COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP592 **Cir. Ct. No. 2003CF1035**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK L. DONLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Patrick Donley appeals an order denying his WIS. STAT. § 974.06 (2015-16)[1] motion for postconviction relief. Donley argues he is

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

entitled to withdraw his plea for three reasons: (1) ineffective assistance of both his trial counsel and postconviction counsel; (2) newly discovered evidence; and (3) in the interest of justice. We disagree and, therefore, affirm the circuit court's order.

BACKGROUND

¶2 On September 3, 2003, Teshia White and her then-boyfriend, Patrick Donley, brought her injured two-year-old son, Sawyer White, to a hospital. Teshia and Donley told hospital staff that Sawyer had fallen down some stairs at Teshia's residence. However, based on Sawyer's injuries, especially his bilateral retinal hemorrhages, some hospital staff believed Sawyer's injuries were likely caused by non-accidental trauma. As a result, local law enforcement was called to investigate. Teshia and Donley initially told the police that Sawyer had fallen down the stairs when both of them were at Teshia's residence: Teshia was doing laundry in the basement and Donley was cutting his own hair.

¶3 Three days after being taken to the hospital, Sawyer was pronounced dead. Doctor Robert Huntington conducted an autopsy one day later. Doctor Huntington was unable to definitively conclude whether Sawyer's injuries were accidental or intentional.

¶4 Meanwhile, the police continued their investigation into Sawyer's death. In late October 2003, police interviewed Chris Yates, who knew Teshia. Yates told police that on September 3, 2003, he was the passenger in a vehicle driven by Teshia when she received a phone call from Donley telling her that Sawyer had fallen down some stairs. The new information Yates provided, if true, indicated that Teshia and Donley were lying about Teshia being home when Sawyer was injured.

¶5 As a result of this new information, the police decided to interview Teshia again. During that police interview, Teshia admitted that she was not home when Sawyer was injured. The police then interviewed Donley. During his interview, Donley said he shook Sawyer until he went limp and then set Sawyer down on the ground "kind of roughly." After providing law enforcement with this confession, Donley was charged with first-degree reckless homicide.

¶6 The Public Defender's Office appointed Attorney Mark Rosen to represent Donley. At the preliminary hearing, Donley was able to elicit testimony from the State's expert witnesses—Dr. Ralph Vardis and Dr. Richard Heckert—that Sawyer's retinal hemorrhages and encephalopathy could have been caused solely by Sawyer's subdural hemorrhage, which in turn could have been caused by direct impact to the head (e.g., falling down the stairs). Based on these concessions, Donley had a viable, alternative medical theory to explain what caused Sawyer's triad of injuries—i.e., subdural hemorrhage, retinal hemorrhages, and encephalopathy.

¶7 After Donley was bound over for trial, he filed a motion for a ***Miranda-Goodchild*** hearing,[2] arguing his confession should be suppressed because it was coerced. Sonja Watermolen, a friend of Teshia, testified at the hearing. Watermolen testified she was present at one of the police interviews involving Teshia. According to Watermolen, the officer conducting the interview made statements about arresting Teshia or taking her children away. Watermolen testified she later: (1) informed the officer that she was going to talk to Donley;

[2] A ***Miranda-Goodchild*** hearing is held to determine the admissibility of a defendant's confession. ***State v. Jiles***, 2003 WI 66, ¶25, 262 Wis. 2d 457, 663 N.W.2d 798.

(2) called Donley and told him Teshia could be sent to jail; and (3) contacted the officer, once Donley told her that he would say whatever the police wanted to hear, informing the officer that Donley wanted to talk. After the hearing, the circuit court denied Donley's motion to suppress his confession.

¶8 In October 2004, Attorney Rosen withdrew at Donley's request and the Public Defender's Office appointed Attorney Ralph Sczygelski to represent Donley. Donley's trial was rescheduled to commence in late February 2005. Attorney Sczygelski attempted to contact Dr. Huntington, who performed Sawyer's autopsy, several times by telephone. Based on a prior encounter with Dr. Huntington in a different case, Attorney Sczygelski believed Dr. Huntington was generally a persuasive witness and, if called as a witness, would have a powerful impact on a jury. However, Dr. Huntington did not return Attorney Sczygelski's messages.

