA evidence against him; (2) seek discovery, inspection, and retesting of biological evidence; (3) challenge the seizure of Wilks's blood and saliva; (4) complain about the destruction of evidence; (5) complain about the labeling of items submitted for testing; and (6) afford the defense expert adequate time to review the results of the State's DNA analysis. In addition, he claimed that the circuit court erred by taking judicial notice of evidence, specifically evidence related to his ABO blood type developed in a prior criminal case against him. He asserted that the alleged error "allowed Raymond Menard [a forensic serologist who testified for the State] to infer that the blood taken from [Wilks] during the instant case and used for DNA testing, was ABO blood type B without being subject to cross-examination regarding the inference." The circuit court denied the motion.

After we resolved Wilks's direct appeal, he filed another postconviction motion, making multiple claims that he received ineffective assistance of counsel in regard to the DNA evidence.

Specifically, he alleged that his trial counsel failed to inspect and test "potentially exculpatory evidence"; failed to seek suppression of DNA evidence; failed to challenge the chain of custody and destruction of certain evidence; and failed to object to admission of "secondary evidence" regarding the DNA test results. He alleged that his postconviction counsel was ineffective in turn for failing to pursue these claims. The circuit court denied the motion, and we affirmed. *See* ***State v. Wilks*** (***Wilks II***), No. 1997AP3409, unpublished op. and order (WI App Aug. 11, 1999).

In March 2017, Wilks filed the first of the two interrelated postconviction motions underlying the instant appeal. Citing WIS. STAT. §§ 806.07(1) and 974.07(2), he sought postconviction discovery, including renewed ABO blood typing and DNA testing. The circuit court denied the motion, and in April 2017, Wilks moved for reconsideration. The circuit court denied that motion as well, and he appeals.[3]

WISCONSIN STAT. § 974.06 is the primary mechanism that permits defendants to raise postconviction claims after the time for an appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. Although Wilks did not invoke the authority of § 974.06 in aid of his most recent postconviction litigation, we may look beyond the label that a

[3] Wilks filed his notice of appeal several days before the circuit court entered the order denying his motion for reconsideration. We nonetheless may consider all matters relating to both orders that Wilks raises on appeal. *See* WIS. STAT. § 808.04(8) (if judgment or order is entered after notice of appeal is filed, notice of appeal shall be treated as entered after judgment or order).

prisoner applies to pleadings to determine if he or she is entitled to relief. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983). Accordingly, we consider whether § 974.06 allows Wilks to pursue a motion for postconviction discovery.

Pursuant to WIS. STAT. § 974.06(4), a convicted prisoner who wishes to pursue a second or subsequent postconviction motion must demonstrate a sufficient reason for failing to raise or adequately address his or her claims in prior proceedings. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). "There is no exception to the ***Escalona-Naranjo*** rule for postconviction discovery motions." ***State v. Kletzien***, 2011 WI App 22, ¶2, 331 Wis. 2d 640, 794 N.W.2d 920. Accordingly, Wilks was required in his current litigation to show a sufficient reason for failing to pursue his postconviction discovery claims in the postconviction motions he previously pursued. *See* ***id.***, ¶¶1-2.

Whether Wilks presented a sufficient reason for serial litigation is a question of law that we consider *de novo*, *see* ***id.***, ¶16, and we resolve the question by examining the four corners of his postconviction motion, *see* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433. Our examination reveals that Wilks offered no reason at all in his March 2017 postconviction motion for failing to raise his current claims during his prior litigation.

Wilks argued in his April 2017 reconsideration request that he had a sufficient reason for an additional postconviction motion. Specifically, he claimed that his litigation should be permitted because in 2011 he first obtained Menard's report regarding the ABO blood-typing. We agree with the State that, because a motion to reconsider is not a vehicle for making new arguments, *see* ***Lynch v. Crossroads Counseling Ctr., Inc.***, 2004 WI App 114, ¶23, 275 Wis. 2d

171, 684 N.W.2d 141, Wilks could not first present a reason for serial litigation in a reconsideration motion.

Moreover, were we to consider the reason Wilks offered for serial litigation, he would not prevail because the reason was insufficient to support his postconviction discovery litigation. The State submitted the serologist's blood-typing report as an exhibit at Wilks's 1992 trial, and the exhibit was the subject of testimony at that time. Wilks's request for reconsideration showed that, notwithstanding his knowledge that the serologist's report existed and notwithstanding Wilks's conceded familiarity with the testimony about that report, Wilks did not seek out a copy of the report until August 2011. Wilks's failure to obtain and review an exhibit from his own trial is not a sufficient reason for yet another postconviction motion.

We turn to whether Wilks may pursue scientific testing under WIS. STAT. §§ 806.07 and 974.07. As the circuit court correctly determined, he may not do so.

