



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

October 5, 2016

To:

Hon. William E. Hanrahan
Circuit Court Judge
215 South Hamilton, Br. 7, Rm. 4103
Madison, WI 53703

John S. Greene
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Tomas D. Cuesta 137594
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

Lanny B. Glinberg
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

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

2015AP2257

State of Wisconsin v. Tomas D. Cuesta (L.C. # 2000CF1226)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Tomas Cuesta appeals an order that denied his most recent postconviction motion seeking relief from a judgment of conviction entered in 2001. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm for the reasons discussed below.

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

In 2001, a jury convicted Cuesta, as a repeat offender, of aggravated battery with intent to cause substantial bodily harm, false imprisonment, and second-degree reckless endangerment. In 2002, in Appeal No. 2001AP3113-CR, this court denied Cuesta's direct appeal—on which he was represented by counsel—rejecting challenges to the racial makeup of the jury, Cuesta's right to a speedy trial, the sufficiency of the evidence, the exclusion of prior bad act evidence relating to the victim, and trial counsel's performance with respect to the timeliness of the proceedings. In 2004 and 2007, in Appeal Nos. 2004AP483-W and 2006AP3187-W, this court denied two petitions for writs of habeas corpus that Cuesta filed pro se, alleging that he had been denied the effective assistance of appellate counsel on his direct appeal. Later in 2007, this court denied a third pro se habeas corpus petition in Appeal No. 2007AP262-W, in which Cuesta raised challenges related to the timeliness of his initial appearance, the victim's failure to testify at the preliminary hearing, counsel's inability to cross-examine the victim about a recantation letter she had written, the jury selection process, Cuesta's right to a speedy trial, trial counsel's failure to obtain and present surveillance video that would have shown the victim failed to take advantage of a potential opportunity to escape while waiting for Cuesta in a car at a convenience store, the exclusion of evidence relating to the victim's medical records and alcohol consumption, and trial counsel's failure to seek DNA or other scientific testing to challenge the State's claim that fingerprints, blood, hair, and bite evidence linked Cuesta to the crime.

In 2009, in Appeal No. 2007AP2924-CR, this court denied an appeal from a circuit court order denying a postconviction motion Cuesta had filed claiming that the State had failed to disclose exculpatory DNA evidence relating to fingerprints, blood, hair, bite marks, and bloody clothes. We noted that there was no factual basis to support Cuesta's claim that the State had withheld exculpatory DNA evidence, because there was nothing in the record showing that DNA

tests to produce such evidence ever had been performed. We also determined that Cuesta was procedurally barred from raising several additional issues.

In 2013, in Appeal No. 2012AP300-CR, this court denied an appeal from a circuit court order denying a series of additional motions Cuesta had filed seeking to obtain DNA testing or other expert analysis of evidence relating to his case, including any saliva from the victim's bite wounds. We characterized Cuesta's series of motions as repetitive litigation based on the theory that "postconviction production and testing of a wide range of biological material will exonerate him and point to another suspect." The circuit court made a factual finding that the bite mark evidence Cuesta was looking for, including a saliva sample from the bite wound, was never collected. The circuit court further determined that Cuesta had not shown that DNA testing on any additional materials was likely to be exculpatory or to make a different outcome at trial reasonably probable. We concluded that the circuit court's finding that no bite mark evidence had been taken was not clearly erroneous, and further determined that—even if we were to treat Cuesta's discovery during the circuit court proceedings that biological evidence associated with the bite mark had not been collected as newly discovered evidence—the lack of testing of any biological evidence from bite marks on the victim did not either undermine the victim's statements to police that Cuesta had assaulted her or prevent the real controversy from being tried.

In the postconviction motion that is the subject of the current appeal, Cuesta identifies nine grounds for relief. Each one of them is procedurally barred under either *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (a matter already litigated cannot be relitigated in subsequent postconviction proceedings "no matter how artfully the defendant may rephrase the issue") and/or *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157

(1994) (claims that were or could have been raised on a prior direct appeal or postconviction motion from a criminal judgment of conviction cannot be the basis for a subsequent postconviction motion under WIS. STAT. § 974.06 unless the court finds that there was sufficient reason for failing to raise the claim in the earlier proceeding).

