COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2455 **Cir. Ct. No. 1994CF943162**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AGUSTIN JUNIOR VELEZ,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*.

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

¶1 PER CURIAM. Agustin Velez appeals an order that denied his postconviction motion filed under WIS. STAT. § 974.06 (2011-12).[1] He also appeals an order that denied his motion to reconsider. He alleges that his trial counsel was ineffective in pursuing his claim that the State deliberately delayed charging him with first-degree intentional homicide to avoid juvenile court jurisdiction. He further alleges that he has newly discovered evidence to support his claim of deliberate charging delay. The circuit court rejected his claims without a hearing. We affirm.

BACKGROUND

¶2 Much of the background underlying this case is found in ***State v. Velez***, 224 Wis. 2d 1, 589 N.W.2d 9 (1999) (***Velez I***). Velez killed James Lovett on June 14, 1994, when Velez was seventeen years old. On June 22, 1994, a juvenile court commissioner issued a warrant for his arrest. *See* ***id.*** at 5. Forty-one days later, on August 2, 1994, Velez had his eighteenth birthday. Thereafter, "the juvenile court warrant was withdrawn, and a criminal warrant was issued in its place." ***Id.*** Police arrested Velez on August 19, 1994, and the State charged him with first-degree intentional homicide as a party to a crime. A jury found him guilty as charged.

[1] Velez's full name is not clear from the record. Circuit court filings by Velez and by his lawyers refer to him variously as "Augustin Velez," "Agustin Velez," and "Agustin Velez, Jr." Other documents in the circuit court record identify him as "Augustin Junior Velez," "Agustin Junior Velez," and "Augustine Velez, Jr." In this court, Velez signed his opening brief "Augustin Velez, Jr." and his reply brief "Agustin Velez, Jr." We have docketed the matter in this court using a caption that reflects Velez's name as it appears in the circuit court caption. *See* WIS. STAT. RULE 809.81(9). In the text of this opinion, we identify Velez by the name that the supreme court used when it resolved Velez's direct appeal in ***State v. Velez***, 224 Wis. 2d 1, 589 N.W.2d 9 (1999) (***Velez I***). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 Velez pursued a direct appeal of his conviction, alleging that he was wrongly denied an evidentiary hearing to show that the State "intentionally 'manipulated the system' to avoid juvenile court jurisdiction." *See* ***id.*** at 9. He contended that he was entitled to a hearing where he would explore his beliefs that: (1) the State should have filed a delinquency petition rather than a warrant for the arrest of a juvenile; and (2) "the arrest warrant, obtained on June 22, 1994, was 'apparently' not entered into the Crime Information Bureau (CIB) and/or the National Crime Information Center (NCIC) computer systems." ***Id.*** at 6. The supreme court determined that a hearing was not required because Velez failed to allege sufficient facts in support of his contention that the State deliberately delayed charging him. ***Id.*** at 19.

¶4 In 2008, Velez brought a postconviction motion under WIS. STAT. § 974.06. He raised a host of claims, among them a contention that his trial counsel and postconviction counsel were ineffective for failing to present proof that the State engaged in intentional manipulative delay to avoid juvenile court jurisdiction. The circuit court denied relief. Velez appealed, but he voluntarily dismissed the appeal before briefing began.

¶5 In 2011, Velez filed the postconviction motion underlying this appeal. He claimed, first, that his trial counsel was ineffective in pursuing his allegation of intentional manipulative delay because, he said, his counsel failed to uncover evidence that Velez was twice arrested and twice released during the period after the juvenile court commissioner issued a warrant for his arrest but before his eighteenth birthday. Second, he claimed that he had newly discovered evidence of those arrests. In support of his claims, he offered a Milwaukee police report naming Velez as a suspect in a theft incident reported on July 27, 1994. Velez also offered documents showing that he was arrested in Chicago, Illinois on

June 28, 1994, for misdemeanor possession of marijuana but that the charge was not pursued.