¶9 Ultimately, Attorney Sczygelski believed Donley's confession and inconsistent statements to police could not be successfully overcome by the medical evidence, despite his being informed by Attorney Rosen that Rosen believed Donley's confession could be refuted at trial with "the medical issues and clinical reasonable doubt." Attorney Sczygelski advised Donley to enter a plea of no contest and not to take his case to trial based on: (1) Donley's confession and inconsistent statements; (2) the expected testimony of some of the State's experts that Sawyer's injuries were likely caused by shaken baby syndrome; and (3) Attorney Sczygelski's concern that medical experts "on the fence may change their [opinions] once they heard about the confession." Attorney Sczygelski believed "pleading was the correct course of action" and explained the "pluses and minuses" of going to trial with Donley.

¶10 After Donley entered a no-contest plea, the Public Defender's Office appointed Attorney Elizabeth Ewald-Herrick as postconviction counsel. She filed a no-merit report finding there were no issues of arguable merit. Donley filed a pro se response to Attorney Ewald-Herrick's no-merit report but he did not raise any of the issues he now raises in this appeal. This court affirmed the conviction. *See* ***State v. Donley***, No. 2006AP486-CRNM, unpublished slip op. (WI App June 27, 2006).

¶11 In 2013, Donley filed a WIS. STAT. § 974.06 postconviction motion arguing he was entitled to withdraw his 2005 no-contest plea. The circuit court held an evidentiary hearing. Eleven witnesses testified on Donley's behalf, including medical experts and a false confession expert. The circuit court denied Donley's motion for postconviction relief in a written decision. Donley now appeals.

DISCUSSION

I. Ineffective Assistance of Counsel Claim

¶12 WISCONSIN STAT. § 974.06 is the mechanism for a defendant to bring constitutional and jurisdictional claims after exhausting statutory direct appeal proceedings. *See* ***State v. Henley***, 2010 WI 97, ¶52, 328 Wis. 2d 544, 787 N.W.2d 350. However, "[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). In addition, a convicted defendant may not bring postconviction claims under § 974.06 if the defendant could have raised the issues in his or her previous postconviction motion, or direct appeal, unless the defendant states a "sufficient reason" for failing to raise those issues. *See* ***State v. Escalona-***

Naranjo, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). A defendant must demonstrate a "sufficient reason" in such a situation because "[w]e need finality in our litigation." ***Id.*** at 185. Whether a defendant's claims are procedurally barred by § 974.06 in any particular case presents a question of law that we review de novo. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶13 The ***Escalona-Naranjo*** rule also applies when a defendant's direct appeal was, as here, resolved via the no-merit procedures adopted in ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, as long as the procedures were in fact followed and they carry a "sufficient degree of confidence warranting the application of the procedural bar under the particular facts and circumstances of the case." ***State v. Tillman***, 2005 WI App 71, ¶20, 281 Wis. 2d 157, 696 N.W.2d 574. Donley does not contend this court failed to follow proper no-merit procedures, nor does he provide any reason we should not have a sufficient confidence in the no-merit procedure to warrant the application of the procedural bar under the particular facts and circumstances of this case. In any event, we have sufficient confidence in the no-merit procedures in this case to warrant application of the procedural bar.

¶14 In ***Tillman***, we explained why it is proper to apply the ***Escalona-Naranjo*** bar when a defendant fails to present what he or she believes are arguably meritorious issues in his or her pro se response to counsel's no-merit report.

> [T]he no merit procedure affords a defendant greater scrutiny of a trial court record and greater opportunity to respond than in a conventional appeal. As with a conventional appeal, appellate counsel examines the trial court record for potential appellate issues. However, the defendant in a conventional appeal does not receive the benefit of a skilled and experienced appellate court also examining the record for issues of arguable merit. Instead,

> the court's role in a conventional appeal is limited to addressing the issues briefed by appellate counsel.

Id., ¶18.

