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DISTRICT I

March 15, 2017

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

2016AP120 State of Wisconsin v. Ervin Thomas (L.C. # 2009CF3972)

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

Ervin Thomas, *pro se*, appeals an order denying his motion to withdraw his guilty plea. He claims he has newly discovered evidence that his case was not brought to trial within 180 days after he made his speedy trial request, as required by the Interstate Act on Detainers (IAD). Upon our review of the briefs and record, we conclude at conference that this matter is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

Thomas was serving a sentence in Illinois when the State of Wisconsin charged him with multiple felonies. Thomas was returned to Wisconsin on a warrant. On September 13, 2010, the day set for trial, he pled guilty to kidnapping and second-degree sexual assault of a child.

On direct appeal, Thomas claimed he was entitled to withdraw his guilty pleas because the State violated his speedy trial rights under the IAD, as adopted by WIS. STAT. § 976.05(3)(a). *See* ***State v. Thomas***, 2013 WI App 78, ¶1, 348 Wis. 2d 699, 834 N.W.2d 425. Under § 976.05(3)(a), the State must try a prisoner incarcerated outside Wisconsin '"within 180 days after the prisoner has caused to be delivered to the prosecuting officer and the appropriate court ... written notice of the place of his or her imprisonment and his or her request for a final disposition."' *See* ***Thomas***, 348 Wis. 2d 699, ¶15 (italics omitted) (citing § 976.05(3)(a)). We held that the operative date of delivery to the prosecuting officer was not the day a mailroom employee in Milwaukee signed the certified mail return receipt accompanying the prisoner's request, but rather was the day on which the prosecutor "actually receive[d] notice of the speedy trial request." ***Id.***, ¶¶4, 20. In Thomas's case, the evidence showed that day was March 18, 2010, the day that personnel in the district attorney's office initialed and file-stamped the request. *See* ***id.***, ¶¶4, 18. The State brought Thomas to trial—and he pled guilty—179 days later, on September 13, 2010. *See* ***id.***, ¶6. Accordingly, we affirmed the circuit court order denying his claim for postconviction relief.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Proceeding *pro se*, Thomas next filed a postconviction motion on November 18, 2014. He alleged that his trial counsel and postconviction counsel were ineffective and that he had newly discovered evidence showing that the prosecutor received his speedy trial request on March 15, 2010, rather than on March 18, 2010. Thomas did not attach any supporting documents to his motion. By order of November 21, 2014, the circuit court denied the motion as conclusory. Thomas did not appeal.

A year later, on November 15, 2015, Thomas filed the postconviction motion underlying the instant appeal. He again asserted he had newly discovered evidence showing that the prosecutor received his request for a speedy trial on March 15, 2010. The circuit court determined that Thomas failed to meet the five-prong test required to prevail on a claim of newly discovered evidence. He appeals.

A person seeking relief based on a claim of newly discovered evidence must establish "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 (citations omitted). If the person satisfies these requirements, "'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.***, ¶44 (citations omitted). The person must satisfy all five requirements to earn relief. *See* ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

Here, Thomas supported his 2015 claim of newly discovered evidence with, first, a letter dated September 10, 2014, from Assistant Corporation Counsel Katheryn West. An accompanying certified mail receipt shows he received that letter on September 12, 2014. In the

letter, West explained to Thomas the mechanics of the mail delivery system for the Milwaukee County courthouse complex during 2010. The explanation included information that employees of Information Management Services Distribution delivered mail to the respective courthouse departments and obtained a signature, recorded in a log, from each recipient.

Second, Thomas offered a portion of a mail delivery log and West's accompanying cover letter dated January 15, 2015. The cover letter explained that West was providing the log to Thomas in response to his record requests of December 2014 and January 2015 and that the log "reflect[s] delivery of [Thomas's] certified mail to the Milwaukee County District Attorney's Office." The log shows that the addressee for Thomas's mail was "DA Rm. 405" and appears to confirm that, on March 15, 2010, someone signed for the letter in the preprinted block for "Dept. Signature."

The foregoing documents do not satisfy the second prong of the newly-discovered-evidence test. As the circuit court cogently explained in its decision denying Thomas's motion:

> even if the district attorney's office received the certified mail from the defendant on March 15, 2010, there is no showing why the defendant could not have secured this information previously in support of his motion for postconviction relief filed on November 18, 2014, and therein lies the crux of the matter. There is no question that he knew when he filed his motion November 18, 2014, that such a log existed because [] West indicated as much in her letter of September 10, 2014.

We agree with the circuit court. Thomas failed to show he diligently pursued information that West told him existed and that was available to him before he filed his first *pro se* postconviction motion on November 18, 2014. Accordingly, the log and accompanying information purporting to show a March 15, 2010 certified mail delivery to the district attorney's office do not constitute newly discovered evidence.

Thomas also sought to support his most recent postconviction motion with a detainer form showing that Wisconsin authorities planned to take him into custody from an Illinois prison on June 3, 2010. He further offered an agreement by Wisconsin officials to return him to Illinois after his trial. These documents fail to satisfy the third prong of the newly discovered evidence test because they are immaterial to the determinative fact, namely, the date on which the prosecutor received Thomas's speedy trial request.

Because nothing that Thomas submitted to the circuit court in November 2015 constituted newly discovered evidence within the meaning of ***Love***,

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

Diane M. Fremgen
Clerk of Court of Appeals