COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP193 **Cir. Ct. No. 2000CF4772**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KAREEM Q. CURRY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kareem Q. Curry, *pro se*, appeals from an order denying his postconviction motion to set aside his conviction based on newly discovered evidence. The circuit court rejected the notion that Curry's newly discovered evidence was newly discovered, and concluded that his motion was

procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). We agree with the circuit court and affirm.

¶2 Two patrolling officers came upon Curry pointing a gun into Charlie McNeil's chest while Curry's brother Marlon was leaning over, or already in, McNeil's car. The Curry brothers fled when police turned the spotlight on them, but they were apprehended. In September 2000, Curry was charged with attempted carjacking by threat of use of a dangerous weapon, as party to a crime,[1] and possession of a firearm by a felon. Marlon was similarly charged in the same complaint, though the cases were later severed.

¶3 Curry was convicted by a jury of the attempted carjacking.[2] The circuit court sentenced him to eleven years' initial confinement and eleven years' extended supervision. Six months later, a jury acquitted Marlon.[3]

¶4 Curry had a direct appeal; we affirmed the judgment of conviction in 2004. In 2005, Curry petitioned this court for a writ of *habeas corpus* based on ineffective assistance of appellate counsel; the petition was denied. Curry then filed three additional postconviction motions seeking resentencing in October 2006, August 2007, and November 2009. Those motions were all denied by the circuit court, and Curry did not appeal. On December 4, 2009, after the circuit

[1] The crime, contrary to WIS. STAT. § 943.23(1g) (1999-2000), is a subset of operating a motor vehicle without the owner's consent; as set forth in the statute, "[w]hoever, while possessing a dangerous weapon and by the use of, or the threat of the use of, force or the weapon against another, intentionally takes any vehicle without the consent of the owner is guilty of a Class B felony."

[2] The felon-in-possession charge appears to have been dismissed at some point, but read in later at sentencing.

[3] Marlon offered a different defense than Curry had.

court rejected the November motion by explaining that sentence modification could no longer be granted in the absence of a new factor, Curry moved to vacate his sentence on the basis of newly discovered evidence.

¶5 Curry's alleged newly discovered evidence was Marlon's acquittal. Curry reasoned that Marlon was charged with attempted carjacking because he was observed in or getting into McNeil's car. From this, Curry contends that Marlon's actions are the attempted carjacking to which Marlon was merely charged as a party. Curry further appears to deduce that if Marlon was acquitted, then any underlying or predicate offense has been nullified, such that Curry could not be a party to that attempted crime.[4]

¶6 The circuit court rejected the motion. It concluded that Marlon's acquittal was not newly discovered and the motion was therefore procedurally barred, writing, "There is no question that the issue presented in the defendant's current motion could have been raised previously; it is *not* a newly discovered evidence claim."

¶7 We agree with the circuit court. When seeking a new trial based on an allegation of newly discovered evidence, a defendant must show, by clear and convincing evidence, that: "'(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is

[4] As the State aptly explained in its brief, the party-to-a-crime statute provides that "[w]hoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and *although the person who directly committed it has not been convicted*[.]" WIS. STAT. § 939.05(1) (1999-2000) (emphasis added). Thus, the fact of Marlon's acquittal does not undermine Curry's conviction, as it was not even necessary for the State to charge Marlon before it could charge and convict Curry.

material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted); *see also* ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted).

¶8 While it is true that the fact of Marlon's acquittal could not have been discovered until after Curry's conviction, we cannot conclude that Curry would fulfill the second prong. Although Curry contends that he and Marlon were estranged, he knew Marlon had been charged. The result of Marlon's trial would have been a matter of record—knowledge of its result was not limited to Marlon or, as Curry appears to believe, the district attorney—and could have been readily discerned before December 2009.

¶9 We also agree with the circuit court that this issue could have been raised previously, thereby resulting in a procedural bar to the current motion. A defendant is required to raise all grounds for relief in his or her original, supplemental or amended motion for postconviction relief, unless sufficient reason is shown for failing to raise the issues earlier. *See* WIS. STAT. § 974.06(4) (2009-10); *see also* ***Escalona***, 185 Wis. 2d at 181. The phrase "original, supplemental, or amended motion" also encompasses a direct appeal. *See* ***State v. Lo***, 2003 WI 107, ¶32, 264 Wis. 2d 1, 665 N.W.2d 756. Curry could have raised the issue of his brother's 2001 acquittal in his 2002 postconviction motion, his 2003 direct appeal, his 2005 *habeas corpus* petition, his 2006 motion, or his 2007 motion.

¶10 In fact, Curry *did* reference Marlon's acquittal in his November 2009 motion, which was rejected—the circuit court ruled that Curry had not identified a new factor. That led Curry to file the December 2009 motion underlying the

current appeal. However, issues previously raised and decided cannot be relitigated, no matter how they are repackaged. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Accordingly, we conclude the circuit court properly denied the motion to set aside Curry's conviction.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).