**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 5, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP1194** **Cir. Ct. No. 1996CF964321B**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EDWARD LEON JACKSON, SR.,**

**DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Edward Leon Jackson, Sr., appeals pro se from an order denying his postconviction motions seeking a new trial based on newly discovered evidence and sentence modification based on new factors. We affirm

the order, as the supporting affidavit to which Jackson points may have been newly discovered but the information in it is not, so he is not entitled to a second trial. Likewise, the facts he claims are new factors are not new and so do not warrant sentence modification.

¶2 In August 1996, Jackson and four others were arrested as they sat in a parked car in front of the home of Christopher Jones. Police were acting on a tip from an informant—Jones—that the five were planning to firebomb the home of a law enforcement officer, just blocks from Jones's residence. The arrestees were the driver, Duane Brown, the front-seat passenger, James Tate, and the rear-seat passengers, Tyrone Stallings, Joseph Davis, and Jackson. Police found three homemade Molotov cocktails in paper bags on the floor of the rear seat of the car. When police removed Jackson from the car, a cigarette lighter fell out. Brown and Tate had guns with multiple live rounds of ammunition. A third gun was on the rear seat. The person who conceived the plot—Jones—agreed to give each man $500 for firebombing the house and then shooting anyone who tried to flee.

¶3 Jackson was charged with being party to the crimes of conspiracy to commit first-degree intentional homicide, conspiracy to commit arson, and possession of a firebomb. He first told police that he knew nothing of the plan and believed they were just going to buy some marijuana from Jones. On further questioning, he admitted his involvement in "Operation Push" in great detail and said he agreed to participate because he needed the money. At trial, testifying in his own defense, he reverted to his initial statement and said he was coerced to falsely admit involvement by the detective's promises of federal immunity, release from custody, and witness protection. He admitted carrying to the car a paper bag that he could tell held a bottle and that smelled of gasoline, but he disavowed any knowledge of the actual contents. He said the lighter was to light a cigarette.

¶4 The interviewing detective denied telling Jackson he would receive federal immunity, as the case was solely in the city's jurisdiction, or be placed in witness protection, making any promises, or providing Jackson with any of the details his confession contained about the conspiracy. Davis testified on rebuttal that the conspiracy included Jackson at every step and, in fact, that Jackson told him about the firebombing plan and the $500 payment.

¶5 A jury found Jackson guilty on all three counts. He received a sixty-two-year sentence.

¶6 In 1997, Jackson filed a WIS. STAT. § 974.02 (2013-14)[1] postconviction motion alleging ineffective assistance of trial counsel and seeking a reduced sentence. The motion was denied. He appealed the denial of his motion but voluntarily dismissed the appeal. In 1999, 2000, 2003, and 2010, he filed motions pursuant to WIS. STAT. § 974.06. All were denied.

¶7 In May 2015 Jackson filed two more WIS. STAT. § 974.06 motions, the first for sentence modification based on new factors and the second for a new trial based on newly discovered evidence. The grounds for the first were that the sentencing court relied on inaccurate information and, based on that, found his character flawed. The grounds for the second were a February 2015 affidavit from co-actor Stallings. In it, Stallings averred that he could say "with … 100% certainty that Joseph Davis lied" in his trial testimony; that Stallings prepared the firebombs, recruited Davis into the conspiracy, and explained the details to Davis; that Jackson was in the car under the belief that the group was going to buy

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

marijuana; and that Stallings would have disclosed the affidavit statements to Jackson's trial counsel and testified to those facts had he been called to testify.

¶8 The circuit court denied both motions in a single order without a hearing. It concluded that Jackson did not show a new factor and that there was no reasonable probability that the outcome of the trial would have been any different had Stallings testified consistent with his affidavit. This appeal followed.

¶9 Jackson contends he was entitled to a hearing on his motions because the allegations, if true, established the existence of newly discovered evidence warranting a new trial. He argues that the Stallings affidavit supports his exculpatory version of events and demonstrates that Davis committed perjury when he testified that Jackson had a role in the conspiracy.

¶10 Whether a motion alleges sufficient facts that, if true, would entitle a defendant to relief is a question of law we review de novo. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the defendant's motion raises such facts, the circuit court must hold an evidentiary hearing. ***Id.*** "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.***

¶11 To prevail on a claim based on newly discovered evidence, a defendant must show by clear and convincing evidence that the evidence was discovered after conviction, without negligence on his or her part, and must be material and not cumulative. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If these four criteria are proved, the circuit court must determine whether a reasonable probability exists that a new trial would produce a

different result, that is, "a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt." ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (alteration in original; citation omitted). "If the newly discovered evidence fails to meet any one of these tests, the moving party is not entitled to a new trial." ***State v. Sarinske***, 91 Wis. 2d 14, 38, 280 N.W.2d 725 (1979). A motion for a new trial based on newly discovered evidence is addressed to the sound discretion of the circuit court. ***State v. Edmunds***, 2008 WI App 33, ¶8, 308 Wis. 2d 374, 746 N.W.2d 590.

¶12 The Stallings affidavit is newly discovered because it was produced eighteen years after Jackson's conviction. The facts it recites about Davis' alleged perjury, however, are not new.

¶13 Jackson asserted in his 1997 postconviction motion that Davis lied. He supported his claim with two police reports of which he became aware in January 1997. One related to the statement of Kiesha Brown who said that on the day before or the day of the planned firebombing she overheard Duane Brown, Tate, Stallings, Davis, and Jones, the informant, discussing "getting paid their money" and that Jackson was not among them. The other related to the statement of Timothy Dembry who said that Davis and Stallings unsuccessfully attempted to recruit him to join the firebombing plot. He did not mention Jackson. Jackson contended in his 1997 motion that Brown's and Dembry's statements would have contradicted Davis's testimony that Davis only heard about the firebombing plan and payment from Jackson and that Jackson recruited him.

¶14 We turn to whether Jackson was negligent in seeking the potentially exculpatory evidence. Stallings avers in his affidavit that he knew Jackson since

before their arrest, that someone named "Tim," rather than Jackson, was to be the fifth conspirator, and that he, Stallings, would have been willing to testify on Jackson's behalf at trial. Jackson does not explain why, if they were acquainted, he did not explore Stallings' knowledge and willingness to testify much earlier. Jackson fails to clearly and convincingly show that he was not negligent in bringing Stallings' assertions forth sooner.

¶15 The facts contained in Stallings' affidavit also are cumulative. There was trial evidence of Jackson's noninvolvement in the conspiracy—his original exculpatory statement and his own testimony. The jury rejected that evidence in the face of his detailed confession and the testimony of the detective to whom he confessed. Stallings' testimony would hardly change the result.

¶16 The circuit court concluded that there was not a reasonable probability that the outcome of the trial would have been any different if Stallings had testified consistent with his affidavit because the affidavit "flies in the face of Jackson's detailed statement to police acknowledging his participation in the conspiracy." It found that Jackson's "incredulous" (sic) retraction of his inculpatory statement would have been no less incredible even with favorable testimony from Stallings.

¶17 We must agree. Davis testified that Jackson was fully aware of and involved in the conspiracy. Stallings would have testified that Jackson was not. Jackson's testimony and police statements supported both views. The inculpatory

version gave significant detail,[2] shoring up Davis's testimony. In addition, Dembry's claim that Davis and Stallings tried to recruit him does not disprove that Jackson also did not attempt to recruit Davis, as Davis testified, nor does it disprove that Jackson was not already a conspirator or later became one.

¶18 Further, Jackson's claimed reason for changing his story is illogical. If, as he first asserted, he was an innocent occupant in the car, he would have no need of immunity. And having been adjudicated delinquent eight times, he would have known immediate release was unlikely by confessing to conspiring to commit first-degree intentional homicide. Beyond that, he, Davis, and Stallings each carried a bagged bottle smelling of gasoline to the car. The obvious inference is that he knew this was not a simple marijuana run.

¶19 Because the facts recited in Jackson's postconviction motion and Stallings's affidavit fail the newly discovered evidence test, they provide no basis for relief. The circuit court thus properly denied the motion without a hearing.

¶20 We likewise conclude that the circuit court properly exercised its discretion in denying Jackson's motion for sentence modification based on a new factor. A circuit court may modify a defendant's sentence upon a showing of a new factor. *See* ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must show by clear and convincing evidence that: (1) a new factor exists and (2) the new factor justifies sentence modification. ***Id.***, ¶¶36-37.

