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DISTRICT IV

December 16, 2019

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

2018AP588 State of Wisconsin v. Charles C. Downing (L.C. # 1991CF836)

Before Fitzpatrick, P.J., Blanchard and Kloppenburg, 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).

Charles Downing appeals an order denying his postconviction motion filed under WIS. STAT. § 974.06 (2017-18).[1] 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. We affirm.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

After a jury trial in 1991, Downing was convicted of five felonies related to one incident, including two counts of armed burglary and one count of first-degree reckless injury. He filed the postconviction motion that is now before us in 2017. The circuit court denied the motion without an evidentiary hearing.

Downing's first arguments relate to Downing's assertion that in 2016 he obtained, with a public records request, documents showing that in 1994, after Downing's conviction in 1992, the lead detective on his case asked the state crime laboratory to recheck unidentified fingerprints that had been found at the crime scene. According to Downing, the lab reported that a database search for matching prints still found none.

Downing argues that the fact that the detective was still attempting to identify those prints after Downing's conviction shows that the detective had doubt that Downing was properly identified and convicted as the attacker. Downing argues that this post-trial fingerprint request can be used to impeach the detective if he is granted a new trial.

Downing frames the issue in two ways. He first argues that the State or police department violated their duty to provide him with exculpatory information under ***Brady v. Maryland***, 373 U.S. 83 (1963), and related cases. This argument fails because Downing does not develop an argument that this obligation continues after conviction, and the United States Supreme Court has held that ***Brady*** does not apply in the postconviction context. ***District Attorney's Office for Third Judicial Dist. v. Osborne***, 557 U.S. 52, 68-69 (2009).

Downing also frames the detective's postconviction fingerprint request as newly discovered evidence. The postconviction fingerprint report did not, as far as Downing tells us, itself contain any new evidence about the fingerprints. Instead, what Downing wants to

introduce is simply the fact that the detective made that request. Downing sees that request as evidence from which a jury could infer that the detective held an opinion that Downing may have been convicted erroneously.

Part of the test for granting a new trial on newly discovered evidence is whether there is a reasonable probability that a different result would be reached in a second trial. ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60. Even if we assume that Downing is correct that the detective resubmitted the unidentified fingerprints due to doubt about whether Downing was guilty, this is not new *factual* evidence. It is ultimately nothing more than opinion about the strength of the State's case. There is no reasonable basis to believe that knowing the detective held such an opinion would cause a jury to disregard its own opinions about the evidence and reach a conclusion different from the first trial.

Downing next argues that his trial counsel was ineffective by not fully using the crime lab report about blood stains. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Downing argues that his trial counsel failed to make the strongest argument available from the report. Downing argues that, instead of just pointing out that the lab report did not tie Downing's blood to the crime scene, counsel should have argued that the report affirmatively shows that three separate blood types were identified, none of which could have been Downing. And, according to Downing, because the two victims testified that there were only three people at the attack scene (themselves and the attacker), that would mean Downing was not there.

More specifically, his argument is based on the lab report that shows that four blood specimens were analyzed.[2] Due to its "paucity," one of the specimens could be identified only as type A, without subtypes. Downing relies on the other three specimens. The report describes the first specimen as "O 1-1," and adds: "PGM Subtyping yielded inconclusive results. Paucity of sample precluded further analysis." The second specimen was identified as "O 1+1+." The third specimen was identified as "A 1+1-." The report further states that blood obtained from Downing was identified as "A 1+1+."

Downing argues that the samples identified as O 1-1, O 1+1+, and A 1+1- come from three different people. And, none of those people can be him, because his own blood was analyzed as a different type, A 1+1+.

Downing acknowledges that further analysis of the fourth specimen, which was partially analyzed only as type A, could show that it matched his own type. However, he argues, if it *did* match his own type, that would mean there were *four* separate blood types found at the scene, which would be inconsistent with the evidence of three people being involved in the incident. Therefore, Downing speculates that the partially analyzed type A is probably another specimen from the person who was typed as A 1+1-.

Downing's argument that samples were found from three people other than himself relies on the proposition that the specimen partially identified as O 1-1 is necessarily from a different

[2] In discussing the report, we are using the copy provided by Downing. The exhibit list shows that a "crime lab report" was introduced at trial as exhibit 22, but the trial exhibits are not in the record transmitted to this court. Elsewhere in Downing's brief he refers to a different trial exhibit as having become "lost." We do not know whether exhibit 22 is lost, or was simply not transmitted, but we also note that some exhibits from the preliminary examination were transmitted, which may suggest that the trial exhibits are no longer available.

person than the sample fully analyzed as O 1+1+. However, that proposition is contrary to the testimony of the lab analyst at trial.

In trial testimony, the analyst described the first type O sample as being "PGM Type 1," and the second O sample as being "PGM 1+1+." The State then asked: "Can you tell whether the blood that was a PGM Type 1 and a PGM 1+1+ was from different individuals or the same?" She replied: "No, I can't tell you that." The State next asked if there was "anything inconsistent between those two bloods." She replied that "both are ABO Type O and both are PGM Type 1, but I cannot tell you what the PGM subtype is of the one on the first bag." Later, the State asked: "As far as you could go, they are consistent, is that fair?" She said: "Yes."

We recognize that, as a layperson, it is possible to look at the report's use of the descriptions "O 1-1" and "O 1+1+" and think that maybe the two samples cannot be from the same person, regardless of what a further subtype result on the first sample might show. However, Downing's obstacle here is that the expert clearly testified that the two samples *could* be from the same person, depending on what further subtyping of the first sample might have shown.

We have no basis at this point to conclude that a non-expert, layperson interpretation of the test results is at all accurate. Downing has not given us any basis from which we could conclude that the expert's testimony at trial was erroneous in its description of what these test results mean. He has not provided us with any opinion from an expert, nor with authoratative material such as a treatise explaining blood test results of this sort.

In short, Downing fails to allege sufficiently that trial counsel failed to properly understand the blood report, or was deficient in cross-examining the expert or making an

argument to the jury based on the report. Downing is asking us to accept his interpretation of the report, even though it is contrary to the report author's testimony at trial, without providing us with any independent basis to conclude that the report means what Downing claims it means. Therefore, we reject this claim.

Downing also argues that his trial counsel was ineffective with respect to the victims' identification of Downing. He argues that counsel should have challenged one victim's statement that Downing moved in court like the attacker by pointing out that a person in shackles, as Downing was in court, would walk with an altered gait.

Even if we assume that counsel should have explored this topic, we conclude that Downing has not alleged prejudice. The probative value of such an observation would be minimal, and would be further reduced by the fact that it would involve telling the jury that Downing was shackled, which itself may have risked prejudice against him.

Downing also argues that his trial counsel should have asked one victim whether she was wearing her eyeglasses during the lineup. Downing does not tell us what the answer to this question would have been, and therefore he does not show prejudice.

To the extent Downing makes other arguments, we conclude they are not sufficiently developed or based on cited legal authority to require further discussion here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals