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September 22, 2015

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

2014AP1925 State of Wisconsin v. Antuan V. Little (L.C. #2009CF4131)

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

Antuan V. Little, *pro se*, appeals from an order of the circuit court that denied his second motion for reconsideration of an order that denied his motion for a new trial based on newly discovered evidence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] The order is summarily affirmed.

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

In 2007, J.B. accused Little of sexual assault. The district attorney declined to prosecute the case at the time, citing inconsistencies in J.B.'s statements. J.B. then recanted the allegations. In 2009, J.B. renewed her accusations against Little, telling investigators that she was doing so at her father's insistence. Little was charged with and, in 2010, convicted by a jury of one count of exposing a child to harmful materials and one count of first-degree sexual assault of a child. He was sentenced to a total of eleven years' initial confinement and six years' extended supervision. We affirmed the judgment in his direct appeal. *See* ***State v. Little***, No. 2011AP2431-CR, unpublished slip op. (WI App Jan. 3, 2013).

On April 24, 2014, Little moved for a new trial based on newly discovered evidence. Specifically, Little presented an affidavit from J.B.'s father, H.R. This affidavit states, in relevant part, that H.R. "believed J.B.'s allegations against Mr. Little, so [he] made sure that Little, got charged with sexual assault," that "J.B. was unwilling to testify against [Little]," and that "[o]n Jan 28th, 2010 [H.R.] coerced, and persuaded J.B. into testifying against Little." In his motion, Little asserted that H.R.'s "coercion forced the [State's] key witness to testify falsely against Little." The circuit court denied the motion on April 30, 2014, noting that there was nothing in H.R.'s affidavit to "support the proposition that the victim lied about what had occurred" and that Little "has not submitted any corroborating evidence for his claim that the victim's testimony was false."

On May 22, 2014, Little moved for reconsideration, asserting that a Facebook post from J.B. was a "new claim of rape"[2] and that while Little could not prove J.B. had lied, his evidence

[2] The post, as reproduced as an exhibit to Little's motion, bears a time stamp indicating that it was posted "51 minutes ago," but it has no other date or time indicators, and it mentions no names.

showed that she was incredible, so he should at least get an evidentiary hearing on his motion. The circuit court denied the motion on May 27, 2014, explaining that Little had shown no reasonable probability of a different result.

On June 10, 2014, Little filed a "supplemental" motion for reconsideration, arguing the allegations in his motion that J.B.'s statements were false were sufficient to get him an evidentiary hearing because he would be entitled to relief if that allegation were true. He also alleged that J.B.'s coerced testimony was a due process violation. On June 12, 2014, the circuit court again denied reconsideration.

Little filed a notice of appeal on August 18, 2014, indicating he was appealing the June 12, 2014 order. By order dated September 19, 2014, we directed the parties to address whether this court had jurisdiction to review the June 12, 2014 order. We issued the order because an appeal cannot be taken from an order denying reconsideration if the reconsideration motion presented the same issues as those determined in the order sought to be reconsidered. *See* ***Silverton Enters., Inc. v. Gen. Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). Little did not timely appeal from the April 30, 2014 order denying the motion for a new trial, so this court would lack jurisdiction to review the June 12 order if it raised the same issues determined in the April 30 order.

We now confirm our jurisdiction. The "new issues" test we are to apply in these situations is to be liberally applied. *See* ***State v. Edwards***, 2003 WI 68, ¶12, 262 Wis. 2d 448,

665 N.W.2d 136; ***Harris v. Reivitz***, 142 Wis. 2d 82, 88, 417 N.W.2d 50 (Ct. App. 1987). Though the issues raised in the second reconsideration motion relate to the newly discovered evidence claim of the original motion, the due process claim sufficiently presents a new issue to confer jurisdiction.[3] *See* ***Harris***, 142 Wis. 2d at 88.

A defendant whose postconviction motion alleges sufficient material facts that, if true, entitle the defendant to relief is entitled to a hearing on the motion. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does not raise sufficient facts or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court's decision to grant or deny a hearing is discretionary. *See* ***id.***

To prevail on a claim of newly discovered evidence, the defendant must show, "by clear and convincing evidence that '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted). If the defendant satisfactorily makes those showings, the circuit court then "'must determine whether a reasonable probability exists that a different result would be reached in a trial.'" *See* ***id.***, ¶44 (citation omitted).

[3] It is not dispositive to our jurisdiction that Little did not know he should appeal until the circuit court told him, with the second reconsideration motion, that his remedy was by appeal if he disagreed with the circuit court. It is also not dispositive to our jurisdiction that Little considered his "supplemental" reconsideration motion and the first reconsideration motion to be "one ongoing motion."

The circuit court originally determined that Little did not sufficiently allege a reasonable probability of a different result; its order denying reconsideration for a second time effectively affirmed that ruling.[4] We agree with the circuit court's conclusions.

"A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***Id.***, ¶44 (citation omitted; bracketed sections in ***Love***). H.R.'s affidavit indicates only that J.B. was an unwilling witness; there is no suggestion that she was an untruthful one. Absent other factual allegations, the simple fact that H.R. had to coerce or persuade J.B. to testify does not in and of itself make her testimony any less reliable or credible than if she were a fully willing witness. Further, Little does not demonstrate how this new evidence of J.B.'s unwillingness to testify and her father's coercion to do so, when added to the old evidence that was presented to the jury during trial, would create reasonable doubt as to his guilt.

Nor does H.R.'s persuasion or coercion rise to the level of a due process violation. Little tries to analogize his "involuntary testimony" case to cases involving convictions based on involuntary confessions. *See* ***Jackson v. Denno***, 378 U.S. 368, 376 (1964) ("[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession[.]").[5] But ***Jackson*** deals with the conviction of an accused based

[4] The circuit court appears to have assumed that Little fulfilled the first four prongs of the test. For purposes of this opinion, we do so as well, although we do question whether H.R.'s affidavit truly amounts to newly discovered evidence, considering that J.B. told investigators in 2009 that she was making a complaint against Little at her father's urging.

[5] Defendant Jackson was questioned while in the hospital, being treated for two serious gunshot wounds, while medicated and awaiting surgery.

on the accused's own involuntary confession. At issue in such a case is more than just due process—there is also a concern about the defendant's right against self-incrimination. *See* ***id.*** at 408 (Black, J., dissenting in part and concurring in part).

The concerns about compelled testimony are necessarily different. In fact, "compulsory process for securing favorable witnesses" and compelling their attendance for the defendant's case is itself a necessary component of due process. *See* ***State v. Schaefer***, 2008 WI 25, ¶63, 308 Wis. 2d 279, 746 N.W.2d 457. Thus, in the absence of other facts, the mere fact that a witness's testimony has been coerced, in the sense that the witness ultimately testified despite her desire not to do so, does not cause us due process concerns.

Because Little has not adequately alleged a reasonable probability of a different result at a new trial, the decision to grant or deny a hearing was a discretionary matter.[6] As such, we discern no erroneous exercise of discretion when the circuit court declined to grant the second motion to reconsider its order denying relief without a hearing.

IT IS ORDERED that the order is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals

[6] Little believes he was entitled to a hearing on his motion because he alleged that J.B. gave false testimony and, if that allegation were true, he would be entitled to relief. However, the allegations in a postconviction motion must not be conclusory. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Little's claim, that if J.B. had to be persuaded to testify, then the testimony must have been false, is conclusory.