[2] For example, Jackson directly quoted Brown, the driver, as saying, "We are going to do this motherf----r cop because he set up one of our guys," then later had the detective cross out "cop" and insert "5-0," a street term for police derived from television's "Hawaii 5-0." Jackson also inserted a handwritten sentence explaining that police found three socks in the car because Jones told them to wipe their fingerprints off the bottles.

A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties." ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. ***Id.***, ¶33. If the facts do not constitute a new factor as a matter of law, a court need go no further in the analysis. ***Id.***, ¶38.

¶21 Jackson cited as new factors that the sentencing court allegedly relied on inaccurate information and disparaged his character.[3] Specifically, he contended the court believed that he testified falsely, which showed a flawed character, that Davis told the truth, and that two women were pregnant by him at the same time, demonstrating a lack of consideration for the women and the children. A paternity test later showed that one of the children, Edward Jackson III, was not his. The circuit court found that these were not new factors and could have been raised in prior motions.

¶22 We agree. A motion requesting sentence modification alleging a new factor is not subject to the "successive motion" bar under WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). ***State v. Grindemann***, 2002 WI App 106, ¶19 n.4, 255 Wis. 2d 632, 648 N.W.2d 507. The court's point, however, was that these are not new factors.

¶23 Jackson's and Davis's testimonies contradicted each other. Besides that we accept the trial court's credibility determinations, ***State v. Pote***, 2003 WI

[3] Jackson did not raise the Stallings affidavit as a new factor in his motion for sentence modification and does not raise it in the sentence modification portion of his appellate brief.

App 31, ¶17, 260 Wis. 2d 426, 659 N.W.2d 82, Jackson has contended that Davis lied since 1997. In fact, he raised and abandoned that claim, as well as a claim that trial counsel should have called Kiesha Brown and Dembry as witnesses to bolster his testimony and undermine Davis's testimony, when he voluntarily dismissed his direct appeal of his 1997 postconviction motion. The paternity test also is not new. According to the lab report, Jackson's blood was drawn in October 1997, seven months postsentencing.[4] The baby was named Edward Jackson III, suggesting that Jackson's paternity was not wholly unlikely. The circuit court did not erroneously exercise its discretion in denying the motion to modify based on a new factor.

¶24 Jackson next contends that his conviction resulted from "outrageous government misconduct." He points to a December 1996 letter the district attorney's office sent to defense counsel advising that the State believed that Jones put the conspiracy in motion, then approached police to act as an informant to mitigate the State's sentencing recommendation in his own felony drug case. Jackson asserts that "[t]he government's agent created the crime" for which he was convicted.

¶25 We reject his argument. For one thing, the letter expressly stated that Jones acted "obviously without the concurrence" of the police department. Jones did not hatch the plan under the aegis of the government.

[4] The report, dated March 26, 2001, indicates the mother's and child's blood samples were taken on March 9, 2001. Even if that is the first that Jackson learned he was not the father, it still was much too late to allege fourteen years later in his 2015 postconviction motion that it constitutes a new factor.

¶26 More to the point, a claim that could have been raised on direct appeal or in a previous WIS. STAT. § 974.06 postconviction motion is barred from being raised in a subsequent § 974.06 postconviction motion unless a sufficient reason is identified for not raising the claim earlier. ***Escalona-Naranjo***, 185 Wis. 2d at 185. Jackson gives no reason, let alone a sufficient one, for not raising it earlier.

¶27 In a final effort to gain reversal, Jackson contends that the combined effect of the alleged errors warrants a new trial in the interest of justice pursuant to our discretionary reversal authority under WIS. STAT. § 752.35. He contends that the jury did not have the opportunity to hear important evidence—the testimony of Stallings, Dembry, or Keisha Brown—bearing on the critical issue of whether he was a co-conspirator. He argues the jury should have been able to hear and weigh their testimony against Davis's testimony and his confession.

¶28 We already have found Jackson's arguments to be unavailing. Combining them adds nothing. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). The State's case was strong. Our review of the record satisfies us that Jackson received a fair trial.

*By the Court*.—Order affirmed.

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