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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

March 5, 2013

To:

Hon. William E. Hanrahan
Circuit Court Judge
215 South Hamilton, Br. 7, Rm. 4103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Lanny B. Glinberg
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Robert Probst
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Tomas D. Cuesta Sr. 139594
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

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

2012AP300-CR State of Wisconsin v. Tomas D. Cuesta, Sr. (L.C. # 2000CF1226)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Tomas Cuesta appeals pro se from an order denying his motion under WIS. STAT. § 974.07(6)(a) (2011-12),[1] for DNA testing of biological material. He uses the appeal to argue for a new trial in the interests of justice because he was denied the effective assistance of trial counsel with respect to the testing of biological material and the prosecution failed to disclose test results of such material. Based upon our review of the briefs and record, we conclude at

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the order of the circuit court.

Cuesta was convicted of aggravated battery, false imprisonment, and reckless endangerment of safety for an assault committed against a former girlfriend. His conviction was affirmed on appeal. ***State v. Cuesta***, No. 2001AP3113-CR, unpublished slip op. (WI App Aug. 29, 2002) (***Cuesta I***). Subsequently, Cuesta filed three motions seeking production of the victim's medical records, DNA testing, and disclosure of DNA or other scientific test results. He also filed three habeas petitions in the appellate courts. On appeal from the denial of one of his postconviction motions seeking disclosure of DNA evidence or testing, we affirmed and explained that under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), Cuesta was precluded from raising new issues on appeal that he either raised or could have raised in one of his prior postconviction proceedings. ***State v. Cuesta***, No. 2007AP2924-CR, unpublished op. and order at 2 (WI App July 31, 2009).

This appeal arises from Cuesta's fourth motion seeking DNA testing or the production of other biological evidence, and in particular, saliva testing on a bite mark. His claims are based in part on his allegation that trial counsel was ineffective for not investigating and pursuing testing of biological material, including a bite mark, and the prosecution's failure to disclose the existence of such test results. They are the same claims litigated in his previous postconviction proceedings—that postconviction production and testing of a wide range of biological material will exonerate him and point to another suspect. "We have repeatedly held that '[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.'" ***State ex rel. Washington v. State***, 2012 WI App 74,

¶30, 343 Wis. 2d 434, 819 N.W.2d 305 (quoting ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991)). Cuesta is barred from relitigating his claims.

To the extent Cuesta raises any new issue, the procedural bar recognized in ***Escalona-Naranjo***, 185 Wis. 2d at 181-82, applies.[2] Under ***Escalona-Naranjo***, if a ground for relief was not raised in an original postconviction motion, a defendant must show a sufficient reason why it was not asserted previously. ***Id.*** Cuesta's allegations of ineffective trial counsel and the prosecution's failure to disclose exculpatory evidence do not provide sufficient reasons for Cuesta's failure to raise in his prior pro se postconviction motions any new issues he might now be advancing.

Besides failing on procedural grounds, Cuesta's claim fails on the merits. The circuit court made a finding of fact that the bite mark evidence Cuesta was looking for was not collected or tested. That finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2) ("[f]indings of fact shall not be set aside unless clearly erroneous"). Cuesta cannot have tested that which does not exist.

Cuesta raises for the first time on appeal that he is entitled to have a jury hear that the biological evidence associated with the bite mark was neither collected nor tested. Even if we accept the non-collection and non-testing as newly discovered evidence, we are not persuaded to exercise our discretion to order a new trial in the interests of justice. *See* ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (court of appeals may set aside a conviction through

[2] Whether the procedural bar applies to a postconviction claim is a question of law. ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

the use of its discretionary reversal powers); WIS. STAT. § 752.35. On Cuesta's first appeal from his conviction, the victim's unequivocal statements that Cuesta assaulted her were determined to be sufficient evidence. ***Cuesta I***, unpublished slip op. at 4. That the police did not collect biological evidence from the bite mark does not detract from the victim's statements. The non-collection of bite mark evidence was not crucial evidence the absence of which precluded the real controversy from being fully tried. *See* ***State v. Ward***, 228 Wis. 2d 301, 306, 596 N.W.2d 887 (Ct. App. 1999) (a claim that the jury was erroneously precluded from hearing crucial evidence falls under the category of the real controversy not being fully tried). Our discretionary reversal power is to be exercised only in exceptional cases. ***Avery***, 345 Wis. 2d 407, ¶38. This is not one.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals