

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1502

Cir. Ct. No. 1996CF298

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLARENCE GIVENS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Clarence Givens appeals from the order denying his motion for postconviction relief. He argues that he is entitled to a new trial because a witness against him has recanted her testimony. Because we conclude

that Givens has not corroborated the recantation testimony, we affirm the order of the circuit court.

¶2 Givens was convicted in 1996 of one count of delivery of cocaine and three counts of delivery of heroin, all as a repeat offender. The charges were based on four controlled buys that were arranged by law enforcement with the assistance of an informant, Karen Hicks, who at that time was known as Karen Franklin. Hicks testified at Givens' trial. The court sentenced Givens to 110 years in prison. We affirmed the judgment and an order denying Givens' motion for sentence reduction. See *State v. Givens*, 217 Wis. 2d 180, 580 N.W.2d 340 (Ct. App. 1998).

¶3 In 1999, Hicks sent Givens a letter that recanted some of her trial testimony. In 2007, Givens filed a motion under WIS. STAT. § 974.06 (2005-06),¹ asserting that Hicks' recantation constituted newly discovered evidence and, based on this evidence, he was entitled to a new trial. The circuit court held a hearing on the motion and Hicks testified. After hearing Hicks' testimony, the circuit court denied the motion. The court found that Hicks' testimony was "inherently inconsistent," and denied the motion.

¶4 Givens, here, renews his argument that Hicks' testimony was newly discovered evidence, and he is entitled to a new trial.

"Motions for a new trial based on newly discovered evidence are entertained with great caution." We will affirm the trial court's denial of such a motion as long as it has a reasonable basis and is made in accordance with accepted legal standards and facts of record. On appeal, we

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

review the trial court's determination for erroneous exercise of discretion.

In order to grant a motion for a new trial based on newly discovered evidence, a defendant must show that: (1) evidence was discovered after trial; (2) the defendant was not negligent in failing to discover the evidence before trial; (3) the evidence is material; (4) the evidence is not cumulative; and (5) there exists a reasonable probability of a different result at a new trial.

State v. Morse, 2005 WI App 223, ¶¶14-15, 287 Wis. 2d 369, 706 N.W.2d 152 (citation omitted). “Finally, when the newly discovered evidence is a witness’s recantation, we have stated that the recantation must be corroborated by other newly discovered evidence.” *State v. McCallum*, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997) (citation omitted).

¶5 The State concedes, and we agree, that Givens has established the first four elements of the newly discovered evidence test. We conclude, however, that we do not need to reach the question of whether there is a reasonable probability of a different result because Givens has not provided any corroboration for Hicks’ recantation. “Recantations are inherently unreliable,” because the recanting witness is admitting that he or she has lied under oath. *Id.* at 476. Because at times there is no physical evidence or witnesses to corroborate the recanting witness, the corroboration element may be met by showing that there is a feasible motive for the initial false statement and there are circumstantial guarantees of the trustworthiness of the recantation. *Id.* at 477-78.

¶6 Hicks’ recantation testimony was, as the circuit court found, “inherently inconsistent,” and nearly incoherent. Her testimony was not as much a recantation as a statement that she was using drugs at the time of Givens’ first trial and had a faulty memory. She did not offer a feasible motive for why the initial statement was false. In fact, she stated that she had testified truthfully at Givens’

trial. Further, there were no circumstantial guarantees of trustworthiness. Hicks' statements were inconsistent with each other as well as with the affidavit she had signed and submitted in support of the motion. Because Givens did not corroborate the asserted recantation, he has not established that he is entitled to a new trial. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

