COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2745 **Cir. Ct. No. 1996CF965819**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT CRAIG LEWIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Vincent Craig Lewis, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion. Lewis raises several

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

issues, the main one being that a laboratory report which existed at the time of his trial, is newly discovered evidence. We reject Lewis's arguments and affirm.

BACKGROUND

¶2 On November 10, 1996, Lewis burglarized the Great Lakes Biochemical Company, killing the night janitor who tried to stop him.[2] Lewis pled guilty to a burglary charge and proceeded to trial on two charges: armed robbery and first-degree intentional homicide while armed. The jury convicted Lewis of both charges, and he was sentenced to life imprisonment on the homicide, forty consecutive years on the robbery, and ten consecutive years on the burglary.

¶3 A no-merit appeal was filed and rejected. On direct appeal, Lewis raised eight claims of ineffective assistance of counsel and two other issues. We rejected Lewis's arguments and affirmed the judgment of conviction. Lewis then filed a ***Knight*** petition for *habeas corpus*, alleging ineffective assistance of appellate counsel.[3] We denied the petition. *See* ***State ex rel. Lewis v. Kingston***, No. 2004AP1441-W, unpublished slip op. (WI App Sept. 9, 2004).[4]

¶4 Lewis then filed a 106-page WIS. STAT. § 974.06 motion in the circuit court. He alleged that the State had engaged in prosecutorial misconduct by submitting false evidence and testimony. In particular, Lewis claimed that the

[2] Lewis has not set forth a clear factual background in this case. We therefore take a portion of our factual recitation from Lewis's prior direct appeal, ***State v. Lewis***, No. 2002AP2285-CR, unpublished slip op. (WI App Apr. 22, 2003).

[3] *See* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

[4] Lewis also filed an unsuccessful *habeas corpus* petition in federal court.

State's lab technician had testified that trial exhibit No. 33 had blood on it, even though her written report stated otherwise.

¶5 The circuit court construed the motion as alleging ineffective assistance of postconviction counsel, consistent with ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996), thereby allowing it to reach the merits of the motion rather than invoking a procedural bar, and rejected the motion. In short, two hammers had been recovered as evidence—one on which the lab detected blood and one on which the lab did not detect blood—and Lewis's motion was based on the faulty or unsupported premise that exhibit No. 33 was the hammer on which the lab found no blood. The court also rejected a motion for a stay of postconviction proceedings, noting that there was no merit to any of Lewis's claims of error. Lewis appeals.

DISCUSSION

¶6 Lewis raises multiple arguments on appeal. We condense them as we deem appropriate for brevity's sake.

I. Newly Discovered Evidence and Prosecutorial Misconduct.

¶7 Lewis alleges newly discovered evidence in a lab report. He also re-alleges prosecutorial misconduct by the State's presentation of allegedly false information relative to exhibit No. 33. However, there is no newly discovered evidence and Lewis does not demonstrate any misconduct.

¶8 As noted, two hammers were collected as evidence during the course of the investigation in this case.[5] The first, retrieved from Lewis's home, received inventory designation "AX." The lab detected no blood on hammer AX. The second hammer, recovered from Lewis's girlfriend's home, received inventory designation "AY." Hammer AY, which was presented at trial as exhibit No. 33, tested positive for blood. Hammer AY was evidently recovered later than, or at least was submitted to the lab later than, hammer AX, as the first lab report made no mention of any item designated AY.

¶9 When the lab technician prepared her second report, which included results from the submission of hammer AY and resubmission of hammer AX, the report explained that hammer AX had been recovered from a specific address (Lewis's home), and tested negative for the presence of blood. The report then stated that "[n]o information was obtained as to where [hammer] AY … was recovered from."

¶10 Lewis asserts that this statement, that there is no information regarding the origin of hammer AY, is new evidence. He also claims that in light of the statement, the State knowingly presented false testimony that hammer AY came from his girlfriend's home and knowingly omitted evidence that hammer AX did not have blood on it.

¶11 One of the key elements of newly discovered evidence is that it must have been discovered *after* trial. *See* ***State v. Sorenson***, 2002 WI 78, ¶26, 254

[5] Lewis had admitted killing the janitor with a metal pipe. However, the medical examiner found semicircular indentations on the janitor's head, such as would be caused by a hammer. In the prior appeal, we noted why the hammer evidence was admissible. ***State v. Lewis***, No. 2002AP2285-CR, unpublished slip op. ¶15 (WI App Apr. 22, 2003).

Wis. 2d 54, 646 N.W.2d 354. Here, the lab report was disclosed well before trial—we know this from Lewis's own references to the report in his WIS. STAT. § 974.06 motion. Thus, the report's content is not newly discovered evidence and cannot be relied upon as such to justify a new trial.

¶12 Further, Lewis extrapolates that because the *lab technician* had no information on the origin of hammer AY at the time she tested it, *no one* ever had information on its origin. However, a detective testified that hammer AY came from Lewis's girlfriend's home. In fact, Lewis, in his prior appeal and writ petition, did not claim a lack of information on hammer AY's origins and instead acknowledged that the hammer came from Lewis's girlfriend's home.[6] Given that the origin of the hammer was known, albeit not to the lab technician when she prepared her report, the State did not present false evidence when offering testimony that the hammer AY came from Lewis's girlfriend's home.

