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August 8, 2017

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

2016AP1712 State of Wisconsin ex rel. Eugene C. Uptgrow v. Brian Hayes (L.C. # 2016CV5610)

Before Kessler, Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Eugene C. Uptgrow, *pro se*, appeals from an order of the circuit court that denied his petition for a writ of *certiorari*. 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 (2015-16).[1] We summarily affirm the order.

BACKGROUND

In 2009, Uptgrow was convicted on one count of second-degree sexual assault with the use of force and sentenced to fourteen years' imprisonment, imposed and stayed in favor of seven years' probation. In August 2013, the Milwaukee Police Department executed a search warrant at the home Uptgrow shared with his mother, Linda Matthews, and his uncle. Police found two handguns in a room where Uptgrow slept and kept his clothes. Uptgrow was charged with two counts of possession of a firearm by a felon as a repeater shortly thereafter.

In March 2014, a probation revocation hearing was held. Matthews testified that Semaj Pryor had come to the house shortly before police executed the warrant. He had two guns with him and was upset about an argument he had with his girlfriend. Matthews said she took the guns away from Pryor and put them in the bedroom where Uptgrow often slept. Pryor also testified; according to Uptgrow, Pryor confirmed Matthews' testimony. Uptgrow provided a written statement, claiming the guns belonged to his mother and he had no idea they were in the bedroom. The administrative law judge conducting the hearing determined Matthews was not credible and ordered Uptgrow's probation revoked.

Uptgrow appealed the decision to the Division of Hearings and Appeals. The Division affirmed the revocation, noting it was "not convinced" Matthews had put the guns "in the

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

bedroom for 'safekeeping' just two hours before the police arrived." The Division also noted that Uptgrow had "committed other serious violations by absconding from supervision and failing to attend sex offender treatment," which "warrant[ed] revocation alone as they indicate Uptgrow [was] not taking his supervision seriously."

In October 2015, Uptgrow was acquitted on the felon-in-possession charges. Among other things, the State's analysts had testified that neither Uptgrow's DNA nor his fingerprints were found on the guns. In November 2015, Uptgrow moved to set aside his probation revocation because of the acquittals; that request was denied because "'[a]n acquittal in a criminal proceeding for a client's conduct underlying an alleged violation shall not preclude revocation of that client's probation or parole for that same conduct.'" *See* WIS. ADMIN. CODE § DOC 331.08 (Dec. 2006); *see also* WIS. ADMIN. CODE § DOC 331.09 (current through May 2017).

In May 2016, Uptgrow sought a new revocation hearing based on newly discovered evidence—specifically, the acquittals and the analysts' testimony. The Division denied the request, repeating that acquittals do not preclude probation revocation. The Division also concluded that Uptgrow's motion failed to satisfy two prongs of the newly discovered evidence test.

Uptgrow petitioned the circuit court for a writ of *certiorari*, which the circuit court denied. The circuit court stated it "concur[red] completely" with the Division and held "as a matter of law that [Uptgrow] does not set forth a viable claim for relief." Uptgrow appeals.

DISCUSSION

It is important to note that we are not reviewing the propriety of the original probation revocation decision, nor are we reviewing the denial of the motion to set aside the revocation. Rather, the only matter before us is Uptgrow's request for a new probation revocation hearing because of newly discovered evidence.

On appeal from denial of a writ of *certiorari*, we review the Division's decision, not that of the circuit court. *See* ***State ex rel. Warren v. Schwarz***, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997). Our standard of review is the same as that of the circuit court. *See* ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶4, 246 Wis. 2d 814, 632 N.W.2d 878. We consider: (1) whether the Division kept within its jurisdiction; (2) whether the Division acted according to law; (3) whether the Division's action was arbitrary; and (4) whether the evidence was such that the Division could reasonably make the decision in question. *See* ***id.*** Uptgrow's argument is, basically, that the Division failed to act according to law when it concluded he was not entitled to a new revocation hearing because of newly discovered evidence.

To prevail on a claim for relief based on newly discovered evidence, the movant must show, by clear and convincing evidence, that: (1) the evidence was discovered after the trial or similar proceedings; (2) the movant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not cumulative. *See* ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60; *see also* ***State ex rel. Booker v. Schwarz***, 2004 WI App 50, ¶14, 270 Wis. 2d 745, 678 N.W.2d 361 (newly discovered evidence claims in probation revocation cases "shall be governed by procedures analogous to those in criminal cases"). If the movant successfully makes such a showing, the tribunal must then move to the

fifth prong and determine whether it is reasonably probable that a different result would be reached in a new proceeding. *See* ***Avery***, 345 Wis. 2d 407, ¶25. Whether to grant a new proceeding based on newly discovered evidence is committed to the Division's discretion. *See* ***id.***, ¶22.

