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**DISTRICT II**

March 19, 2014

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You are hereby notified that the Court has entered the following opinion and order:

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2013AP1467-CR                      State of Wisconsin v. Joseph C. Konicki (L.C. #2009CF88)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Joseph C. Konicki was convicted upon a jury verdict of felony possession of THC, second or greater offense, and of three misdemeanors—possession of psilocybin, possession of cocaine, and possession of drug paraphernalia. We affirm the judgment of conviction and the order denying his postconviction motion requesting a new trial on grounds of newly discovered evidence. Based upon our review of the briefs and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).<sup>1</sup>

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Police executed a search warrant at Konicki's home. They found various drugs and drug paraphernalia around the house and a 151-gram bag of marijuana hidden in basement ceiling tiles. Konicki's girlfriend, Laura Hernandez, had spent the night at the house. Anthony Peters, Konicki's lifelong friend, had been occupying the basement for about a month. Both were present during the search; Konicki was not. Hernandez testified at trial that she knew nothing about the stash of marijuana. Peters did not testify. The jury found Konicki guilty.

Two years later, Konicki filed a postconviction motion for a new trial based on newly discovered evidence. The motion was supported by an affidavit in which Peters averred that some of the drugs and drug paraphernalia were his and that, unbeknownst to Konicki, he hid "a larger quantity of THC" in the basement ceiling tiles. Peters's testimony at the postconviction motion hearing corroborated that claim. The motion was denied. Konicki appeals.

To obtain a new trial on the basis of newly discovered evidence: (1) The evidence must have come to the moving party's knowledge after a trial; (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 [evidence] must not be merely cumulative ... ; and (5) it must be reasonably probable that a different result would be reached on a new trial. *State v. Kimpel*, 153 Wis. 2d 697, 701-02, 451 N.W.2d 790 (Ct. App. 1989). The defendant must prove the first four prongs by clear and convincing evidence. *State v. Armstrong*, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98. A motion for a new trial based on newly discovered evidence is addressed to the trial court's sound discretion. *State v. Sarinske*, 91 Wis. 2d 14, 37, 280 N.W.2d 725 (1979).

Konicki fails to establish that he was not negligent in discovering why, if the hidden marijuana truly was Peters's, he could not have learned that fact earlier. Hernandez testified she

knew nothing about it. If he believed her, and if the marijuana was not his, Peters would have been the logical person to query at once, as Peters was the only other resident, and he stayed in the basement. Instead, Konicki lamely contends that the police and his trial attorney failed to question Peters and relies on Peters's ownership claim made over two years later when he allegedly first realized Konicki was in trouble.

Further, Peters's claim was not credible. He testified that the marijuana in the ceiling was in a zip-lock baggie and that he hid it there "a few days" before it was found. The detective who found it, however, testified that the pot was in a vacuum-sealed bag that had to be cut open and that the bag was dusty and apparently had been chewed on by mice. Moreover, it strains belief that, for nearly two and a half years, Peters was unaware of the charges against one who he testified was "like a brother" to him or, alternatively, that he simply waited that long to try to exonerate his lifelong friend. A different result at a new trial is not reasonably probable.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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