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**DISTRICT I**

November 4, 2015

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

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2014AP1606 State of Wisconsin v. Darryl Ward (L.C. #2009CF1865)

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

Darryl Ward, *pro se*, appeals from a June 27, 2014 order of the circuit court that denied his motion for postconviction relief. 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] We summarily affirm the order.

Ward drove his car onto a sidewalk where a group of teenagers were walking, striking and injuring at least four of them. Ward admitted to the police that he had been driving the car.

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

According to the complaint, two passengers in the car, Jeremy Pierce and Hozae Carson, told the police that Ward had intentionally driven into the group of people on the sidewalk. After a jury trial, Ward was convicted of one count of first-degree reckless injury, using a dangerous weapon, three counts of first-degree recklessly endangering safety, all while using a dangerous weapon, and one count of failing to stop his vehicle at the scene of an accident to render aid. On appeal, his appointed appellate counsel filed a no-merit report. Ward responded to the report, raising issues he believed had merit. We affirmed Ward's conviction in a nine-page opinion. A year and a half later, Ward filed this collateral challenge to his conviction. The circuit court denied his postconviction motion.

Ward argues that there is newly discovered evidence showing that he was not at the scene of the crime. First, he presents an affidavit from Pierce, who states that Ward was not present in the car and that a person named Joe was driving. Pierce further avers that he lied to the police when he said Ward was driving and he recently learned the name of the actual driver, Joe, from another person. Second, Ward presents an affidavit from Darius Tharpe, who avers that a person named Hozae told him that Ward was not the driver. Tharpe also states that Hozae told him that a person named Joe had been driving the car.

A defendant seeking a trial on the basis of newly discovered evidence "must prove: (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." ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (quotation marks and citation omitted). If the defendant proves all four criteria, then the circuit court must determine whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt about the defendant's guilt. ***Id.***

"[W]hen the newly discovered evidence is a witness's recantation, … the recantation must be corroborated by other newly discovered evidence." ***State v. McCallum***, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997). "The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion." ***Plude***, 310 Wis. 2d 28, ¶31.

Tharpe's affidavit does not satisfy the test for newly discovered evidence because Tharpe states *someone else* told him that Ward was not at the scene and that a person named Joe had been driving. Tharpe's information about what Hozae purportedly told him is hearsay, which could not be admitted at trial. If the proffered evidence could not be admitted at trial, there is no reasonable probability that the evidence would change the jury's verdict. *See* ***id.***, ¶32.[2]

Turning to Pierce's affidavit, it must be corroborated by other newly discovered evidence because Pierce is recanting his prior statement to the police. *See* ***McCallum***, 208 Wis. 2d at 473-74. Tharpe's affidavit does not provide the necessary corroboration because the information in Tharpe's affidavit is inadmissible hearsay. Because Pierce's affidavit is not corroborated, it does not satisfy the test for newly discovered evidence under ***Plude***.

[2] Before discussing what Hozae told him about Ward, Tharpe states: "I already knew [Ward] was not there at the scene [based on] personal knowledge." Tharpe's one-line assertion that he "already knew" Ward was not on the scene based on personal knowledge is also not sufficiently detailed to constitute newly discovered evidence under ***Plude***. *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42.

Ward next argues that he received ineffective assistance of trial counsel because his lawyer did not subpoena the arresting police officer, who would have testified that Ward smelled like marijuana, which Ward contends would have supported his argument that his confession was involuntarily. This claim is barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). ***Escalona-Naranjo*** provides that a defendant must raise all grounds for relief in his first motion for postconviction relief or on direct appeal. *See* ***id.*** at 181. The procedural bar applies regardless of whether appointed appellate counsel files a no-merit report as long as the no-merit procedures were, in fact, followed during the direct appeal. ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574. Here, the no-merit procedure was followed: Ward responded to the no-merit report and we issued a nine-page decision detailing the reasons that there were no arguably meritorious appellate issues. Ward's claim is procedurally barred by ***Escalona-Naranjo*** and its progeny.[3]

Ward next argues that the circuit court did not establish that the complaint was factually adequate. We will not consider this claim because Ward did not raise it in the circuit court. *See* ***Jackson v. Benson***, 218 Wis. 2d 835, 901, 578 N.W.2d 602 (1998). He also failed to raise it during his direct appeal. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181. Finally, Ward argues that he received ineffective assistance of postconviction counsel because his postconviction counsel failed to discover the evidence he now proffers from Pierce and Tharpe. As previously explained, the affidavits fail to satisfy the test for newly discovered evidence. Failing to raise a

[3] Even if this claim were not barred, Ward has offered nothing to link the smell of marijuana to his argument that he lacked the mental ability to make a voluntary statement.

meritless argument does not constitute ineffective representation. ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996).

Upon the foregoing, therefore,

IT IS ORDERED that the June 27, 2014 order is summarily affirmed.

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