¶13 We additionally note that the State had no obligation to present to the jury evidence that hammer AX, from Lewis's home, had no blood on it. The State provided that information to Lewis's attorney before trial, fulfilling the State's disclosure obligation.[7] *See* WIS. STAT. § 971.23(1)(h) (State must disclose exculpatory evidence "to the defendant or his or her attorney[.]"); *see also* ***State v.***

[6] The State also argues that Lewis is precluded from making any argument regarding the hammer because he argued about it in both the prior appeal and the writ petition. We decline to invoke a procedural bar on this issue.

[7] Lewis also claims that the chain of custody for hammer AY was not adequately documented. No such objection was raised at trial, precluding a challenge now. *See* ***State v. Carprue***, 2004 WI 111, ¶46, 274 Wis. 2d 656, 683 N.W.2d 31. In addition, an evidentiary objection is not an appropriate subject for a WIS. STAT. § 974.06 motion. *See* ***State v. Evans***, 2004 WI 84, ¶33, 273 Wis. 2d 192, 682 N.W.2d 784 (section 974.06 motions limited to constitutional/jurisdiction issues).

Harris, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. The State is not responsible for what Lewis or his attorney did with the information after its disclosure to them.

II. Motion for a Stay Due to a Foreign Object and Filing a Reply Brief

¶14 While briefing on Lewis's WIS. STAT. § 974.06 motion was ongoing Lewis filed a document in circuit court that sought a stay pursuant to WIS. STAT. RULE 809.14(3)(a). He claimed there was a "foreign object" in the State's photographs of exhibit No. 33, which it had attached to its response brief, and he asserted the State should address that object.[8] The circuit court construed Lewis's submission as a reply brief, denied the stay, and denied the § 974.06 motion. Lewis complains the circuit court did not stay proceedings as required by RULE 809.14 and did not permit him to file a reply brief.

¶15 WISCONSIN STAT. RULE 809.14 is a rule of appellate procedure relating to motions practice in this court. RULE 809.14(3)(a) states:

> The filing of a motion seeking an order or other relief which may affect the disposition of an appeal or the content of a brief, or a motion seeking consolidation of appeals, automatically tolls the time for performing an act required by these rules from the date the motion was filed until the date the motion is disposed of by order.

This rule is wholly inapplicable to Lewis's circuit court filings, and the circuit court was not required to stay briefing on Lewis's WIS. STAT. § 974.06 motion.

[8] The "foreign object" in the photos to which Lewis refers appears to be a large brown- or amber-colored puddle of something, possibly a wax seal.

¶16 To the extent that Lewis complains the circuit court did not allow him to file a reply brief, it is clear that the court construed the stay motion as Lewis's reply brief. Lewis does not show that he objected to this interpretation or his lack of opportunity to reply once the circuit court entered its order, so any challenge to the court's interpretation of his document is waived. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). We also agree with the State that because Lewis's motion and opening circuit court brief began from a faulty factual premise, nothing in a formal reply brief would change the court's decision to reject the WIS. STAT. § 974.06 motion.

III. Ineffective Assistance of All Counsel

¶17 Lewis's appellate brief closes with an argument that trial and appellate counsel were ineffective for not raising challenges based on the lab report. As noted above, the court construed Lewis's WIS. STAT. § 974.06 motion as a claim that *postconviction* counsel was ineffective. Lewis cannot prevail on any ineffective assistance claims.

¶18 Lewis's first direct appeal raised *eight* claims of ineffective assistance of trial counsel. To the extent any ineffective-assistance-of-trial-counsel issues repeat, they are barred from this appeal as previously adjudicated. WIS. STAT. § 974.06(4); ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). To the extent any claims against trial counsel are new, they are barred because no sufficient reason is offered for failure to raise them earlier. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).

¶19 Ineffective assistance of postconviction counsel may sometimes be a sufficient reason for failing to previously raise an issue. *See* ***Rothering***, 205

Wis. 2d at 682. Thus, if postconviction counsel were ineffective for failing to raise issues about trial counsel's performance, Lewis might have some sufficient reason for not raising those additional issues about trial counsel earlier. However, there is simply no merit to any of Lewis's claims of error relative to the hammers and the lab report. Thus, trial counsel had no basis to raise any of the errors Lewis now alleges, so postconviction counsel had no reason to criticize trial counsel's failure to raise those issues. In other words, neither trial counsel nor postconviction counsel performed deficiently, so any ineffective assistance claims against either attorney would fail.

¶20 Finally, ineffective assistance of appellate counsel can only be challenged through a ***Knight*** petition for *habeas corpus*. A ***Knight*** petition must be filed in this court—the circuit court cannot review appellate counsel's performance.[9] We therefore decline to address ineffective assistance of appellate counsel in the current posture.[10]

By the Court.—Order affirmed.

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

[9] It appears this rule is why the circuit court construed the WIS. STAT. § 974.06 claims as an ineffective assistance of postconviction counsel claim.

[10] In any event, ***Knight*** petitions are subject to similar procedural bars as WIS. STAT. § 974.06 motions. That is, a petitioner usually only gets one chance at a ***Knight*** petition. *See* ***State ex rel. Schmidt v. Cooke***, 180 Wis. 2d 187, 189-90, 509 N.W.2d 96 (Ct. App. 1993).