¶15 In Donley's no-merit appeal, Attorney Ewald-Herrick complied with the detailed requirements set forth in WIS. STAT. RULE 809.32(1). In addition, we conducted an independent review of the record in compliance with ***Anders***'s mandate. *See* ***State v. Allen***, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (court of appeals' statement in a no-merit decision that it conducted an independent review under ***Anders*** is conclusive). Furthermore, Donley was fully capable of arguing in his pro se response to Attorney Ewald-Herrick's no-merit report that Attorney Sczygelski was ineffective for failing to conduct an adequate investigation, yet he failed to do so. Donley was fully capable of making that argument because he made a similar argument in his pro se response that law enforcement coerced his confession. Under these circumstances, we conclude application of the procedural bar is appropriate. *See* ***Tillman***, 281 Wis. 2d 157, ¶20 (procedural bar applies to no-merit appeal when the no-merit procedures: (1) were followed; and (2) warrant sufficient confidence to apply the procedural bar).

¶16 Since Donley could have raised an ineffective assistance of trial counsel claim in his response to the no-merit report, he must show sufficient reason for failing to do so. As best we can discern, Donley's only reason for failing to make the ineffective assistance of trial counsel claim in his no-merit appeal is "[b]ecause the substantive grounds [in this appeal] are different than during the direct appeal process." However, the procedural bar applies not only to issues raised, but also those that could have been raised but were not. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. Donley argues he could not have

raised the issue of ineffective assistance of trial counsel in his response to the no-merit report because "the evidence he submitted in his [WIS. STAT. §] 974.06 motion was not in the record at that time." He is essentially saying he could not raise ineffective assistance of trial counsel in response to the no-merit report because his postconviction counsel did not raise the issue in a postconviction motion. However, that is the point. A claim of ineffective assistance of trial counsel must first be preserved by a postconviction motion with the circuit court to be considered in a direct appeal. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 677-78, 556 N.W.2d 136 (Ct. App. 1996).

¶17 Donley also asserts a claim of ineffective assistance of postconviction counsel. The sole basis for this claim is postconviction counsel's failure to make a claim of ineffective assistance of trial counsel in her no-merit report. That claim is also barred for essentially the same reason—that is, Donley's failure to make a claim of ineffective assistance of postconviction counsel in his response to the no-merit report. When he received the no-merit report, it was evident his postconviction counsel did not claim ineffective assistance of trial counsel. In filing his response to the no-merit report, and raising issues not addressed in that report, Donley was clearly not relying upon his postconviction counsel to make all claims. As noted above, Donley was fully capable of arguing in his pro se response to the no-merit report that Attorney Sczygelski was ineffective for failing to conduct an adequate investigation. Since he failed to make a claim of ineffective assistance of trial and postconviction counsel in his response to the no-merit report, he is barred from now doing so under ***Escalona-Naranjo***.

II. Claim for Plea Withdrawal Based on Newly Discovered Evidence

¶18 For a defendant to obtain plea withdrawal based on newly discovered evidence, he or she "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. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). If these four conditions are satisfied, then the circuit court must ascertain "whether a reasonable probability exists that a different result would be reached in a trial." ***Id.*** "The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof." ***Id.***

¶19 We review the circuit court's determination—that Donley failed to establish the right to plea withdrawal based on newly discovered evidence—for an erroneous exercise of discretion. *See* ***id.*** (citing ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)). "A court properly exercises its discretion if it relies on the relevant facts in the record and applies the proper legal standard to reach a reasonable decision." ***Id.*** (citation omitted). "[I]f the circuit court's factual findings are unsupported by the evidence or if the court applied an erroneous view of the law," then the court erroneously exercised its discretion. ***Id.***

¶20 Donley argues three general categories of "newly" discovered evidence, all in the form of expert medical testimony: (1) evidence suggesting that shaking, as a sole mechanism, is unlikely to cause traumatic brain injury in infants and toddlers—coupled with evidence suggesting that if shaking could cause such an injury in infants and toddlers, it would also result in neck and/or spinal cord injury; (2) evidence demonstrating that short falls can cause subdural hemorrhage,

retinal hemorrhage, and encephalopathy in young children; and (3) evidence that bilateral retinal hemorrhages are not pathognomonic of shaken baby syndrome. We conclude the circuit court properly exercised its discretion in determining that this evidence was not newly discovered.

