OFFICE OF THE CLERK
**WISCONSIN COURT OF APPEALS**
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

**DISTRICT II**

August 10, 2016

*To*:

Hon. Emily S. Mueller
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

W. Richard Chiapete
District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Nancy A. Noet
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

David McAlister Sr., #089161
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

---

2014AP2561 State of Wisconsin v. David McAlister, Sr. (L.C. #2005CF324)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

David McAlister, Sr. appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2013-14)[1] postconviction motion without an evidentiary hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. We conclude that the circuit court did not misuse its discretion when it denied the § 974.06 motion without an evidentiary hearing. We affirm.

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

McAlister was convicted of attempted armed robbery (threat of force), possession of a firearm by a felon, and armed robbery (threat of force). In the September 2009 decision affirming his conviction, ***State v. McAlister***, No. 2008AP2995-CR, unpublished slip op. (WI App Sept. 23, 2009), we rejected McAlister's challenges to the trial testimony of his alleged accomplices, Alphonso Waters and Nathan Jefferson. ***Id.***, ¶8. McAlister argued that Waters perjured himself at trial and both Waters and Jefferson were offered concessions for their testimony against him, which were not fully disclosed by the State. ***Id.***, ¶3. We held that the jury was informed of the concessions, even if Waters did not describe them accurately, ***id.***, ¶¶9-12, and the jury received appropriate jury instructions to assist in evaluating the testimony of Waters and Jefferson, ***id.***, ¶9. We held that the evidence to convict McAlister was sufficient, citing the testimony of Waters and Jefferson and how their testimony generally corresponded with the victims' description of events. ***Id.***, ¶¶20-21.

In May 2014, McAlister filed a *pro se* WIS. STAT. § 974.06 postconviction motion seeking a new trial on the grounds of newly discovered evidence. He offered the affidavits of three individuals, McPherson, Prince and Shannon, who claimed that Waters and Jefferson lied when they testified about McAlister's involvement in the charged crimes. In their affidavits, the three individuals described what McAlister contended was a conspiracy by Waters and Jefferson to frame him for the crimes.

Affiant McPherson stated that he was incarcerated with Waters during the period before Waters testified against McAlister. Waters, who did not like McAlister, shared his concern about his pending robbery charges and other crimes yet to be discovered and charged. Waters told McPherson that he and Jefferson were lying about McAlister's involvement in the robberies. Waters agreed to testify against McAlister in order to get concessions from the State, even

though that would require him to lie about McAlister's involvement. McPherson alleged that he and Waters rehearsed Waters's trial testimony.

Affiant Prince stated that he was in jail with Jefferson, who told him that Waters had instructed Jefferson to testify and say that another man orchestrated the robberies he and Waters were charged with committing. Five years later, while at Waupun Correctional Institution, Prince overheard another inmate discussing his own case. That inmate, McAlister, mentioned that two men, Waters and Jefferson, had set him up. Prince introduced himself to McAlister and told McAlister about his interactions with Jefferson.

Affiant Shannon also met Jefferson in jail. Jefferson told him that he and Waters were the only ones involved in the robberies. Jefferson suggested that if he and Waters told the same story and implicated McAlister, they might obtain concessions from the State in relation to their own charges.

The circuit court denied McAlister's WIS. STAT. § 974.06 motion without an evidentiary hearing. The court characterized the three affidavits as offering recantation testimony because they related the statements of witnesses who testified to the contrary at trial. The court found that the three affiants had "limited credibility," the recantations did not bear circumstantial guarantees of trustworthiness, and McAlister failed to show a "feasible motive" for the initial false statements.[2] The court also found that the credibility of Waters and Jefferson was challenged at trial in the context of the concessions they received from the State, and their

[2] The circuit court's recantation analysis is discussed in ***State v. Ferguson***, 2014 WI App 48, ¶¶24-25, 354 Wis. 2d 253, 847 N.W.2d 900.

motive to testify was presented to the jury. The court determined that McAlister did not meet his burden to show that there would be a reasonable probability of a different result had the evidence offered in the three affidavits been available to the jury. McAlister appeals

In ***State v. Sulla***, 2016 WI 46, 369 Wis. 2d 225, 880 N.W.2d 659, the court recently reaffirmed the analysis to be applied when a postconviction motion is denied without an evidentiary hearing. "[E]ven if the motion alleges sufficient nonconclusory facts," an "evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief." ***Id.***, ¶29 (citation omitted); ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334 (To be entitled to an evidentiary hearing on a WIS. STAT. § 974.06 motion, a defendant must allege sufficient material facts which, if true, would entitle the defendant to relief.). A circuit court has discretion to deny "even a properly pled motion" without an evidentiary hearing "if the record conclusively demonstrates that the defendant is not entitled to relief." ***Sulla***, 369 Wis. 2d 225, ¶30.

We may decide an appeal on grounds other than those used by the circuit court. *See* ***State v. Rognrud***, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990) (we may affirm on other grounds). We decide this appeal under the law of newly discovered evidence without the need to address whether the three affidavits also constituted recantation evidence. *See* ***State v. Ferguson***, 2014 WI App 48, ¶¶24-25, 354 Wis. 2d 253, 847 N.W.2d 900 (newly discovered evidence and recantation evidence discussed).

A defendant seeking a new trial on the basis of newly discovered evidence must show 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." ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60.

We conclude that the three affidavits McAlister submitted in support of his postconviction motion were merely an attempt to retry the credibility of Waters and Jefferson, whose credibility was well-aired at trial. Evidence does not warrant a new trial when, as here, it would merely tend to impeach the credibility of witnesses. ***State v. Machner***, 92 Wis. 2d 797, 806, 285 N.W.2d 905 (Ct. App. 1979). Because the three affidavits were cumulative, they did not satisfy the requirements for newly discovered evidence. ***Avery***, 345 Wis. 2d 407, ¶25. Therefore, McAlister did not allege sufficient material facts that, if true, would entitle him to the relief sought, i.e., a new trial. ***Balliette***, 336 Wis. 2d 358, ¶18.

The circuit court properly denied McAlister's WIS. STAT. § 974.06 motion without an evidentiary hearing.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed. WIS. STAT. RULE 809.21.

---

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