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April 9, 2015

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

2014AP2317 State of Wisconsin v. Terrance D. Prude
(L.C. #1999CF5988)

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

Terrance D. Prude, *pro se*, appeals the order denying his postconviction motion for plea withdrawal. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21(1) (2013-14).[1]

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

Background

This is the sixth time Prude has sought relief from this court. Because the underlying facts and procedural history have been set forth before, they will not be repeated. *See e.g.*, ***State v. Prude***, No. 2004AP554-CR, unpublished slip op. (WI App May 9, 2006); ***State v. Prude***, No. 2007AP1077, unpublished slip op. (WI App May 13, 2008); ***State v. Prude***, No. 2008AP2552-CR, unpublished slip op. (WI App Mar. 8, 2011); ***State v. Prude***, No. 2013AP1513, unpublished slip op. ¶¶2-6 (WI App Dec. 10, 2013).

For purposes of resolving this appeal, it suffices to state that Prude pled guilty to five counts of armed robbery as a party to a crime. As relevant here, count one stemmed from the November 1999 armed robbery of Charles Berry, who reported that the defendant and two others pulled him from his car at gunpoint and drove away with the vehicle. Berry said that he personally observed Prude approach him while holding a handgun. Prude confessed that he was part of a group of four individuals who were involved in the offense.

In June 2014, Prude filed a WIS. STAT. § 974.06 motion to withdraw his guilty plea. He claimed to have newly discovered evidence, which consisted of his own affidavit and an affidavit of another inmate, Joeval Jones. Jones stated that he had told the prosecutor in Prude's case that the armed robbery charge contained in count one of the complaint was a fake robbery and that Prude was not involved. Prude averred that he would not have pled guilty to count one if he had known about this exculpatory information, which he first learned of in March 2014. He argued that the prosecutor failed to disclose this information in violation of WIS. STAT. § 971.23 and ***Brady v. Maryland***, 373 U.S. 83 (1963).

In a thorough written decision, the circuit court denied Prude's motion. The court explained that corroboration was required because Jones's affidavit "is predicated upon purported recantations of the victim [Charles Berry] and Darniel Johnson[, a co-actor in the armed robbery]." It summarized the evidence Prude offered:

> Jones starts out his affidavit by stating:
>
> > In the first few days of November in 1999, a guy I know named Charles Berry came to me and told me he needed to find someone he knew who could help him set up a fake robbery against himself because he had smoked up the marijuana that he was only supposed to sell on behalf [of] the people who he was selling it for. Charles said he needed it to look like a 'real robbery' because this would be the only way to prevent those people he was selling drugs for from trying to kill him behind him smoking it. Charles asked me if I had someone I knew who could help and I told him 'Yeah.'
>
> Jones further states that Charles Berry called him the next day and told him that he was "ready" and to meet him at a gas station. He states that after he hung up the phone, he had a female drop him, Manny Fresh and Darniel Johnson off at the gas station. Jones states that they walked up to Berry's Cadillac and knocked on the trunk. Berry got out, stating "Damn, you got here fast." Jones asked Berry in a joking manner, "Now what?" and Berry responded, "Shit, y'all just drive away and I'll run across the street to the other gas station and tell the clerk I got robbed for my car." Jones states that he agreed and he and his co-actors drove away in Berry's vehicle.
>
> Jones further states that in December 1999, Darniel Johnson wrote him from the Milwaukee County Jail telling him that he had been charged in the "fake robbery" and that he mistakenly implicated the defendant. Jones then states that in March 2000, he called the prosecutor in the defendant's case and told her that the defendant was not involved and that the armed robbery was set up by the victim.
>
> Jones'[s] entire affidavit is premised on his claim that Charles Berry orchestrated the armed robbery and enlisted Jones'[s] help in order to protect himself from drug dealers.

(Record citations omitted; punctuation as it appears in circuit court's decision.)

In addition to concluding that Prude's claim of newly discovered evidence failed because there was no corroboration, the circuit court held that Prude's claim of an alleged ***Brady*** violation failed because Prude had not established that Jones's alleged call to the prosecutor was exculpatory evidence. The circuit court explained that Jones's "'confession' was nothing more than an uncorroborated recantation being offered on behalf of the victim."

