

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2012

Diane M. Fremgen
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. 2010AP2885

Cir. Ct. No. 2009CV177

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL. JOHN D. TIGGS, JR. N/K/A
A'KINBO J.S. HASHIM,**

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County:
CRAIG R. DAY, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 PER CURIAM. John Tiggs, n/k/a A'Kinbo Hashim, appeals an order affirming a decision of the Division of Hearings and Appeals that denied two motions to reopen his probation and extended supervision revocation hearings. In the motions to reopen, Hashim alleged newly discovered evidence

consisting of documents that challenged both the credibility of Hashim's accuser, J.B., and DNA evidence. The division concluded that Hashim failed to meet the criteria for a new hearing based on newly discovered evidence set out in *State ex rel. Booker v. Schwarz*, 2004 WI App 50, ¶12, 270 Wis. 2d 745, 678 N.W.2d 361. Hashim argues that he meets the *Booker* standard and that the newly discovered evidence, viewed cumulatively, establishes grounds for a new revocation hearing.¹ We disagree with Hashim, and affirm the order.

¶2 Hashim's probation and extended supervision were revoked based on findings that he sexually assaulted and battered J.B. After probable cause was found that Hashim committed a felony, pursuant to a plea agreement Hashim pled no contest to the battery count and the sexual assault charges were dismissed. Hashim filed a petition for a writ of certiorari resulting in the court issuing two orders. In one order, the court affirmed the division's revocation decision and, in the second, it remanded the matter for an evidentiary hearing on Hashim's claim of newly discovered evidence. Hashim filed a second request for a new hearing based on newly discovered DNA evidence. In support of his motions, Hashim presented four criminal complaints charging J.B. with crimes, and computer read-outs showing the disposition of those complaints. Hashim also presented an affidavit from an engineering manager stating that the driver's side front window of Hashim's car was "off the roller," causing the window to be open. Hashim contends that this evidence would show that J.B. could have called for help during

¹ Much of Hashim's argument relates to the initial revocation decision and the administrative law judge's decision to limit evidence regarding J.B.'s prior convictions. That issue was addressed and rejected in this court's October 20, 2011 opinion in appeal No. 2009AP3203 in which we affirmed the revocation of Hashim's probation and extended supervision. The present appeal is limited to the order denying the motions in which Hashim alleged newly discovered evidence.

the alleged assault. Finally, Hashim presented a crime laboratory report showing that no semen was detected on penal swabs, quantitative analysis of Hashim's penal swab showed a value that was too low to conclusively state that human DNA was present, and neck swabs taken from J.B. showed the presence of Hashim's DNA. The division denied both requests to reopen, and the circuit court affirmed those decisions.

¶3 A person seeking a new revocation hearing based on newly discovered evidence must satisfy a five-prong test: (1) the evidence must have come to the moving party's knowledge after the revocation hearing; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony that was introduced at the revocation hearing; and (5) it must be reasonably probable that a different result would be reached at a new hearing. *Booker*, 270 Wis. 2d 745, ¶12. The fifth requirement focuses on the outcome of a new hearing, not on how the newly discovered evidence might have affected the original hearing. We review the division's decision, not that of the circuit court. *Id.*, ¶10. Our review is limited to determining whether the division stayed within its jurisdiction, acted according to law, was not arbitrary, oppressive, or unreasonable, and whether the evidence was such that the division might reasonably make the decision that it did. *Id.* This court must affirm the division's decision if reasonable minds could arrive at the same conclusion. *Jackson v. Buchler*, 2010 WI 135, ¶39, 330 Wis. 2d 279, 793 N.W.2d 826.

¶4 The division correctly determined that the evidence Hashim presented regarding J.B.'s criminal charges and criminal history did not warrant a new revocation hearing. The four criminal complaints were not newly discovered evidence because Hashim had knowledge of them or could have discovered them

prior to the revocation hearing. Hashim had knowledge of J.B.'s legal problems as was shown by a July 1, 2008 statement where Hashim referred to a pending burglary charge against J.B. The administrative law judge also found that Hashim personally accessed CCAP prior to his revocation hearing and that he or someone on his behalf printed out case details from CCAP for one of J.B.'s cases the day before the revocation hearing.

¶5 Regarding both motions to reopen the revocation proceedings, Hashim failed to establish a reasonable probability that a new revocation hearing would yield a different result. The administrative law judge found that the documentary evidence cast doubt on J.B.'s credibility, but did not overcome the totality of the evidence corroborating J.B.'s incriminating statements. J.B.'s credibility is a matter determined by the division, not this court. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978). Regarding the DNA evidence, Hashim focuses on the lack of his DNA taken from a bite mark on J.B.'s eyebrow and the presence of his DNA on J.B.'s neck. Hashim contends this supports his contention that he gave J.B. hickeys, suggesting consensual contact with J.B. However, Hashim ultimately pled no contest to one count of battery to J.B. That conviction alone justifies revocation of Hashim's probation and extended supervision, regardless whether J.B. was sexually assaulted. *See Wagner v. State*, 89 Wis. 2d 70, 77, 277 N.W.2d 849 (1979) (“[I]t is a condition of a sentence to probation that the probationer lead a law-abiding life during the period of his or her probation.”). Therefore, there is no basis for believing that a new revocation hearing would yield a different result.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2009-10).

