

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 2014

Diane M. Fremgen
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 No. 2011AP2835

Cir. Ct. No. 2005CF6907

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CEDRIC DEAN,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Cedric S. Dean, *pro se*, appeals from an order of the circuit court denying his WIS. STAT. § 974.06 motion. We affirm the order.

¶2 In 2007, a jury convicted Dean on one count of first-degree reckless homicide and one count of armed robbery. He was sentenced to fifty years'

imprisonment for the homicide, and a concurrent eighteen-year sentence for the robbery. Postconviction counsel was appointed and filed a notice of appeal in 2008, but Dean discharged him when counsel determined the appeal should be a no-merit appeal. Dean then voluntarily dismissed the pending appeal in 2009. Also in 2009, Dean filed four different motions seeking to vacate the DNA surcharge that the trial court had imposed at sentencing. Each of those motions was denied, and none were appealed.

¶3 In November 2011, Dean filed the WIS. STAT. § 974.06 motion underlying this appeal. He alleged, under *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), that postconviction/appellate counsel had been ineffective for failing to pursue issues of ineffective trial counsel, insufficient evidence to support the verdicts, and use of perjury to obtain the verdicts. The circuit court denied the motion because Dean had discharged postconviction/appellate counsel in order to pursue remedies himself. The circuit court also concluded that the four prior DNA motions constituted a bar to the latest motion under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Dean then commenced this appeal.

¶4 On appeal, Dean does not address any of the issues he raised in his postconviction motion. Accordingly, those issues are now waived. See *Reiman Associates, Inc. v. R/A Advertising, Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

¶5 The first issue Dean does raise on appeal is a claim that the trial court erred by imposing the DNA surcharge without sufficient explanation, as required by *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. However, this issue was not presented to the circuit court in the underlying motion

and, therefore, we decline to consider it for the first time on appeal. See *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501, 505 (1997).

¶6 We additionally note that the issue of the DNA surcharge has been litigated at least three times before in this case.¹ The motion that Dean filed on September 30, 2009, specifically relied on *Cherry* to challenge the surcharge. The circuit court in 2009 denied the motion, explaining that *Cherry* did not require a different result, but Dean did not appeal. Thus, *Caban* notwithstanding, Dean is also prohibited from relitigating issues that have already been decided. See *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512, 514 (Ct. App. 1991).

¶7 The second issue Dean raises on appeal is whether the trial court erred “in informing the jury that they must accept an essential element of the case as conclusively proven.” Dean concedes that this issue was not raised before the circuit court. However, he contends that this court can use its discretionary powers because the real controversy was not fully tried. See *Vollmer v. Luety*, 150 Wis. 2d 891, 906, 443 N.W.2d 32, 38 (Ct. App. 1989).

¶8 As Dean concedes that the jury instruction issue was not raised in the circuit court, we need not consider it on appeal. See *Caban*, 210 Wis. 2d at 604, 563 N.W.2d at 505. Further, we are not persuaded to exercise our power of discretionary reversal because even if it were appropriate to reach the issue, Dean has not adequately developed an argument. His assertion that the jury was instructed to “accept an essential element of the crime (the cause of death element) as conclusively proven” is conclusory: while Dean quotes from the portion of the

¹ The first motion was denied not on the merits but because Dean’s appeal was still pending at the time.

transcript in which the trial court instructed the jury about how to treat the parties' stipulation, he does not tell us what the stipulation was about or where to find it in the record. We need not consider undeveloped arguments, *see M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244–245, 430 N.W.2d 366, 369 (Ct. App. 1988), and we need not search the record for evidence to support Dean's contention, *see Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 411, 620 N.W.2d 463, 465–466.

¶9 Finally, after briefing was complete, Dean filed a motion asking this court to apply the rationale of *State v. Starks*, 2013 WI 69, 349 Wis. 2d 274, 833 N.W.2d 146, to his case. The supreme court concluded that motions for postconviction relief under WIS. STAT. § 974.06 are distinct from motions to vacate the DNA surcharge and, thus, “a *Cherry* motion, standing alone, can *never* bar a defendant from later filing a § 974.06 motion.” *See Starks*, 2013 WI 69, ¶¶46–47, 349 Wis. 2d at 299–300, 833 N.W.2d at 159–160.

¶10 It does appear that the circuit court relied on all four of Dean's previous DNA motions, at least one of which invoked *Cherry*, when applying the *Escalona* procedural bar to deny his present WIS. STAT. § 974.06 motion. However, assuming without deciding that *Starks* applies retroactively to the circuit court's November 2011 order, reversal still is not warranted. One of the reasons the circuit court denied Dean's § 974.06 motion alleging ineffective postconviction/appellate counsel is because Dean discharged that attorney to pursue relief himself. *Starks* does not relieve Dean from addressing the substantive portion of the circuit court's order but, as we have seen, Dean abandoned any challenge to the substantive rejection of his motion by failing to brief it on appeal. *Starks* also does not overrule *Caban*, *Witkowski*, *M.C.I.*, or

Grothe, so the issues Dean did raise on appeal are still properly rejected by this court.

By the Court.—Order affirmed.

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