Discussion

A. Newly discovered evidence.

A defendant seeking to withdraw a guilty or no contest plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). This court reviews the circuit court's decision on post-sentence plea withdrawal for an erroneous exercise of discretion. ***Id.*** For plea withdrawal based on a claim of newly discovered evidence, the defendant must prove by clear and convincing evidence that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking [the] evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***Id.*** If those four criteria are met, the circuit court "must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.***

Prude disagrees with the circuit court's assessment that Jones's affidavit amounts to recantation evidence. He argues that Jones's statements to the prosecutor and in his affidavit are to impeach the victim. Even if we accept Prude's assessment that this was impeachment

evidence, we would nevertheless conclude that the circuit court properly determined an evidentiary hearing on Prude's claims was not warranted.[2]

There are no sworn statements from either Berry or Johnson. There is only Jones's version of his conversation with Berry and of a letter he purportedly received from Johnson, but did not provide with his affidavit. The circuit court, in its decision, expressed its skepticism as to the information in Jones's affidavit related to Johnson, who was prosecuted and convicted upon his own plea of guilty for his participation in the armed robbery of Berry, concluding: "It defies logic that Johnson would plea[d] guilty to a crime he helped stage. No explanation is offered for that. Nor is there any explanation for Johnson 'mistakenly' implicating the defendant."

We conclude that the newly discovered evidence before the circuit court was neither clear nor convincing so as to warrant an evidentiary hearing. Moreover, to the extent Prude's argument hinges on inadmissible hearsay found in Jones's affidavit, such evidence cannot provide a basis for challenging a conviction. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 253, 409 N.W.2d 432 (Ct. App. 1987).

B. ***Brady****/Discovery Violation*.

Additionally, Prude argues that the State's failure to inform him of Jones's call to the prosecutor was a violation of his due process rights. *See* ***Brady***, 373 U.S. at 87 ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

[2] We need not base our affirmance on the reasons relied upon by the circuit court. *See* ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds* ("An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court.").

evidence is material either to guilt or to punishment"); *see also* WIS. STAT. § 971.23(1)(h) (State is required to disclose "any exculpatory evidence" to the defense). The burden to show a ***Brady*** violation rests with the defendant. *See* ***State v. Harris***, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737. To satisfy the burden, a defendant must establish that the evidence at issue is favorable, the State suppressed the evidence, either willfully or inadvertently, and the defense was thereby prejudiced. *See* ***id.***, ¶15.

Regarding his alleged phone call to a prosecutor in March 2000, Jones states:

> In March of 2000, I called the Milwaukee District Attorney's Office and asked to speak with … the prosecutor of Prude's case. When I was eventually connected to [the prosecutor] I told her my name and conveyed to her that there was no crime committed against Charles Berry and that Prude was not involved in the case she's prosecuting Prude for. She asked me how did I know she was prosecuting Prude and I told her that Prude's co-defendant Darniel Johnson told me. She then asked me to explain to her what happened with Charles Berry and after I told her that it was me, Darniel Johnson and Manny Fresh who were involved in the fake robbery and she asked me "so you're saying that no crime was committed and that Charles Berry set it all up to look like a ['']robbery['] and that Prude was not involved" and I said "yes[."] She then told me that Prude had already given an incriminating statement against himself and further thanked me for such information and asked for all my contact information and I gave it to her.

Jones stated that he never contacted Prude or his lawyer because he assumed the prosecutor would tell them about this information. Prude, in his own affidavit, avers that the prosecutor never informed him or his lawyer about the call and that he would not have pled guilty if he had known this information.

The averments in Jones's affidavit relating to his contact with the prosecutor again fall short. There is only Jones's bald assertion that the call took place—and nothing else in the

record that demonstrates the State possessed any evidence whatsoever related to the supposed call. Additionally, as the State points out, "[i]f the prosecutor did actually receive such a phone call from Jones, the information she received was directly contradicted by the statements of the victim Berry and co-actor Johnson, as well as the confession of Prude himself, and therefore the information was not constitutionally material." *See* ***Harris***, 272 Wis. 2d 80, ¶13 ("In order to establish a ***Brady*** violation, the defendant must, in addition to demonstrating that the withheld evidence is favorable to him, prove that the withheld evidence is 'material.'"); *see also* ***Harris***, 272 Wis. 2d 80, ¶16 ("'[t]he mere possibility that an item of undisclosed information might have helped the defense ... does not establish materiality in the constitutional sense'") (brackets in ***Harris***; citation and one set of quotation marks omitted).

The circuit court properly concluded that Prude did not set forth a viable constitutional violation under ***Brady***.[3]

Upon the foregoing reasons,

IT IS ORDERED that the circuit court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

[3] In his appellate brief, Prude clarifies that he is not claiming, as a stand-alone issue, that he made a false confession. Prude acknowledges that any such claim would be procedurally barred. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994).