¶21 Donley first presents "evidence suggesting that shaking, as a sole mechanism, is unlikely to cause traumatic brain injury in infants and toddlers—coupled with evidence suggesting that if shaking could cause such an injury in infants and toddlers, it would also result in neck and/or spinal cord injury." *See supra* ¶20. However, prior to Donley's 2005 conviction, this information was already available to Donley.[3] Donley does not explain why he did not discover this evidence prior to his conviction. Therefore, the circuit court properly exercised its discretion in determining that Donley failed to demonstrate "that he was not negligent in finding th[is] information."

¶22 Donley next presents "evidence demonstrating that short falls can cause subdural hemorrhage, retinal hemorrhage, and encephalopathy in young children." *See supra* ¶20. However, Donley discovered evidence to that effect prior to his conviction. For example, a police report in this case indicates that Dr. Huntington, who conducted the initial autopsy, believed that Sawyer's injuries

[3] *See, e.g.*, F. A. Bandak, *A Biomechanics Analysis of Injury Mechanisms*, 151 FORENS. SCI. INT'L 71, 71 (2005) (concluding that "an infant head subjected to the levels of rotational velocity and acceleration called for in the SBS literature … would experience forces on the infant neck exceeding the limits for structural failure of the cervical spine" and that this finding is "in stark contradiction with the reported rarity of cervical spine injury in children diagnosed with SBS"); M. T. Prange et al., *Anthropomorphic Simulation of Falls, Shakes, and Inflicted Impacts in Infants*, 99 J. NEUROSURG. 143, 149 (2003) ("[T]here are no data showing that the [maximum change in angular velocity] and [peak angular acceleration] of the head experienced during shaking … is sufficient to cause [subdural hematoma] or primary [traumatic axonal injury] in an infant.").

were "consistent with a multiple impact event." Likewise, Dr. M. Shahriar Salamat concluded in his neuropathology report that Sawyer's injuries were "consistent with the clinical report of a fall down fourteen stairs." Moreover, the State's expert witnesses at the preliminary hearing conceded that Sawyer's injuries could have been caused by a fall. Doctor Vardis admitted that Sawyer's subdural hemorrhage could have been caused by a direct impact to the head during a fall down a flight of stairs, which could then have caused encephalopathy. Doctor Heckert admitted that bilateral retinal hemorrhaging could be caused solely by a subdural hemorrhage—and the resulting increase in intracranial pressure. Because Donley discovered this evidence prior to his conviction, the circuit court did not erroneously exercise its discretion in determining that Donley failed to establish he was entitled to plea withdrawal on the basis of "new" evidence to this effect.[4] *See*

[4] In support of his argument that this evidence regarding short falls is "new," Donley also cites various scientific papers published after his conviction. *See* D. Chadwhick et al., *Annual Risk of Death Resulting From Short Falls Among Young Children: Less than One in One Million*, 121 PEDIATRICS 1213 (2008); Nicole Ibrahim & Susan Margulies, *Biomechanics of the Toddler Head During Low-Heights Falls: An Anthropomorphic Dummy Analysis*, 6 J. NEUROSURG: PEDIATRICS 57 (2010); P.E. Lantz & D.E. Couture, *Fatal Acute Intracranial Injury, Subdural Hematoma, and Retinal Hemorrhages Caused by Stairway Fall*, 56 J. FORENS. SCI. 1648 (2011); Chris Van Ee et al., *Child ATD Reconstruction of a Fatal Pediatric Fall* (ASME INT'L MECH. ENG'G CONGRESS & EXPOSITION, Nov. 2009). Although these particular papers—and the information contained within—are "new" in the sense that they were published after Donley's conviction, the circuit court correctly concluded that this evidence "is merely cumulative to the evidence available at the time of Donley's plea in 2005." *See* ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (defendant not entitled to new trial based on newly discovered evidence when the new evidence is merely cumulative).

Moreover, the "new" evidence Donley presents regarding short falls consists of expert medical testimony. Given the fact that Donley knew short falls could cause subdural hemorrhage, retinal hemorrhage, and encephalopathy in young children in 2005, this expert testimony is simply the "newly discovered importance of evidence previously known and not used" and, therefore, does not constitute "newly discovered evidence." ***Vara v. State***, 56 Wis. 2d 390, 394, 202 N.W.2d 10 (1972).

Edmunds, 308 Wis. 2d 374, ¶13 (evidence must be discovered after defendant's conviction to be considered new).

¶23 Finally, Donley presents "evidence that bilateral retinal hemorrhages are not pathognomonic of shaken baby syndrome." *See supra* ¶20. However, Donley also discovered evidence to this effect prior to his conviction. For example, in the police report we previously mentioned, Dr. Huntington informed an investigator that, in his view, retinal hemorrhages are not pathognomonic of shaken baby syndrome or non-accidental injury. Doctor Heckert also admitted during his preliminary hearing testimony that bilateral retinal hemorrhaging could be caused solely by a subdural hemorrhage and the resulting increase in intracranial pressure, thereby suggesting that retinal hemorrhages are not necessarily pathognomonic of shaken baby syndrome.[5] Thus, the circuit court properly exercised its discretion in determining that Donley failed to establish he was entitled to plea withdrawal on the basis of this "new" evidence.[6] *See* ***Edmunds***, 308 Wis. 2d 374, ¶13 (evidence must be discovered after defendant's

[5] Other sources of evidence at the time were consistent with those views. *See, e.g.*, P.E. Lantz et al., *Perimacular Retinal Folds From Childhood Head Trauma*, 328 BMJ 754, 756 (2004) ("Statements in the medical literature that perimacular retinal folds are diagnostic of shaken baby syndrome are not supported by objective scientific evidence.").

[6] In support of his argument that this evidence regarding retinal hemorrhages is "new," Donley also cites one scientific paper published after his conviction. *See* Alex V. Levin & Cindy W. Christian, *Clinical Report—The Eye Examination in the Evaluation of Child Abuse*, 126 PEDIATRICS 376 (2010). However, the circuit court correctly concluded that this evidence "is merely cumulative to the evidence available at the time of Donley's plea in 2005." *See* ***Edmunds***, 308 Wis. 2d 374, ¶13 (defendant not entitled to new trial based on newly discovered evidence when the new evidence is merely cumulative). Additionally, the "new" expert medical testimony Donley presents in regards to retinal hemorrhages is not newly discovered evidence because it simply reflects the "newly discovered importance of evidence previously known and not used." ***Vara***, 56 Wis. 2d at 394 (citation omitted).

conviction to be considered new and defendant must demonstrate he or she was not negligent in seeking the "new" evidence).

III. Discretionary Reversal in the Interest of Justice

¶24 Donley argues the real controversy was not fully tried and, therefore, he is entitled to withdraw his plea in the interest of justice under WIS. STAT. § 752.35.[7] Of course, because Donley plead no contest, there was no trial. Regardless of whether there was a trial or not, the statute grants this court discretionary reversal powers when the real controversy was not fully tried or it is probable that justice has for any reason miscarried. However, we have recognized that "[o]ur discretionary reversal power is formidable, and should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. Given our prior no merit review and Donley's failure to provide newly discovered evidence, Donley has not demonstrated this is one of the rare "exceptional cases" requiring discretionary reversal. *See* ***Henley***, 328 Wis. 2d 544, ¶25.

By the Court.—Order affirmed.

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

[7] Donley does not argue he is entitled to withdraw his plea because "it is probable that justice has for any reason miscarried." WIS. STAT. § 752.35; *see also* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990) (discussing the difference between "[t]he first category of cases [relating to] when the real controversy has not been fully tried" and "[t]he second class of cases … where for any reason the court concludes that there has been a miscarriage of justice"). Cases from our supreme court interpreting the power of the supreme court to reverse judgments under WIS. STAT. § 751.06 are equally applicable as interpreting the power of the court of appeals to reverse judgments under § 752.35. *See* ***Vollmer***, 156 Wis. 2d at 19.