Because we are to utilize analogous criminal procedures, Uptgrow's motion also had to allege sufficient material facts on its face in order to warrant an evidentiary hearing on the request for a new revocation hearing. *See* ***Booker***, 270 Wis. 2d 745, ¶15; *see also* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). Whether the motion alleges sufficient facts is a question of law this court reviews *de novo*. *See* ***Booker***, 270 Wis. 2d 745, ¶15. Our review is limited to the information contained within the four corners of the motion itself.[2] *See* ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433.

The Division denied Uptgrow's motion to reopen his probation revocation proceedings because it "fails under points three [materiality] and five [reasonable probability of a different result] above." With respect to materiality, the Division again explained that "acquittal on related criminal charges does not entitle [Uptgrow] to a new revocation hearing." *See* WIS. ADMIN. CODE § DOC 331.09. Further, the Division noted that the absence of DNA and fingerprints "does not mean [Uptgrow] could not have knowingly possessed" the guns. Uptgrow takes issue with the conclusion of immateriality, arguing that it is contrary to ***State ex rel. Campbell v. Schwarz***.

[2] We note that Uptgrow's motion to reopen his probation revocation based on newly discovered evidence is not part of the record on appeal. We are therefore unable to review whether it states sufficient material facts warranting relief.

Campbell is an unpublished *per curiam* decision, *see* ***State ex rel. Campbell v. Schwarz***, No. 2009AP2074, unpublished slip op. (WI App Oct. 21, 2010), and is not binding on this court, *see* WIS. STAT. RULE 809.23(3).[3] In any event, ***Campbell*** is distinguishable. Campbell's probation revocation had been on a paper record, and the live testimony that was subsequently given at Campbell's trial differed significantly from the information available during revocation, making the criminal acquittal material. *See* ***Campbell***, No. 2009AP2074, unpublished slip op. ¶¶19, 21-24. Here, the relevant testimony from Uptgrow's mother, that she had put the guns in the bedroom without Uptgrow's knowledge, was consistent between the revocation hearing and the trial; the administrative law judge simply did not believe her. Uptgrow's acquittals have no bearing on that credibility determination.

Uptgrow also complains that the Division failed to consider the materiality of the State's analysts' testimony. We disagree—the Division noted their testimony but concluded it simply did not mean Uptgrow did not knowingly possess the firearms: a person may be in possession of contraband when it "'is found in a place immediately accessible to the accused and subject to his [or her] exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the'" contraband.[4] ***State v. Allbaugh***, 148 Wis. 2d 807, 814, 436 N.W.2d 898 (Ct. App. 1989) (citation omitted; brackets in ***Allbaugh***).

[3] It also should not have been cited for any purpose. *See* WIS. STAT. RULE 809.23(3).

[4] Uptgrow believes ***State ex rel. Smith v. Schwarz*** controls on this point, but ***Smith*** is also an unpublished *per curiam* decision that is not controlling. *See* ***State ex rel. Smith v. Schwarz***, No. 2013AP2469, unpublished slip op. (WI App Aug. 26, 2014); *see also* WIS. STAT. RULE 809.23(3).

However, even if the Division erred in deciding the evidence of acquittal was not material, it did not err in its determination that there was no reasonable probability of a different result. The Division concluded there would be no different result from a new revocation hearing because Uptgrow had also violated his probation by absconding and failing to complete sex offender treatment. Uptgrow's only argument on this point comes in the conclusion of his main brief on appeal, where he writes, "Considering that Uptgrow's failure to report to his agent, and failing to attend his sex offender treatment does not amount to the revocation of his probation, this remand to the Division is appropriate since the Division did not prove that he possessed firearms. The other alleged violations warrant an alterative to revocation at best."

Again, the question is not whether revocation was warranted, it is whether the revocation decision should be reopened based on newly discovered evidence. Uptgrow does not appear to dispute that absconding and failing to attend treatment constitute violations of his probation. While he appears to believe those two offenses would warrant a different result—*i.e.*, "an alternative to revocation at best"—this claim is conclusory and underdeveloped and is otherwise insufficient to address the Division's conclusion that there was no likelihood of a different result. We are unpersuaded that the Division erred in that conclusion or that it erroneously exercised its discretion when it declined to grant a hearing on the motion to reopen the revocation.

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals