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DISTRICT I

September 7, 2017

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

2016AP2134 State of Wisconsin v. Odell M. Hardison (L.C. # 2002CF1376)

Before Brennan, P.J., Kessler 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).

Odell M. Hardison, Jr., *pro se*, appeals from orders of the circuit court that denied his WIS. STAT. § 974.06 (2015-16)[1] motion for relief and his reconsideration motion. Based upon

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

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. The orders are summarily affirmed.

In 2004, a jury convicted Hardison on two counts of possession of a firearm by a felon, one count of delivering between fifteen and forty grams of cocaine as a second or subsequent offense, one count of delivering between five and fifteen grams of cocaine as a second or subsequent offense, and one count of maintaining a drug trafficking place as a second or subsequent offense. The circuit court imposed sentences totaling sixteen years' initial confinement and nineteen years' extended supervision. Hardison discharged his appointed postconviction counsel and filed a *pro se* postconviction motion, which the circuit court denied. Hardison appealed, but this court affirmed. The supreme court denied his petition for review.

After filing his first notice of appeal, Hardison filed at least nine additional motions for relief with the circuit court, interspersed with the occasional appeal, plus a petition for sentence adjustment in the circuit court and petitions for writs of *habeas corpus* in the circuit court, the court of appeals, and the supreme court. Hardison was unsuccessful at all of these attempts at relief.

In September 2016, Hardison filed the motion for relief underlying this appeal. He claimed newly discovered evidence in the form of two affidavits from witnesses who, according to Hardison, demonstrate he was not in the places where the delivery of cocaine had allegedly occurred. Hardison also claimed postconviction counsel was ineffective for several reasons. The circuit court denied the motion, concluding that even if the affidavits were newly discovered evidence, there was no reasonable probability of a different result. The circuit court also ruled that Hardison's ineffective-assistance claims were procedurally barred by ***State v. Escalona-***

Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Hardison moved for reconsideration, which the circuit court denied. Hardison appeals from both orders.[2]

To prevail on a claim of newly discovered evidence, the 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. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). "If the defendant makes this showing, then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted). The decision whether to grant a new trial based on newly discovered evidence is committed to the circuit court's discretion. *See* ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60.

We agree with the circuit court's analysis of why there is no reasonable probability of a different result from these affidavits, so we conclude it properly exercised its discretion in denying relief. However, we also conclude that Hardison did not actually satisfy the newly discovered evidence test.

[2] The order denying reconsideration also denied a motion in which Hardison claimed his sentence was excessive. Hardison does not address that portion of the order on appeal, so the issue is deemed abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

A defendant claiming newly discovered evidence must show, by clear and convincing evidence, that he was "'not negligent in seeking [the] evidence."' *See* ***Armstrong***, 283 Wis. 2d 639, ¶161 (citation omitted). Hardison's first affidavit is from Felice L. Thornhill, the mother of Hardison's child, who says she was with Hardison on the night of one of his drug deliveries. Thornhill claimed she had a view of the bathroom where the delivery occurred the whole night, and she never saw Hardison enter the bathroom.[3] The second affidavit is from Jimmy L. Williams, Sr., Hardison's childhood friend, who says he borrowed Hardison's van and returned it to Hardison's car wash, where the second drug delivery occurred. Williams stated he saw the confidential informant who bought the drugs come into the car wash, but the informant never spoke to Hardison before leaving.[4] Williams then spoke with Hardison briefly before leaving himself.

Hardison had to have known that these people were with him around the times and at the places of the drug deliveries, but he does not indicate he told trial counsel to seek them out. He offers no explanation, in his postconviction motion or appeal, for why he was not negligent in seeking out this evidence. We therefore conclude the affidavits do not qualify as newly discovered evidence.

We also agree with the circuit court that Hardison's ineffective-assistance claims are barred. As we have explained at least once before, Hardison cannot claim ineffective assistance

[3] The circuit court concluded Thornhill's information would not yield a different result because it was cumulative of testimony given by Hardison and two others that Hardison had not gone into the bathroom.

[4] The circuit court noted that Williams' information contradicted Hardison's own testimony that he had greeted the informant and introduced him to others at the car wash.

of postconviction counsel because he discharged that attorney. *See* ***State v. Hardison***, No. 2012AP1600-CR, unpublished slip op. ¶4 (WI App Apr. 9, 2013). Moreover, any ineffective-assistance claim is also barred by ***Escalona***, since Hardison offers no reason, much less a sufficient reason, for his failure to raise these particular claims in any of his prior motions or appeals. *See* ***id.***, 185 Wis. 2d at 185; ***State v. Hardison***, No. 2011AP351, unpublished op. and order at 3 (WI App Nov. 8, 2011); ***Hardison***, No. 2012AP1600-CR, unpublished slip op. ¶¶3-4; ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756.

The State now asks us "to advise Hardison that further attacks on his convictions in Milwaukee County Case number 2002CF1376 will result in the court imposing restrictions at least as severe as those imposed in" ***State v. Casteel***, 2001 WI App 188, ¶¶19-27, 247 Wis. 2d 451, 634 N.W.2d 338.[5] The State also asks us to caution Hardison that if we were to dismiss any future appeal for any of the reasons stated in WIS. STAT. RULE 809.103(2), including a finding that the appeal is frivolous or that there is no ground for relief, then Hardison will be responsible for the full filing fee of the appeal even if a waiver is granted earlier in the proceedings. *See* WIS. STAT. RULE 809.103(3).

Hardison is hereby so warned.

Upon the foregoing, therefore,

IT IS ORDERED that the orders appealed from are 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

[5] Specifically, the ***Casteel*** sanctions would require Hardison to submit by affidavit: (1) a copy of the circuit court's written decision and order he seeks to appeal; (2) a statement setting forth the specific grounds upon which this court can grant relief; (3) a statement showing how the issues sought to be raised differ from issues raised and previously adjudicated; and (4) a statement of why any new claims so raised are acceptable under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-86, 517 N.W.2d 157 (1994). *See* ***State v. Casteel***, 2001 WI App 188, ¶25, 247 Wis. 2d 451, 634 N.W.2d 338. Failing to file an affidavit or filing an insufficient affidavit may be punishable by contempt, while filing a false affidavit could result in prosecution under WIS. STAT. § 946.32. *See* ***Casteel***, 247 Wis. 2d 451, ¶25 n.11.