



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 I

October 24, 2016

To:

Hon. William S. Pocan
Milwaukee County Courthouse
901 N. 9th Street
Milwaukee, WI 53233

Michael C. Sanders
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Barrett, Clerk
Milwaukee County Courthouse
821 W. State Street, Room 114
Milwaukee, WI 53233

Kwesi B. Amonoo #297757
New Lisbon Corr. Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

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

2015AP1706

State of Wisconsin v. Kwesi B. Amonoo
(L.C. # 1995CF951175)

Before Kessler, Brennan and Brash, JJ.

Kwesi B. Amonoo, *pro se*, appeals from a circuit court order denying his postconviction motion for a new trial based on newly discovered evidence.¹ We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2013-14).² We summarily affirm the order.

¹ The Honorable William S. Pocan, who was assigned the case due to judicial rotation, denied the motion at issue on appeal.

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

This is the fourth time Amonoo has filed an appeal related to his convictions for two counts of attempted first-degree intentional homicide and four counts of first-degree reckless endangerment of safety. In his direct appeal, we summarized the facts of the case as follows:

Amonoo fired a gun at six people as they left a Kohl's Food Store shortly after having been angered by one of the six inside the store. Amonoo fired four or five shots from the middle of the street at the group. Two of the victims were hit in the chest with gunfire.

State v. Amonoo, No. 1996AP1761-CR, unpublished slip op. at 2 (WI App Sept. 19, 1997) (“*Amonoo I*”). Amonoo’s defense at trial was that he was not at the scene and was therefore not the person who fired the gun. We affirmed Amonoo’s convictions and the order denying his postconviction motion. *See id.*

About thirteen years after we affirmed his convictions, Amonoo filed a WIS. STAT. § 974.06 motion with the assistance of retained counsel. The motion was denied and we affirmed. *See State v. Amonoo*, No. 2011AP566, unpublished slip op. (WI App Jan. 24, 2012) (“*Amonoo II*”).

In 2013, Amonoo filed another WIS. STAT. § 974.06 motion and also sought a new trial based on newly discovered evidence. The circuit court denied the motion and we affirmed. *See State v. Amonoo*, No. 2014AP56, unpublished slip op. (WI App Oct. 7, 2014) (“*Amonoo III*”). In that decision, we described Amonoo’s motion with respect to newly discovered evidence: “Amonoo said he received a letter from Nakisha Sanders, describing the confession of David Walker to the shooting for which Amonoo is incarcerated. The motion includes an affidavit from Sanders, plus an affidavit from Marcus Johnson purporting to describe Walker’s confession to a ‘crime’ for which Amonoo is incarcerated.” *See id.*, ¶5. We continued:

Sanders and Johnson both provided Amonoo with affidavits. Sanders' affidavit, dated October 26, 2012, states, in pertinent part, "I have been trying to locate Kwesi Amonoo for years now to tell him that David Walker confessed to the shooting that Kwesi Amonoo was incarcerated for. David said he shot the 'Ricans' because they jumped him." Johnson's affidavit, signed on November 30, 2012, states:

[“]At Myrtle Pirant’s house on the eastside of Milwaukee in April 1995, I met with David Walker. He confessed to me that Kwesi was in jail for a crime that he (David) committed. He said that he shot some ‘ricans’ in retaliation for something they did to him. David confessed this to me, my fiancée, Myrtle, Sesi and Simeon. [H]e then went on to say that he robbed a store called Al’s on Center street. He said that he stole Al’s gun, a 38 and that[’]s the gun he used to get at the rican with that [sic] jumped him at school. Immediately upon seeing Mr. Amonoo I relayed this information to him.[”]

Id., ¶11 (some formatting altered; second set of brackets in *Amonoo III*). We also noted that Walker was not available to personally testify in any postconviction hearings because he committed suicide. *Id.*, ¶12.

Amonoo III stated the legal standards that apply to a motion for a new trial based on newly discovered evidence:

[T]he defendant 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 (quotation marks and citation omitted). “If the defendant is able to make this showing, then ‘the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.’” *Id.* (citation omitted).

Amonoo III, No. 2014AP56, unpublished slip op., ¶10. We also recognized that pursuant to WIS. STAT. § 908.02, “[h]earsay evidence is generally inadmissible at trial.” See *Amonoo III*, No. 2014AP56, unpublished slip op., ¶12. We continued: “There are, of course, exceptions to

this rule, and Amonoo attempts to show four different ways in which the hearsay evidence of Walker's confession would be admissible." *Id.* We rejected those arguments. *Id.*, ¶¶13-18.

Amonoo III also recognized that "[i]nadmissible evidence cannot provide a basis for challenging a conviction." *Id.*, ¶19 (citing *State v. Bembenek*, 140 Wis. 2d 248, 253, 409 N.W.2d 432 (Ct. App. 1987)). We concluded: "Consequently, assuming without deciding that Amonoo sufficiently alleged the first four factors of the newly discovered evidence test, *see Avery*, 345 Wis. 2d 407, ¶25, he has not shown a reasonable probability of a different result in a new trial." *Amonoo III*, No. 2014AP56, unpublished slip op., ¶19.

In 2015, Amonoo filed another motion for a new trial based on newly discovered evidence. This time, he relied on the same affidavits of Sanders and Johnson, but also added another affidavit. That new affidavit, by a person named Sesi T. Edu, states in its entirety:

I was interviewed by police in March 1995 in relation to a shooting that took place at Kohl's food store. I was on my way to the gas station [on two cross streets]. I observed David Walker, who was wearing a Bulls pullover and dark pants, pull out a silver colored gun and start shooting at a group of people in front of the store. I was in the middle of the block and as the shooting started I began walking back toward[] [another street]. I was never contacted by any of [Amonoo's] attorney[s]. I didn't come forward because I feared for my safety. David confessed to the shooting after [Amonoo] was found guilty. I moved to Atlanta for awhile and tried to forget about the ordeal. I became Facebook friends recently with several people who knew [Amonoo] & was told that he was still locked up. I'm coming forward now to correct a wrong.

(Some capitalization omitted.) Amonoo argued in his motion—as he did in 2013—that the affidavits of Johnson and Sanders fall under the residual hearsay rule because Edu’s affidavit supports their statements about Walker’s alleged confession.³

The circuit court denied Amonoo’s motion, concluding that Edu’s affidavit did not provide “the Sanders or Johnson affidavits with the requisite ‘comparable circumstantial guarantees of trustworthiness’ to fall within the residual hearsay exception.” *See* WIS. STAT. § 908.045(6) (providing a hearsay exception if the declarant is unavailable and the statement, although not covered by any of the other hearsay exceptions listed in the section, has “comparable circumstantial guarantees of trustworthiness.”). The circuit court explained: “Ms. Edu does not specify when Walker confessed, what he confessed to or to whom he confessed. The fact that Ms. Edu claims that Walker confessed or that she witnessed Walker carry out the shooting at the Kohl’s store is not sufficient to corroborate the confessions that Walker purportedly made to Sanders and Johnson.”

The circuit court also said that it was not persuaded that Edu’s affidavit, on its own, justified a new trial. It explained: “Even assuming that [Amonoo’s] proffered evidence satisfies the first four of the general requirements [for newly discovered evidence], the court finds there is no reasonable probability of a different result at a new trial given the overwhelming eyewitness testimony placing [Amonoo] at the scene as the shooter.” This appeal follows.

³ Amonoo’s motion also contained references to an affidavit from his mother, Bertha Collier, but on appeal he does not develop an argument specifically concerning that affidavit. Therefore, we do not discuss it.

“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,” and on appeal “[w]e review the circuit court’s determination for an erroneous exercise of discretion.” *Avery*, 345 Wis. 2d 407, ¶22. Furthermore, “[a] hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief.” *State v. Allen*, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. We conclude that the circuit court did not erroneously exercise its discretion when it denied Amonoo’s motion without a hearing.

First, Edu’s affidavit does not adequately corroborate the Johnson and Sanders affidavits. It lacks any details about Walker’s alleged confession, such as what acts Walker claims to have admitted and to whom Walker allegedly confessed. Further, as the State points out, Edu’s affidavit indicates that Walker confessed after Amonoo “was found guilty,” which occurred in June 1995, but Johnson’s affidavit said that Walker confessed in April 1995. Therefore, Edu and Johnson could not be referring to the same confession. Because Edu’s affidavit does not adequately corroborate the Johnson and Sanders affidavits, it does not provide a basis for those affidavits to be admitted under the residual hearsay exception. *See* WIS. STAT. § 908.045(6).

We further agree with the circuit court that Edu’s affidavit, on its own, does not provide a basis for a new trial. Even if we assume for purposes of this appeal that the first four factors of the newly discovered evidence test have been established, we agree with the circuit court that Amonoo has not shown “a reasonable probability exists that a different result would be reached in a trial.” *See Avery*, 345 Wis. 2d 407, ¶25 (citation omitted). Edu’s affidavit lacks details and fails to address important issues, such as why Edu told the police in 1995 that she did not see

who did the shooting.⁴ It also neglects to mention that Edu knew Amonoo and had been staying at his house for three weeks at the time of the shooting. In addition, Edu's affidavit does not explain how she knew Walker or whether she knew who he was when she allegedly saw him shoot a gun outside the Kohl's food store. Moreover, as the circuit court noted, there was "overwhelming eyewitness testimony placing [Amonoo] at the scene as the shooter." Amonoo's appellate brief attempts to discredit the testimony of the six individuals who identified Amonoo as the shooter, but having once again reviewed the trial testimony, we agree with the circuit court that the testimony provided strong evidence of Amonoo's guilt. There is no reasonable probability that a jury would acquit Amonoo even if Edu were to testify consistent with her affidavit.

For the foregoing reasons, we conclude that the circuit court did not erroneously exercise its discretion when it denied Amonoo's motion for a new trial based on newly discovered evidence without a hearing.

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

Diane M. Fremgen
Clerk of Court of Appeals

⁴ According to a police report Amonoo filed in his 2013 motion for a new trial, Edu told the police that "she never turned around to see who was firing the shots, and continued walking."