¶6 The circuit court rejected Velez's claims. It concluded that the evidence of Velez's contacts with law enforcement while Velez was a juvenile during the summer of 1994 failed to demonstrate that the State or its agents intentionally manipulated the criminal justice system to avoid juvenile court jurisdiction over him. The circuit court next denied Velez's motion to reconsider, and this appeal followed.

DISCUSSION

¶7 A court of criminal jurisdiction has the power to hear and determine any case brought against an adult defendant, regardless of the defendant's age at the time of the offense. ***State v. LeQue***, 150 Wis. 2d 256, 265, 442 N.W.2d 494 (Ct. App. 1989). The criminal court's authority to act "is circumscribed only by the exclusive jurisdiction given to the juvenile court over children alleged to have committed crimes." ***Id.*** at 264. At the time that Velez committed the homicide, courts of juvenile jurisdiction had original jurisdiction over people younger than eighteen years old who were accused of committing a crime.[2] *See* WIS. STAT. §§ 48.12(1), 48.02(3m) (1993-94).

[2] Under the laws of 1993-94, some exceptions existed to the juvenile court's jurisdiction over children alleged to have violated the law before reaching the age of eighteen. *See* WIS. STAT. §§ 48.17, 48.18 (1993-94). We need not review those exceptions here. We also add that the age at which a court of criminal jurisdiction has original jurisdiction over a juvenile accused of committing an intentional homicide is now ten years old. *See* WIS. STAT. § 938.183(1)(am); *cf.* ***Velez I***, 224 Wis. 2d at 6 n.2.

¶8 A person accused of a crime has "a due process right not to be deprived of the potential benefits of juvenile jurisdiction through deliberate [S]tate manipulation designed to avoid juvenile jurisdiction." ***LeQue***, 150 Wis. 2d at 267. Such manipulation is a due process violation that requires dismissal of the prosecution. *See* ***State v. Montgomery***, 148 Wis. 2d 593, 595, 436 N.W.2d 303 (1989). Nonetheless, "due process does not protect a defendant from the loss of juvenile court jurisdiction due to the mere passage of time, absent such manipulative intent by the [S]tate." ***LeQue***, 150 Wis. 2d at 267.

¶9 Velez has maintained virtually from the inception of this case that the State's failure to arrest him in connection with the homicide until he reached adulthood stemmed from deliberate manipulation to ensure loss of juvenile court jurisdiction over him. He argues now that he can support that claim with newly-discovered documentary evidence and that his trial counsel was ineffective for failing to uncover this evidence.

¶10 Turning first to Velez's claim that his trial counsel was ineffective, we agree with the State that the claim is barred because Velez previously litigated it. Velez's first *pro se* postconviction motion in 2008 included the allegation that his trial counsel was ineffective for failing to discover and present proof that the State manipulated the court system to avoid juvenile court jurisdiction over him. In support of his 2008 claim, he argued that his trial counsel overlooked evidence that, he said, showed he was arrested in Milwaukee on July 27, 1994. Specifically, he pointed to the presentence investigation report prepared in 1995 for his sentencing in this case. He emphasized that the report states, in part: "[t]here was a further notation in the Justis [sic] Computer the defendant was arrested on 7-27-94 for [a]uto [t]heft and theft, but no charges were issued on

that." The circuit court, however, denied Velez's 2008 postconviction motion in its entirety.

¶11 We must reject Velez's attempt to relitigate the ineffective assistance of counsel theory he previously presented to the circuit court. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Velez argues that ***Witkowski*** does not apply because, in his view, the evidence he offers now is qualitatively different from the evidence he offered in 2008. We disagree. As in 2008, Velez alleges that his trial counsel was ineffective for failing to investigate a claim of intentional manipulation. As in 2008, Velez supports his contention with documents that, he claims, show he was arrested for theft as a juvenile in the summer of 1994 but not charged with homicide until several weeks later, after he reached adulthood. Although Velez has added more documentation to support the claim that he received ineffective assistance from his trial counsel, the claim itself is not new. Accordingly, it is barred. *See* ***id.***

¶12 We recognize that the circuit court did not rely on ***Witkowski*** as the basis for rejecting Velez's claim. Nonetheless, we may affirm a circuit court's order on grounds other than those relied upon by the circuit court. *See* ***State v. Amrine***, 157 Wis. 2d 778, 783, 460 N.W.2d 826 (Ct. App. 1990). We do so here.

