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DISTRICT II

October 14, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2665 State of Wisconsin v. Craig C. Tolonen (L.C. # 2006CF291)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Craig C. Tolonen appeals pro se from an order denying his motion for the appointment of counsel. The order also denied his WIS. STAT. § 974.06 (2013-14)[1] postconviction motion for a new trial on grounds of newly discovered evidence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In 2007, a jury found Tolonen guilty of first-degree reckless homicide in the death of a six-month-old baby. Tolonen moved for postconviction relief alleging that because the baby's injuries were more consistent with battered child syndrome than with shaken baby syndrome (SBS), another individual, JW, caused her death. The trial court denied the postconviction motion and Tolonen's judgment was affirmed on appeal. ***State v. Tolonen***, No. 2009AP2513-CR, unpublished slip op. (WI App Mar. 23, 2011). In pertinent part, we rejected Tolonen's request for a new trial based on "developments in the science concerning shaken baby syndrome," explaining that "[t]he testimony at trial was that [the baby's] injuries could have been caused by being shaken or by being thrown" and "Tolonen admitted to having done both." ***Id***., ¶¶18-19.

Thereafter, in 2011, Tolonen moved the trial court to appoint counsel for purposes of litigating a WIS. STAT. § 974.06 postconviction motion. The court forwarded Tolonen's motion to the State Public Defender (SPD), and after the SPD declined to appoint counsel under WIS. STAT. § 977.05(4)(j),[2] the trial court denied Tolonen's motion for a court-appointed attorney, finding that the proposed claims were not complex and did not require representation. Thereafter, the Wisconsin Innocence Project rejected Tolonen's request for assistance.

In 2014, Tolonen filed a renewed motion for the appointment of counsel along with a WIS. STAT. § 974.06 postconviction motion alleging that newly discovered evidence supported

[2] Pursuant to WIS. STAT. § 977.05(4)(j), upon the request of an indigent person or referral by the court, the SPD may, in its discretion, appoint counsel if it "determines the case should be pursued." In its letter to the trial court, the SPD's representative explained that generally the agency made discretionary appointments "only when we are convinced that there is a reasonable chance of success, the issue presented is of statewide importance, is important to the development of the criminal law, and is so complex that representation by an attorney is necessary." The letter stated that Tolonen's case failed to meet these criteria.

his claim that the baby died from battering rather than shaking injuries.[3] In denying Tolonen's newly discovered evidence claim, the court stated:

> While the defendant's proffered "newly discovered evidence" might indicate a continuing debate in the medical community as to the effects of shaken baby syndrome, this case was not tried on that theory and the evidence presented to the jury went far beyond merely shaking an infant. As such, even if the defendant's proffered testimony were admitted at trial, this Court concludes there is no reasonable probability that a different result would be reached at that trial.

Based on its determination that Tolonen was not entitled to relief, along with the SPD's earlier refusal to appoint counsel and "the failure of the Innocence Project to accept the defendant's case," the trial court denied the motion to appoint counsel. Tolonen appeals only the order denying the appointment of counsel.

We conclude that the trial court properly exercised its discretion in denying Tolonen's motion to appoint counsel. Pursuant to WIS. STAT. § 974.06(3)(b), the trial court is not required to refer an indigent defendant to the SPD if "the files and records of the action conclusively show that the person is entitled to no relief." Here, the trial court determined that Tolonen was entitled

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[3] As in his 2011 motion to appoint counsel, Tolonen offered the expected testimony of three experts who would testify that the science surrounding SBS has shifted drastically since the 1990s, and that shaking a baby with sufficient force to cause the head injuries sustained by Tolonen's victim would necessarily damage the neck and cause certain bruising patterns.

A defendant seeking a new trial based on newly discovered must prove by clear and convincing evidence all of the following: (1) the evidence was discovered after trial; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative to the evidence that was introduced at trial. ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. If all four factors are proven, then it must be determined whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. ***Id***.

to no relief on his newly discovered evidence motion.[4] ***State v. Balliette***, 2011 WI 79, ¶50, 336 Wis. 2d 358, 805 N.W.2d 334 (trial court has the discretion to deny a motion without an evidentiary hearing if the record conclusively demonstrates that the movant is not entitled to relief). Tolonen's motion relied on ***State v. Edmunds***, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590, wherein the court determined that developments in the medical science concerning SBS constituted newly discovered evidence. However, Tolonen's trial occurred in 2007, well after the shift in SBS discourse. ***Id.***, ¶12 (observing that the shift began in 1997 and had taken a firm foothold by the time of Edmunds' postconviction motion in 2006). Additionally, one of Tolonen's "new" experts previously testified at his original trial that "shaking doesn't cause head injury unless there is first neck injury. … To get brain damage, you need to damage the neck." Tolonen has not established that his new evidence was discovered after conviction or that it was not merely cumulative.

Further, there is no reasonable probability of a different result at a new trial. *See* ***id.***, ¶13. We agree with the trial court that "[t]he problem with the defendant's motion as it relates to newly discovered evidence is that his 'newly discovered evidence' deals only with 'shaken baby syndrome.'" The evidence was not simply that Tolonen shook the baby, but that he threw her onto a couch where she hit her head on the armrest and, according to his own statement, "flopped back over." Observing that the State's expert opined the baby's death was caused by head trauma, that the State's theory was based on "Impact trauma" as the cause of death, and that Tolonen both admitted to and reenacted throwing the baby, the trial court stated: "The act of

[4] Furthermore, the trial court did previously refer Tolonen to the SPD pursuant to WIS. STAT. § 974.06(3)(b), and the SPD declined to appoint counsel. Tolonen's 2011 motion to appoint counsel alleged the same grounds as his instant motions for counsel and postconviction relief.

throwing the child against the couch cannot be underestimated. As in ***Edmunds***, it is not just the shaking that is relevant but the shaking combined with head trauma that is in issue."

Finally, the trial court recognized but declined to exercise its inherent authority to appoint counsel. *See* ***Roberta Jo W. v. Leroy W.***, 218 Wis. 2d 225, 240, 578 N.W.2d 185 (1998) (where there is no statutory or constitutional right to counsel, the trial court may appoint counsel "when, in the exercise of its discretion, it deems such action necessary"). In so doing, the trial court considered the SPD's refusal to appoint counsel, the Wisconsin Innocence Project's determination not to accept Tolonen's case, and its own conclusion concerning the merits of Tolonen's motion. The court applied the correct legal standard to the proper facts and reached a rational, explainable decision. *See* ***Gaugert v. Duve***, 2001 WI 83, ¶44, 244 Wis. 2d 691, 628 N.W.2d 861.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals