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**DISTRICT II**

December 6, 2017

To:

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

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2017AP202-CR

State of Wisconsin v. Aaron L. Birkholz (L.C. # 2014CF232)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).**

Aaron L. Birkholz appeals from a judgment of conviction and an order denying his postconviction motion. He contends that he is entitled to a new trial due to newly-discovered evidence. 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).<sup>1</sup> We affirm the judgment and order of the circuit court.

In 2014, probation and parole agents searched Birkholz's property following a tip that he possessed a firearm.<sup>2</sup> At the home where he was residing, they found a .45 caliber handgun, numerous .45 caliber bullets, bags of marijuana, a scale, a used bong, and a used pipe. At the home where he was moving into, they found additional .45 caliber shells. The State charged Birkholz with possession of a firearm by a felon, possession with intent to deliver THC, and possession of drug paraphernalia.

The matter proceeded to trial. There, Birkholz and his wife, Chauncey, insinuated that the gun, marijuana, and drug paraphernalia belonged to a man named Justin Kraemer. According to Birkholz and Chauncey, Kraemer lived with them, mostly in their basement, for a short period of time before agents conducted the search.<sup>3</sup> They further testified that the bullets found in the first home were a Father's Day gift for Birkholz's father that they simply forgot to give. They had no explanation for the shells found in the second home, however. Moreover, an agent who searched the first home testified that the home's basement appeared "unfinished" and contained no bedrooms or beds. A police officer also testified that Birkholz had given a written and signed statement indicating that the bong and pipe belonged to him and his wife.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version.

<sup>2</sup> At the time of the search, Birkholz was on supervision for a felony offense.

<sup>3</sup> Kraemer invoked his Fifth Amendment right not to testify at Birkholz's trial.

Ultimately, the jury found Birkholz guilty of possession of a firearm by a felon, possession of THC, and possession of drug paraphernalia. The circuit court sentenced him to a total of three years of initial confinement and three years of extended supervision.

After sentencing, Birkholz filed a postconviction motion for a new trial due to newly-discovered evidence. In it, he alleged that a fellow inmate named Trevor Chapleski-Garrison informed him that he had been approached by Kraemer to purchase a gun before Birkholz's arrest. Birkholz surmised that this was the same gun he was convicted of possessing. Birkholz further noted that the gun was found in a container with the marijuana, thereby suggesting that the marijuana was also Kraemer's.<sup>4</sup>

The circuit court held a hearing on the postconviction motion where Chapleski-Garrison reiterated his story. However, his testimony was vague as to the details of the encounter with Kraemer. For example, he could not remember the year it took place or the color of Kraemer's gun. His testimony was also inconsistent with what he had told a detective earlier. According to Detective Eric Kowalski, who also testified at the hearing, Chapleski-Garrison initially described Kraemer's gun as a revolver that was smaller in caliber than a .45. However, Chapleski-Garrison testified that he did not "recall [the gun] being a revolver" and that it "may have been" a .45.

In the end, the circuit court concluded that even if the jury had heard Chapleski-Garrison's testimony, it would not have had a reasonable doubt as to Birkholz's guilt. Accordingly, the court denied the postconviction motion. This appeal follows.

On appeal, Birkholz argues that the circuit court erred in denying his postconviction motion. Whether to grant a motion for a new trial based upon newly-discovered evidence is committed to the circuit court's discretion. *State v. Plude*, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. We will affirm the court's denial of such a motion if "it has a reasonable basis and is made in accordance with accepted legal standards and facts of record." *State v. Morse*, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152.

In order to obtain a new trial on the ground of newly-discovered evidence, the defendant must prove by clear and convincing evidence that (1) the evidence was discovered after the conviction; (2) he or she was not negligent in seeking it; (3) the evidence is material; and (4) the evidence is not merely cumulative. *State v. Armstrong*, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98. Assuming the defendant meets this burden, the court "must determine whether a reasonable probability exists that a different result would be reached in a [new] trial." *State v. Love*, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted). A "reasonable probability" exists when a jury, looking at both the old evidence and the new, would have reasonable doubt as to the defendant's guilt. *Id.*

Here, the circuit court appropriately considered the legal standard governing newly-discovered evidence and concluded that the proffered evidence did not establish a reasonable probability of a different result. We agree. As noted above, agents gathered ample evidence to convict Birkholz of his crimes. Chapleski-Garrison's testimony, which was vague and

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<sup>4</sup> The postconviction motion neglects to mention that the container holding the gun and marijuana also held a Wisconsin photo identification card belonging to Birkholz.

inconsistent, would not have undermined that. Indeed, Chapleski-Garrison’s testimony provides no explanation for the drug paraphernalia found at the first home, Birkholz’s photo identification card found near the gun and marijuana, or the bullets/shells found at both the first home and second home.<sup>5</sup> Accordingly, we are satisfied that the circuit court properly denied Birkholz’s postconviction motion.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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

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

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<sup>5</sup> As the circuit court astutely observed, “There was absolutely no evidence in the record to explain why that ammunition would have been at the new [home] if the gun wasn’t possessed by Mr. Birkholz....”