¶13 We also reject Velez's claim that he has newly discovered evidence. The claim is barred because Velez does not offer a sufficient reason for failing to raise the issue in his first *pro se* postconviction motion.

¶14 A prisoner may mount a collateral attack on a conviction by filing a motion under WIS. STAT. § 974.06 at any time after expiration of the deadline for a

direct appeal. *See* § 974.06(1). Nonetheless, "[w]e need finality in our litigation." ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, a prisoner may not raise an issue in a motion filed under § 974.06 absent showing a sufficient reason for failing to raise the issue in a previous such motion or in a direct appeal. *See* ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. Whether a prisoner has presented a sufficient reason for serial litigation is a question of law that we review *de novo*. *See* ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

¶15 As justification for an additional postconviction motion here, Velez contends that "[b]ecause neither [he] nor his attorney knew at the time of his direct appeal that the [S]tate and [M]ilwaukee [p]olice had lied about the exist[e]nce of documents proving manipulation of the system, [Velez] could not have raised the newly-discovered evidence claim on Velez's direct appeal." Further, he asserts that "after [his] direct appeal, he learned that he could personally request, via open records and Freedom of Information request[s], legal documents pertaining to his case that were still in existence."

¶16 Although Velez's contentions might explain why Velez did not present the evidence he offers now during his direct appeal, his contentions do not explain why he failed to include the evidence with his first postconviction motion in 2008. Velez simply does not offer a sufficient reason for failing to obtain and present all of the 1994 documents until he filed his second postconviction motion in 2011. Specifically, Velez does not reveal precisely when he learned about the possibility of using the open records laws and the Freedom of Information Act to make requests for documents, he does not explain how he learned about these tools, and he does not explain why he did not pursue these avenues more promptly. Clearly he knew, better perhaps than anyone, the details of his past

contacts with law enforcement. Indeed, as Velez acknowledges, he "has always maintained that he [was] arrested twice during the time frame the State was alleging there were warrants out for his arrest." His failure to offer a sufficient reason for omitting the 1994 documents from his 2008 postconviction submission defeats his current claim. Accordingly, we reject it. *See* ***Amrine***, 157 Wis. 2d at 783.

¶17 For the sake of completeness we add that, were we to assume that Velez presented a sufficient reason for serial litigation, we would nonetheless conclude that the circuit court properly denied relief. A person seeking relief based on a claim of newly discovered evidence must establish "by clear and convincing evidence that '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citations omitted). If the person satisfies these requirements, "'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a [new] trial.'" ***Id.*** at ¶44 (citation omitted). No reasonable probability exists that the information Velez presents now would have altered the outcome of the original proceedings.

¶18 Velez disagrees. He contends that the circuit court "could have reasonably believed, based on the new evidence, that the [S]tate and its agents had manipulated the system and [on that basis] dismissed the charge[s] against" him. We are not persuaded.

¶19 A due process objection "to the adult court's jurisdiction ... presents a question of constitutional fact." ***LeQue***, 150 Wis. 2d at 265. When reviewing

such questions, we uphold the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous, and we independently determine the constitutional issues involved. *See* ***State v. Bollig***, 2000 WI 6, ¶13, 232 Wis. 2d 561, 605 N.W.2d 199.

¶20 Here, the circuit court first considered the Milwaukee police report that, according to Velez, shows that Milwaukee police arrested him for theft on July 27, 1994. The circuit court found that the police report does not support Velez's contention. The report names four individuals: one victim, two arrestees, and one suspect. Velez is the suspect. Accordingly, the circuit court concluded that the incident report does not support Velez's claim that police arrested him.[3] The circuit court's conclusion in this regard is not clearly erroneous, and we accept it. *See* ***Bollig***, 232 Wis. 2d 561, ¶13.