WISCONSIN STAT. § 806.07 applies in civil and equitable actions. *See* ***Henley***, 328 Wis. 2d 544, ¶70 (discussing § 806.07(1)(g)-(h)). Wilks does not cite any authority holding that the statute is available for use by criminal defendants as a postconviction tool. *See* ***id.*** Accordingly, we reject any suggestion that § 806.07 is a mechanism that Wilks may use to pursue postconviction relief in this case. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (explaining that we do not address claims unsupported by citations to legal authority).

As to WIS. STAT. § 974.07, it provides, in pertinent part, that a convicted defendant may pursue:

> an order requiring forensic deoxyribonucleic acid testing of evidence to which all of the following apply:
>
> (a) The evidence is relevant to the investigation or prosecution that resulted in the conviction....
>
> (b) The evidence is in the actual or constructive possession of a government agency.
>
> (c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

See § 974.07(2).

Here, the bulk of Wilks's arguments turn on a serologist's report and testimony regarding ABO blood-typing. Specifically, Wilks seeks to test a "fresh sample" of his bodily fluids to see if he can refute the serologist's claim that he is a type-B secretor. This request falls outside the scope of WIS. STAT. § 974.07, which relates only to DNA analysis. Moreover, assuming solely for the sake of argument that § 974.07 addresses ABO blood typing, such analysis was available at the time of Wilks's trial, his ABO blood type and secretor status were the subjects of trial testimony, and Wilks does not show that any new blood typing techniques have since been developed. *Cf.* § 974.07(2)(c). In sum, Wilks cannot pursue ABO blood type testing under § 974.07.

Wilks also sought to submit the physical evidence in his case to DNA testing techniques developed since his trial. This request falls within the scope of WIS. STAT. § 974.07, but to succeed, he was obligated, among other burdens, to make the showing required by § 974.07(2)(c), namely, that such testing would yield "more accurate and probative results" than those obtained through the RFLP testing conducted at the time of his trial. *See* ***State v. Moran***, 2005 WI 115, ¶3, 284 Wis. 2d 24, 700 N.W.2d 884 (stating that a party proceeding under

§ 974.07 must make the showing required under § 974.07(2)), *overruled on other grounds by* ***State v. Denny***, 2017 WI 17, ¶60, 373 Wis. 2d 390, 891 N.W.2d 144.

To meet his burden, Wilks could not rely on conclusory assertions. *See* ***Allen***, 274 Wis. 2d 568, ¶15. Postconviction motions "require the allegation of sufficient materials facts that, if true, would entitle the defendant to relief." *See* ***id.*** Accordingly, Wilks was required to show why the testing he requested would be more accurate and probative than the RFLP testing previously conducted, who said so, and when and how the determination was made. *See* ***id.***, ¶23. Wilks did not shoulder that burden. Rather, he stated that, after his trial concluded, he learned of "a yet more inexact technique called DQ Alpha testing and a more discriminate [sic] technique called (STR) Short Tandem Repeat [that] has also been developed for forensic crime DNA identification and isolated population genetics." In support, he cited ***District Attorney's Office v. Osborne***, 557 U.S. 52, 57-61 (2009).

As Wilks appears to recognize, DQ Alpha testing is "a relatively inexact form of DNA testing." *See* ***id.*** at 57. He does not offer a reason, let alone a persuasive reason, to pursue an inexact testing technique. As to STR analysis, while the ***Osborne*** court describes the process as "extremely discriminating," *see* ***id.*** at 60 n.3, nothing in either ***Osborne*** or in Wilks's motion shows that such testing would produce results that are more accurate or more probative than the RFLP analysis already conducted. Moreover, we note the observation of the ***Osborne*** court that "RFLP testing ... 'has a high degree of discrimination,' although it is sometimes ineffective on small samples.'" *See* ***id.*** at 58 n.1 (citations omitted). Wilks fails to provide anything, let alone the detailed showing required by ***Allen***, demonstrating that the sample sizes of the biological material tested in his case were too small to conduct effective RFLP analysis.

Instead, Wilks's postconviction motion offered discussions of alleged flaws in his trial. He claimed that: the serologist testified falsely about his blood type and secretor status; the serologist's report was inadmissible; his trial counsel suppressed exculpatory evidence; his trial counsel improperly stipulated to the chain of custody for certain evidence; and the State failed to introduce some DNA test results. These claims are attacks on his conviction that do not in any way demonstrate flaws in the RFLP analysis or suggest that new testing would produce better or more accurate results. Accordingly, the claims are beyond the scope of WIS. STAT. § 974.07. Moreover, as Wilks appears to concede, he previously raised these claims in his prior postconviction motions. He asserts, however, that "grounds re-raised under § 974.07 must be an exception to the sufficient reason requirement," and that he is entitled to raise again claims already disposed because they are "an essential precursor" to his § 974.07 motion. To the contrary, "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

Accordingly,

IT IS ORDERED that the orders are summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals