COURT OF APPEALS
DECISION
DATED AND FILED

June 08, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2009AP1188
2009AP1312

Cir. Ct. Nos. 1994CF941567
1994CF940682

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NO. 2009AP1188

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEONARD REMONE AVERY,

DEFENDANT-APPELLANT.

NO. 2009AP1312

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE LYNDELL AVERY,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Andre Lyndell Avery and Leonard Remone Avery were convicted of first-degree intentional homicide, while possessing a dangerous weapon, party to a crime, and two counts of first-degree recklessly endangering safety, while possessing a dangerous weapon, party to a crime. The Averys are brothers, and their convictions stem from a 2004 shooting at a Milwaukee tavern in which Chris Davis was killed and two female tavern patrons were wounded. Both Andre and Leonard filed a motion for postconviction discovery asking that swabs taken of Davis's hands be tested for gunshot residue. The circuit court denied the motions, and the Averys appeal *pro se*. Their appellate briefs are identical, and on our own motion, we consolidate these appeals for disposition. *See* WIS. STAT. RULE 809.10(3) (2007-08)[1] (separate appeals may be consolidated upon the court's own motion). The State argues that the brothers' claims are procedurally barred. We agree and, therefore, affirm the circuit court orders.

BACKGROUND

¶2 The following facts are taken from this court's previous opinions and orders. On the night of the shooting, Leonard and Davis were at a tavern.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

There was a history of acrimony between the Avery and Davis families. After a verbal confrontation inside the tavern, the two men left the tavern. Andre, who was waiting outside the tavern, fired several shots, killing Davis and wounding two women inside the tavern. At trial, the State conceded that Davis was armed—Andre testified that Davis was holding a gun at his brother's back as they left the tavern and a .9 millimeter Glock was found at Davis's feet after he was shot.[2] Forensic examination of the bullets recovered from Davis and from the scene established that they were all fired from the same gun barrel and that the Glock handgun found near Davis's body used a larger bullet. As we stated in an earlier opinion, "[i]n short, the trial evidence showed that all of the bullets from the shooting were fired from Andre Avery's gun." ***State v. Andre Avery***, Nos. 2004AP1121 and 2005AP1395, unpublished slip op., ¶38 (WI App June 20, 2006), *recons. denied*, unpublished order, Sept. 19, 2006 (***Andre II***).

¶3 Both Andre and Leonard have repeatedly challenged their convictions. Both had a direct appeal under WIS. STAT. RULE 809.30. This court affirmed the judgments of conviction: ***State v. Andre Avery***, 215 Wis. 2d 45, 571 N.W.2d 907 (Ct. App. 1997) (***Andre I***) and ***State v. Leonard Avery***, No. 95AP2759-CR, unpublished slip op. (Wis. Ct. App. Feb. 4, 1997) (***Leonard I***). The supreme court denied review in both cases. In December of 2003, Andre filed

[2] Other witnesses testified that they did not see Davis aiming a gun at Leonard, and in his statements to police that were introduced at trial, Leonard did not tell police that Davis was aiming a gun at him as they left the tavern.

a WIS. STAT. § 974.06 postconviction motion that the circuit court denied. Andre filed a notice of appeal. While that appeal was pending, Andre filed additional motions in the circuit court, seeking a new trial based on newly-discovered-evidence and seeking to compel postconviction discovery. The appeal was held in abeyance pending the circuit court's decision on those motions. The circuit court denied Andre's motions and he appealed. The appeals were consolidated by this court and we affirmed. ***Andre II***. The supreme court denied review.

¶4 In December of 2004, Leonard filed a WIS. STAT. § 974.06 postconviction motion, raising the same newly-discovered-evidence arguments that were then being litigated by Andre. Leonard also moved to join in Andre's motion. The circuit court joined the cases, heard the motions together, and denied relief. Like his brother, Leonard appealed, and this court affirmed. ***State v. Leonard Avery***, No. 2005AP1447, unpublished slip op. (WI App March 14, 2006) (***Leonard II***). The supreme court denied review. Further facts concerning the arguments raised in the previous § 974.06 appeals will be stated below as necessary.

DISCUSSION

¶5 Under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), a defendant must "raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion." *See also* WIS. STAT. § 974.06(4). A defendant cannot raise an argument in a second postconviction motion that was not raised in a prior postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. And, under § 974.06(4), "[a]ny ground finally adjudicated or not so raised, or knowingly,

voluntarily and intelligently waived … in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion," absent sufficient reason. Moreover, once an issue is litigated, it cannot be relitigated in a subsequent proceeding. ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶6 With those principles in mind, we examine the claims raised by the Averys in this latest postconviction motion. In April of 2009, both Andre and Leonard filed a motion for postconviction discovery under ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999). The motions were directed at ten swabs taken of Davis's hands. The Averys sought a court order that the swabs be tested for gunshot residue, to determine whether Davis was shooting a gun when he was shot—evidence that the Averys believe would be exculpatory or support a lesser charge. The circuit court denied the motions, concluding that there was not a reasonable probability that the evidence sought by the Averys would result in a different outcome at trial. *See* ***id.*** at 320-21.

¶7 The appeals of both Andre and Leonard are procedurally barred. In Andre's case, he has already litigated the matter. One of the motions addressed in ***Andre II*** was a motion to compel the postconviction discovery of test results from swabs taken of Davis's hands. *See* ***Andre II***, unpublished slip op., ¶¶9, 36 and 39. Further, in his motion for reconsideration filed in that matter, Andre argued that the State improperly suppressed the swabs by not submitting them for testing—an argument renewed in this litigation. In our order denying the motion

for reconsideration, we considered Andre's argument at length.[3] He cannot relitigate the issue. *See* ***Witkowski***, 163 Wis. 2d at 990.

[3] In our order denying Andre's motion for reconsideration, we stated:

> Avery contends that the State improperly suppressed swabs for gunshot residue taken from the shooting victim, Chris Davis, and that our opinion fails to address the issue properly. In support of the argument, Avery's motion for reconsideration presents a letter dated May 5, 2006 from the State Crime Lab indicating that no gunshot swabs taken from Davis were submitted for testing. Relying on ***State v. Del Real***, 225 Wis. 2d 565, 593 N.W.2d 461 (Ct. App. 1999), Avery argues that had the State revealed that swabbing was done but not ultimately tested by the State Crime Lab, he could have challenged before the jury, the State's failure to perform the test deriving a favorable inference to his defense.
>
> We decline to consider the letter. It is not a part of the appellate record and Avery made no attempt to seek this court's permission to have it properly admitted to the appellate record before submitting it. Moreover, the letter adds nothing to our understanding of what occurred. Avery did not include in the appellate record his request for discovery of exculpatory evidence before or during trial and the State's response, if any, to such a request. At the same time, the record already contains reports indicating that gunshot residue swabs were taken from Davis as well as records listing the material submitted to the Crime Lab for analysis. Those records did not include the swabs.
>
> We are unaware of any common law or statutory duty requiring the State Crime Lab to make an affirmative statement concerning evidentiary material, like swabs taken for gun residue, not submitted for testing. In fact, expressing the principle makes clear that the existence of such a duty would be wholly unreasonable.

(continued)

¶8 In Leonard's case, he is procedurally barred because he could have raised this issue in his earlier WIS. STAT. § 974.06 motion. The records show that Leonard's first § 974.06 motion was virtually identical to Andre's motion; indeed, Leonard explicitly moved to join in Andre's motion and the motions were handled together by the circuit court. While those motions were pending, Andre filed his first ***O'Brien*** motion. We see no reason why Leonard could not have also joined in that motion, and Leonard makes no effort to explain why he did not do so.[4] As noted above, § 974.06 requires a "prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same

---

> ***Del Real*** does not support Avery's contention that had the State revealed that the swabbing was done but not tested, Avery could have challenged the State's handling of the evidence to his benefit. In ***Del Real***, a detective testified that he knew that no swabbing of Del Real's hands occurred at the scene. 225 Wis. 2d at 568. The detective stated that if swabbing had occurred, he would have been informed as he was the detective in charge of the scene. ***Id.*** Evidence that swabbing had occurred was subsequently produced. Pursuant to a postconviction order, the swabs were tested and showed negative results. Based on this series of events, this court reversed Del Real's conviction and remanded for a new trial.
>
> The instant case is factually distinguishable. Here, the State disclosed that there was swabbing and provided lab reports indicating that these swabs were not submitted for testing. Because the swabs were not submitted for testing and because the State disclosed this to Avery, the record is barren of evidence suggesting that the State improperly suppressed exculpatory evidence from him. Our opinion states that "Andre Avery has not pointed to any evidence, however, that the swabs of Davis's hands were tested for gunshot residue." ***Avery***, slip op. at 18, ¶39. The statement is factually correct. Accordingly, we decline to alter our opinions on the matter.

[4] As noted in our order denying Andre's motion for reconsideration in ***Andre II***, *see* note 3, *supra*, the State had disclosed that swabs had been taken and not submitted for testing and, therefore, any claim the State improperly suppressed exculpatory evidence would fail.

time, run counter to the design and purpose of the legislation." ***Escalona-Naranjo***, 185 Wis. 2d at 185. We conclude that Leonard is procedurally barred.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.