

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 11, 2009**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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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. 2008AP896**

**STATE OF WISCONSIN**

**Cir. Ct. No. 1996CF961013**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ROBERT E. BOOTH,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
PATRICIA D. McMAHON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Robert E. Booth appeals *pro se* from a postconviction order denying his motion for a new trial. The issues are: (1) whether Booth is entitled to a supplemental evidentiary hearing to establish an agreement between the State and its principal witness, Booth's brother Levi,

which would have dissuaded Booth from pleading guilty to a reduced charge; and (2) whether Levi recanted his testimony incriminating Booth, constituting newly discovered evidence.<sup>1</sup> We conclude that: (1) Booth is not entitled to a supplemental evidentiary hearing to again attempt to prove an agreement that he was previously unable to prove and that is necessary to his plea withdrawal claim; and (2) Levi's purported recantation does not constitute newly discovered evidence because: (a) the trial court found Levi was not credible; and (b) in the context of Booth's stated reasons for pleading guilty to a reduced charge, the difference between Levi's original and postconviction testimony was inconsequential. Therefore, we affirm.

¶2 At the preliminary hearing, Levi testified that on March 9, 1995, he drove a van with Rosie Townsend and Booth to a location where Booth confronted the victim Johnny Martin ("Slim") about a debt. Levi testified that there was another man standing with Slim; Booth's counsel later identified this man as Slim's relative. Booth took out a handgun; Levi told him to put it away. Booth did so, but shortly thereafter shot Slim. Booth returned to the van, and Levi drove them away. Booth was charged with first-degree intentional homicide.

¶3 Several months later, Booth pled guilty to the reduced charge of first-degree reckless homicide as a party to the crime. Upon questioning about the reduced charge from the trial court, the prosecutor explained that the proposed testimony was more consistent with a reckless rather than an intentional charge.

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<sup>1</sup> Levi Booth is Robert's brother; both have the same surname. To avoid confusion, we refer to the defendant-appellant as Booth and to the witness by his first name, Levi. Some documents in the record refer to Levi as Leroy. On appeal, we refer to him as Levi, which is consistent with the parties' references to him.

Booth's counsel also explained in extensive detail how Booth actually felt threatened by Slim's relative, who Booth thought had a firearm. Booth felt threatened and took out his gun, which discharged during a struggle with Slim.

¶4 Booth was in court listening to his counsel's explanation of why he was pleading guilty to the reduced charge, and told the trial court that he understood, among other things, that by pleading guilty he was forfeiting any defenses he may have had to the charge, most specifically self-defense, and that he understood his liability both directly and as a party to the crime. At sentencing, defense counsel filed correspondence to supplement the presentence investigation report, reiterating Booth's version of events that described the homicide as a result of the gun discharging, as opposed to an intentional shooting. The trial court imposed a forty-year sentence.

¶5 Eleven years later, Booth moved for postconviction relief based on an affidavit from Levi explaining that he did not actually see Booth shoot Slim because he was talking to Townsend, and that he had implicated Booth because he was threatened with charges if he had refused. When confronted with his preliminary hearing testimony that Booth shot Slim once from close range and Slim fell to the ground, Levi insisted that he never testified that he actually "saw" the shooting. The bases for Booth's motion were that: (1) had he known about the deal between the State and Levi, he (Booth) would not have pled guilty even to the reduced charge of reckless homicide; and (2) Levi's recantation constituted newly discovered evidence.<sup>2</sup>

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<sup>2</sup> Booth raised the first issue as three, namely: (1) whether the State agreed not to prosecute Levi for his involvement if he agreed to implicate Booth; (2) whether Booth was informed of this agreement; and (3) if there was an agreement of which Booth was aware, (continued)

¶6 The trial court conducted an evidentiary hearing with testimony from Levi and from the two police detectives who had originally interviewed him in 1996. The trial court found that Levi was not credible. The only evidence of an agreement was from Levi because both detectives denied there was an agreement. Consequently, the trial court found that there was no agreement. Without an agreement, the trial court explained that there was no longer a basis for Booth's plea withdrawal claim. The trial court's determination that Levi was not credible also negated the validity of his postconviction testimony, obviating the newly discovered evidence claim.<sup>3</sup>

¶7 Booth appeals. He seeks a remand for a supplemental evidentiary hearing to question the prosecutor who issued the original charge on whether there was an agreement seeking Levi's cooperation in exchange for not issuing charges against him.

¶8 To allow plea withdrawal after sentencing, a defendant must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. Stated otherwise, the defendant must "show 'a serious flaw in the fundamental integrity of the plea.'" *Id.* (citations omitted).

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whether he would have pled guilty to the reduced charge. At the evidentiary hearing, the trial court proposed that Booth first proffer evidence on the sole issue of whether there was an agreement before proffering evidence on the other two issues. The trial court's finding that there was no agreement between the State and Levi rendered evidence on the second and third issues unnecessary.

<sup>3</sup> The trial court's determination that Levi was not a credible witness renders unnecessary any further analysis of whether Levi's postconviction affidavit and testimony actually constituted a recantation.

¶9 Booth constructs an agreement from Levi's testimony and inferences from all of the testimony. Levi testified there was an agreement, and Booth contends that the following inferences also compel the existence of an agreement: (1) Levi would not have incriminated Booth absent being compelled to do so; (2) Levi was not charged as even a party to the crime for his involvement; and (3) each of the detectives thought Levi should have been charged.<sup>4</sup> Realizing that he cannot overcome the trial court's denial on the sum total of this evidence and inferences supporting an agreement, Booth contends that the trial court should have directed the prosecutor to testify about whether there was an agreement for Levi's cooperation. The trial court adjudicates, not litigates; it is Booth's clear and convincing burden to accomplish plea withdrawal, not that of the trial court. Booth proceeding *pro se* on appeal now seeks a supplemental evidentiary hearing to elicit testimony from the prosecutor on his charging decisions and the existence of an agreement. The prosecutor was sequestered and available to testify; however, Booth's counsel expressly declined to call him as a witness. There is no valid reason to remand this matter for testimony that was previously available.

¶10 There is no credible evidence, much less clear and convincing evidence, of an agreement between the State and Levi. Without establishing an agreement, Booth has no basis for his plea withdrawal claim that had he known about the agreement he would not have pled guilty. We therefore affirm the trial court's ruling.

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<sup>4</sup> One of the detectives acknowledged that charging decisions are within the district attorney's prerogative; the detectives had no authority to offer this type of an agreement.

¶11 Booth's second claim is that Levi's alleged recantation constitutes newly discovered evidence. It is unnecessary to analyze whether Levi's postconviction testimony is newly discovered evidence because that testimony would not lead to a reasonable probability of a different outcome. See *State v. McCallum*, 208 Wis. 2d 463, 474-75, 561 N.W.2d 707 (1997).

¶12 The prosecutor's reason for reducing the charge was because Levi's original testimony was more supportive of a conviction for reckless rather than intentional homicide. Booth's version of the incident also supported a reckless charge. Levi's postconviction revelation that he did not "see" Booth shoot Martin, but only heard the gun discharge, fully supports the reduced charge of reckless homicide to which Booth had already pled guilty. Consequently, the disparity in Levi's original versus his postconviction testimony is inconsequential because the charge was reduced to coincide with the less incriminating testimony. Additionally, the trial court found that Levi was not credible. This finding, as supported by Levi's refusal to admit to his preliminary hearing testimony, is not clearly erroneous, and therefore, we will not reverse the trial court's credibility finding. See *State v. Terrance J.W.*, 202 Wis. 2d 496, 501, 550 N.W.2d 445 (Ct. App. 1996). For these reasons, Booth did not establish any newly discovered evidence. See *State v. Love*, 2005 WI 116, ¶¶43-44, 284 Wis. 2d 111, 700 N.W.2d 62.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).