First, Cuesta claims that the State's disclosure that it did not collect or test any biological specimen from the victim's bite wounds constitutes newly discovered evidence as to the inadequacy of the State's investigation. This claim is barred by *Witkowski* because this court already addressed the significance of the lack of testing of any biological evidence from the bite wounds in Appeal No. 2012AP300-CR.

Second, Cuesta claims that the circuit court's failure to keep or include in the record a master list of all potential jurors called in the jury pool impeded his ability to demonstrate that the jury selection procedure systematically excluded black and Spanish-speaking minorities in violation of federal jury selection statutes and Cuesta's constitutional rights to due process and an impartial jury. This claim is barred by *Witkowski* because this court already addressed the selection and composition of the jury in Appeal No. 2001AP3113-CR.

Third, Cuesta claims that the circuit court denied his constitutional rights to due process and to cross-examine witnesses by refusing to allow him to call his first two attorneys to testify at his original postconviction hearing before his direct appeal, in order to establish ineffective assistance. This claim is barred by *Witkowski* because this court already determined in Appeal No. 2001AP3113-CR that Cuesta did not suffer any prejudice from the alleged actions of his first two attorneys.

Fourth, Cuesta claims that the suppression of evidence relating to the victim's prior conviction for fraud violated his due process rights. This claim is barred by *Witkowski* because this court already determined in Appeal No. 2001AP3113-CR that the circuit court properly exercised its discretion in excluding the prior bad act evidence.

Fifth, Cuesta claims that the suppression of medical records and other evidence relating to the victim's blood alcohol level and state of mind at the time of the assault denied his constitutional rights to due process and a fair trial. This claim is barred by *Witkowski* because this court already addressed the relevance and admissibility of the victim's blood alcohol test results and other medical records in Appeal No. 2007AP262-W.

Sixth, Cuesta claims that the prosecutor withheld exculpatory evidence by "excluding [the] bloody clothing that [the victim] was wearing at the time of the attack" and not having it "scientifically investigated." We understand this contention to be yet another claim such as those addressed in Appeal Nos. 2007AP2924-CR and 2012AP300-CR relating to Cuesta's speculative belief that additional DNA testing of the evidence presented at trial would somehow point to another suspect and exonerate Cuesta—despite the victim's testimony that Cuesta had beat her, a witness's identification of Cuesta as the driver of a vehicle from which the witness heard screaming before calling the police, and another witness's testimony that Cuesta was angry with the victim because he had caught her with an ex-boyfriend. If a specific request for DNA testing of blood spots on the victim's clothes was not raised in one of Cuesta's prior motions seeking postconviction discovery, the claim is still barred by *Escalona-Naranjo* because Cuesta has not presented any sufficient reason why it could not have been included with his prior claims.

Seventh, Cuesta claims that the prosecutor withheld exculpatory evidence by not calling the victim's mother as a witness to testify that the victim had been injured several times in the past, and due to alcohol- and drug-use problems, could never remember how she got the injuries. This claim is also barred by *Escalona-Naranjo*, if it has not already been specifically litigated, because Cuesta has not presented any sufficient reason why it could not have been included with his prior claims.

Eighth, Cuesta claims that he was denied his right to a speedy trial. This claim is barred by *Witkowski* because this court already determined in Appeal No. 2001AP3113-CR that Cuesta's original speedy trial demand was premature and that the trial was held within ninety days of Cuesta's subsequent demand, which triggered the deadline.

Finally, Cuesta claims that the trial court violated his due process rights by imposing enhanced sentences for habitual criminality without submitting the question of his past criminal history to the jury and without giving him notice prior to trial of the possibility that his sentences could be enhanced. Even if we were to treat Cuesta's apparent recent discovery of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (requiring the facts underlying certain penalty enhancers to be submitted to a jury as elements of the offense) as a sufficient reason for Cuesta's failure to challenge the application of penalty enhancers in prior litigation, his contentions still lack merit. First, *Apprendi* itself stated that "the fact of a prior conviction" was an exception to the rule requiring submission of penalty enhancers to a jury. *Id.* at 490. Second, the complaint in this case plainly provided Cuesta notice of the additional penalties that could be imposed upon him for habitual criminality based upon his prior criminal history.

IT IS ORDERED that the order denying Cuesta's postconviction motion is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals