COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2572 **Cir. Ct. No. 1995CF955367**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY JAMES JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Roy James Jones, *pro se*, appeals from a circuit court order denying his motion for postconviction relief and DNA testing pursuant

to WIS. STAT. §§ 974.06 and 974.07 (2009-10).[1] The circuit court concluded that Jones's § 974.06 claims were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). It denied Jones's motion for DNA testing because it concluded that Jones failed to meet the standards outlined in § 974.07. We affirm.

¶2 This is the sixth time that Jones has sought relief from this court since his 1997 convictions for kidnapping and sexually assaulting two teenage girls.[2] *See* ***State v. Jones***, No. 1998AP685-CR, unpublished slip op. (WI App June 29, 1999); ***State v. Jones***, No. 2004AP1836, unpublished slip op. (WI App Dec. 20, 2005); ***State v. Jones***, No. 2007AP2097-CR, unpublished slip op. (WI App Sept. 23, 2008); ***State ex rel. Jones v. Pollard***, No. 2008AP2589-W, slip op. (WI App Dec. 30, 2008); and ***State v. Jones***, No. 2010AP779, unpublished slip op. (WI App Jan. 11, 2011). We will not repeat the extensive recitation of facts or procedural history outlined in those decisions.

¶3 At issue in this appeal is the denial of the motion that Jones filed in the circuit court in August 2011 that sought relief pursuant to WIS. STAT. § 974.06 and WIS. STAT. § 974.07. We consider each of those bases for relief in turn.

I. Relief sought pursuant to WIS. STAT. § 974.06.

¶4 Jones's motion for relief pursuant to WIS. STAT. § 974.06 raises a host of issues. For instance, he asserts that: his trial counsel and postconviction counsel failed to recognize and investigate the fact that the police suspected other

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Jones also filed at least one *pro se* WIS. STAT. § 974.06 motion that was denied by the circuit court and not appealed.

men of being the perpetrator; questions remain about the initial DNA testing performed in this case; the State engaged in prosecutorial misconduct; and the victims' testimony concerning Jones's car was incredible.

¶5 To the extent Jones's motion raised issues that were already addressed in prior appeals, his challenges are barred. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). To the extent Jones's motion raised issues that he did not previously raise in his numerous postconviction motions, they are barred "absent a showing of a sufficient reason." *See* ***State v. Lo***, 2003 WI 107, ¶15, 264 Wis. 2d 1, 665 N.W.2d 756; *see also* ***Escalona-Naranjo***, 185 Wis. 2d at 185 ("Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.").

¶6 Jones's motion asserted that he had a valid reason for not raising numerous issues in his previous WIS. STAT. § 974.06 motions. He explained:

> The prison has a property limit restriction and when Jones began accumulating legal papers, it was decided he was over the allowable limit, so his excess legal papers were stored in a storage area where he did not have access to them. He had no idea or knowledge of certain discovery until only recently when he convinced prison officials to permit him access to his stored legal papers. It was at this time that Jones discovered this new information, which his attorn[ey]s also failed to argue. Therefore, Jones cannot be barred from bringing these new issues at this time, by way of no fault on his part, and by way of oversight on his counsel's part.

(Some uppercasing omitted.) We are not convinced that Jones has presented a valid reason to avoid the ***Escalona-Naranjo*** bar.

¶7 Jones has been filing *pro se* postconviction motions in this case since 2002. Jones does not assert that he ever notified the circuit court or this court that he lacked access to some of his legal papers, and we have not seen any reference to such a claim in the voluminous record. We reject Jones's attempt to assert that after nearly ten years of filing *pro se* motions and appeals, this court should allow him to raise new issues for the first time because he did not have access to certain documents that were taken from him when he accumulated too many legal papers. Jones's claim for relief pursuant to WIS. STAT. § 974.06 is barred. *See* ***Lo***, 264 Wis. 2d 1, ¶15; ***Escalona-Naranjo***, 185 Wis. 2d at 185.

II. Request for DNA testing pursuant to WIS. STAT. § 974.07.

¶8 Jones's motion sought postconviction DNA testing pursuant to WIS. STAT. § 974.07. In support, he argued that "DNA technology is constantly improving" and that the DNA evidence presented at trial has been called into question. He attached part of an article from a publication called "Prison Legal News" and cited a March 2010 Illinois case which, the State later pointed out, was withdrawn in June 2011. *See* ***People v. Wright***, Nos. 1-07-3106, 1-07-3464, 2010 WL 1194903 (Ill. App. Ct., June 3, 2011) (withdrawing opinion).

¶9 Requests for postconviction DNA testing are governed by WIS. STAT. § 974.07. Our supreme court has recognized that "the plain language of § 974.07(6) gives a movant the right to conduct DNA testing of physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material, *if* the movant meets several statutory prerequisites." ***State v. Moran***, 2005 WI 115, ¶3, 284

Wis. 2d 24, 700 N.W.2d 884. The first prerequisite is that "the movant must show that the evidence meets the conditions under … § 974.07(2)." ***Moran***, 284 Wis. 2d 24, ¶3. The conditions mandated by § 974.07(2) are:

> (a) The evidence is relevant to the investigation or prosecution that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect.
>
> (b) The evidence is in the actual or constructive possession of a government agency.
>
> (c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

Id.

¶10 The second prerequisite for DNA testing is that "the movant must comply with all reasonable conditions imposed by the court to protect the integrity of the evidence." ***Moran***, 284 Wis. 2d 24, ¶3. The third prerequisite is that "the movant must conduct any testing of the evidence at his or her own expense" or, "[i]f a movant seeks DNA testing at public expense, the movant must proceed under § 974.07(7)(a) or (b), and satisfy the heightened requirements in subsection (7)." ***Moran***, 284 Wis. 2d 24, ¶3.

¶11 Jones has previously sought postconviction DNA testing. Twice this court affirmed orders denying his request because he had not satisfied WIS. STAT. § 974.07(2)(c). *See* ***Jones***, No. 2010AP779-CR, unpublished slip op. ¶9; ***Jones***, No. 2007AP2097-CR, unpublished slip op. ¶11. Specifically, Jones refused to disclose the results of DNA testing his trial counsel had performed prior to trial that were never disclosed to the State or offered at trial. This court reasoned that

because it was unknown what evidence the defense tested, what methods were used, and what the results were, Jones "cannot show the evidence he seeks to have tested 'has not been previously subjected to forensic … testing[.]'" ***Jones***, No. 2010AP779-CR, unpublished slip op. ¶10 (quoting § 974.07(2)(c); ellipses and bracketing in original).

¶12 In the WIS. STAT. § 974.07 motion now before this court, Jones for the first time disclosed what purports to be a three-page report from GeneLex laboratory, dated January 30, 1997, which concludes that Jones "would be excluded as the donor of the human DNA recovered from" the underwear of victim Easter B. The State notes that the report "is a completely unauthenticated document" that appears to be incomplete.[3] Even assuming that the document is authentic, Jones still fails to satisfy the statutory requirements for DNA testing, for reasons explained below.

¶13 We begin our analysis by discussing Jones's motion, which stated that "[t]he evidence [he] primarily wants tested, has never been subjected to testing, that being the head and pubic hairs" of both victims. He also implied that he would like to again test the clothing of both women, "using a scientific technique that was not available previously."

¶14 Jones's motion did not address the issue of who should pay for the DNA testing, but in his reply to the State's circuit court brief, Jones "request[ed] that the cost of testing be assessed against the county and state." He added:

[3] We also note that there are some typographical anomalies that call into question the document's authenticity, as does the fact that trial counsel chose not to introduce this supposedly exculpatory report at trial.

"However, what the defendant is willing to submit to is that the Court order that money from his [prisoner] release account be used to cover testing costs, and any costs beyond that be assessed to the state." Later in his brief, he reiterated:

> Defendant further moves the Court to either order that the county and state pay the costs of said testing, or order that money be used from Jones's [prisoner] release account to cover the costs thereof, and any additional costs be met by the county and state, since Jones is indigent, without adequate funds, and due to his wife's medical emergency which now makes it impossible for her to cover the costs as previously planned on.

We do not view Jones's statements as unequivocal offers to pay all of the costs of DNA testing, and we infer that the circuit court did not either, because it analyzed whether Jones met the requirements of WIS. STAT. § 974.07(7), which applies when the State is asked to cover the costs of DNA testing. *See* ***Moran***, 284 Wis. 2d 24, ¶3. We will likewise analyze whether Jones satisfied § 974.07(7).[4]

¶15 The circuit court denied Jones's request to test the DNA evidence related to victim Aleisha H. because it has been destroyed and cannot be subjected to testing. We agree with the circuit court that Jones cannot meet the requirement of WIS. STAT. § 974.07(2)(b) ("The evidence is in the actual or constructive possession of a government agency."). Jones complains about the fact that this evidence is no longer available, but he was notified in December 2007 that

[4] Jones asserts for the first time in his appellate reply brief that his request for DNA testing should be considered under WIS. STAT. § 974.07(6), which applies where "the movant conduct[s] any testing of the evidence at his or her own expense." *See* ***State v. Moran***, 2005 WI 115, ¶3, 284 Wis. 2d 24, 700 N.W.2d 884. We reject Jones's attempt to recharacterize the motion he filed in the circuit court. This court is reviewing the circuit court's order denying a motion that asked for the State to cover some or all of the costs of DNA testing; we are not considering a new request that Jones be allowed to conduct DNA testing entirely at his own expense. The circuit court properly analyzed Jones's request under § 974.07(7) and on appeal, we review the circuit court's analysis of the motion before it.

evidence pertaining to Aleisha H. had been destroyed. Jones has not shown that the issue of whether certain evidence should have been destroyed years ago is relevant to the analysis of a current request for DNA testing pursuant to § 974.07. We reject his one-paragraph argument that the circuit court "improperly addressed the issue of the [S]tate's destruction of evidence" because it is not developed and offers no legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we will not address issues on appeal that are inadequately briefed). We conclude that because the State no longer has evidence related to Aleisha H., § 974.07(2)(b) was not satisfied and the circuit court properly denied Jones's request to conduct DNA testing on evidence concerning Aleisha H. *See* ***id.***

¶16 Whether the circuit court properly denied Jones's request to previously tested clothing and hair fibers collected from Easter B.—which have not been destroyed—requires more analysis. We begin with WIS. STAT. § 974.07(2)(c).

¶17 Jones's motion suggested that he wanted to retest Easter B.'s clothing. It is undisputed that before the trial, the clothing was subjected to a Polymerase Chain Reaction (PCR) DNA test by the State and, according to Jones, by the defense. Jones's motion asserted that he has located a laboratory that uses a scientific technique that would provide a more accurate result. In support of his assertion, Jones attached a single page from a brochure from Orchid Cellmark, a company which claims to be "a world leader in forensic DNA testing." The brochure indicates that it is "one of a few private laboratories to offer Y Chromosome STR and Mitochondrial DNA testing services." However, Jones did not provide sufficient information demonstrating that those tests could be used to test the clothing in this particular case and that the testing would be more accurate

than the PCR testing that was used in this case.[5] We agree with the State: "Jones'[s] claim is conclusory. The Orchid Cellmark information simply describes some of the company's testing techniques. The remainder of Jones'[s] submission is devoid of any competent, expert evidence as to how and why any of those techniques would be reasonably likely to produce more accurate results in this case." We affirm the circuit court's conclusion that Jones's request to retest the clothing failed to satisfy WIS. STAT. § 974.07(2)(c).

¶18 Jones's motion also indicated that certain hairs had never been tested and that he should be allowed to have them tested by Orchid Cellmark. While it is undisputed that the *State* never tested the hairs, Jones's report on the defense's testing of Easter B.'s underwear does not eliminate the possibility that the *defense* tested the hairs. But assuming the hairs were not tested, then Jones would appear to have satisfied WIS. STAT. § 974.07(2)(c), because he seeks to test evidence that "has not previously been subjected to forensic [DNA] testing." *See* ***id.*** Nonetheless, his motion was properly denied because he failed to satisfy § 974.07(7).

¶19 Specifically, we agree with the circuit court that Jones failed to show that if the results of DNA testing of the hair had been known, Jones would not have been prosecuted or convicted, *see* WIS. STAT. § 974.07(7)(a), or "the outcome of the proceedings … would have been more favorable to" him, *see* § 974.07(7)(b)1. As the circuit court explained, testing of the hair "is not

[5] Jones is not qualified to provide a medical opinion that the PCR evidence in his case was "seriously flawed" and resulted in a misidentification, as he asserted in his motion. The excerpt of an article from a publication called "Prison Legal News" and Jones's citation to criminal case that was ultimately withdrawn are likewise insufficient evidence that the DNA evidence introduced in Jones's case was inaccurate.

warranted because favorable testing would not undermine confidence in the outcome due to the DNA link with the defendant's semen on the victim's underwear." In other words, even if there were hairs from other people found on Easter B., that would not negate the fact that DNA testing linked Jones to the semen found in Easter B.'s underwear.

¶20 For the foregoing reasons, we affirm the circuit court's order denying Jones's motion to conduct DNA testing on certain hairs and clothing from the two sexual assault victims in this case.

By the Court.—Order affirmed.

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