¶21 Moreover, as the circuit court accurately observed, nothing in Velez's submission reflects that any law enforcement entity involved in reviewing the July 1994 theft allegation had any connection to or knowledge of the outstanding warrant for Velez's arrest in the homicide matter. We agree with the circuit court's conclusion that, "at best, the evidence points to possible negligence for failing to identify [Velez] as being wanted in connection with the homicide; however, it does not support a finding of manipulative intent."

[3] As evidence of an arrest in Milwaukee in July 1994, Velez also offered text from the presentence investigation report. The presentence investigation report is, of course, not new. Velez has known about it since his sentencing in 1995, and he pointed to the same text in support of his 2008 postconviction motion. Accordingly, the report does not aid Velez. *See* ***State v. Fosnow***, 2001 WI App 2, ¶9, 240 Wis. 2d 699, 624 N.W.2d 883 (evidence previously known is not newly discovered).

¶22 The circuit court next examined the evidence that Chicago police arrested Velez for misdemeanor marijuana possession in Illinois on June 28, 1994. The circuit court found that Velez's arrest by Chicago police does not throw any light on the intent of Wisconsin law enforcement. In reaching this conclusion, the circuit court determined that Velez's motion omits any showing either that the arresting officers in Chicago knew about the Wisconsin warrant or that they took any action to contact Wisconsin law enforcement with information that Velez was under arrest for possessing marijuana.

¶23 Velez responds by pointing to evidence that Milwaukee police contacted the Chicago Gang Crimes Investigative Unit on June 24, 1994, seeking help in finding him. He fails to show, however, that he was arrested by—or came into contact with—officers in the Chicago Gang Crimes Investigative Unit. Additionally, as the circuit court observed when rejecting Velez's motion for reconsideration, "evidence that Milwaukee law enforcement made attempts to locate [Velez] in Chicago prior to his arrest in that city on June 28, 1994, does not demonstrate manipulative intent to charge the defendant as an adult. In fact, it belies the defendant's claim."

¶24 Velez further suggests that the failure of Chicago police to recognize him as a wanted person demonstrates that Milwaukee police did not enter the June 22, 1994 arrest warrant into the CIB and NCIC databases, thus revealing the manipulative intent of Wisconsin law enforcement. Velez is wrong.

¶25 First, Velez fails to show that Chicago police checked the national warrant databases upon arresting him, or that such a check was routine practice for Chicago police in 1994 when they arrested a person for misdemeanor marijuana possession. Second, Velez fails to show that, if the Chicago police conducted a

warrant search, the search they conducted was sufficiently thorough and reliable as to uncover the Milwaukee warrant.[4] Third, and critically, ***Velez I*** long ago settled the question of whether Wisconsin law enforcement personnel entered the June 22, 1994 arrest warrant into the national databases. *See* ***id.***, 224 Wis. 2d at 8. There, the supreme court explained that the Milwaukee Police Department provided information to the circuit court "*from the NCIC and the CIB verifying that the warrant was entered into both computer systems on June 22, 1994, the same date the warrant issued*." ***Id.*** (emphasis added). The supreme court determined that the record "conclusively demonstrated that the warrant was indeed entered." ***Id.*** at 22. Velez offers nothing from the national warrant databases to undermine that conclusion.

¶26 In sum, Velez did not present newly discovered evidence that, if presented earlier, would probably have changed the outcome of the criminal prosecution against him. Accordingly, the circuit court properly denied him any relief. For all of the foregoing reasons, we affirm.

By the Court.—Orders affirmed.

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

[4] The record suggests ample opportunity for unreliable results from any warrant database searches for Velez that may have followed his 1994 arrest in Chicago. He acknowledges in his various submissions that he gave false names of "Mario Acosta" and "Antonio Velez" when Chicago police arrested him. Further, as described in footnote one, variant spellings of his name appear throughout the record, and Velez himself spells his name inconsistently in documents that he has filed in this court and in circuit court. Moreover, even today, "[b]esides the complications of aliases and intentional and unintentional misinformation, warrant databases are often especially challenging to search efficiently." *See* Wayne J. Pitts, *From the Benches and Trenches Dealing with Outstanding Warrants for Deceased Individuals: A Research Brief*, 30 Just. Sys. J. 219, 219 (2009).