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DISTRICT IV

April 27, 2018

To:

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

2017AP324

State of Wisconsin v. Lamont L. Weber (L.C. # 2013CF171)

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, 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).

Lamont Weber appeals an order that denied his postconviction motion for a new trial based upon a claim of newly discovered evidence, along with amendments and supplements to that motion that the circuit court deemed untimely. After reviewing the record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm for the reasons discussed below.

Weber was convicted of an eighth offense of operating a motor vehicle under the influence of an intoxicant (OWI-8th) based in large part upon the testimony of an eyewitness, John Marion. Marion testified that he was smoking a cigarette outside of his house when he observed a blue pickup truck pull into a neighbor's driveway and partially over the curb onto the lawn, knocking over some garbage cans. The truck sat in the driveway for a minute or two, then backed out and stopped in front of another house. After another couple of minutes, the driver, who was the sole occupant of the vehicle, got out of the truck and staggered over to pick up the garbage cans, then went back and entered the house in front of which he had parked. Marion could hear the driver talking to himself as he walked back and forth, but could not make out the words because his speech was slurred. Marion then called 911, and watched as the police arrived and made contact with Weber. Marion identified Weber in court as the driver of the pickup truck.

In addition to Marion's testimony, City of Madison Police Officer Michele Walker testified that she was dispatched to the scene in response to the 911 call, where she immediately ran the plates of the pickup truck and determined that it was registered to Weber. Once Walker's backup arrived, the two officers approached the house, knocked, and contacted two men—one of whom identified himself as Weber and confirmed that he owned the truck. Walker asked Weber to step outside and wait on the stoop while she went back to her squad car and took a statement

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

over the phone from Marion. When Walker returned to Weber, Weber asked Walker for a ride home and said to her, “You can’t do anything to me because you did not see me drive.” Walker then had Weber perform a series of field sobriety tests. Weber was unable to follow Walker’s finger with his eyes; had difficulty standing up straight; was unable to complete the walk-and-turn test; and could not recite the alphabet. Walker then placed Weber under arrest and transported him to the police station to conduct an Intoximeter chemical breath test. The parties stipulated that the test showed a blood alcohol concentration of 0.18.

This court affirmed Weber’s conviction in a no-merit proceeding. *State v. Weber*, Appeal No. 2014AP2723-CRNM, unpublished slip opinion (Apr. 13, 2016). Weber subsequently filed a postconviction motion alleging that he had newly discovered a report provided by a private investigator describing an interview with Marion that Weber believes contradicts testimony provided by Walker regarding the details of Walker’s interactions with Marion.

The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to an issue; (4) the testimony must not merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See State v. Coogan*, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). We conclude that Weber has failed to meet the last of these factors.

Specifically, if newly discovered evidence serves only to impeach the credibility of a witness who testified at trial, it is insufficient to warrant a new trial as a matter of due process,

because it does not create a reasonable probability of a different result. *See State v. Kimpel*, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989). Here, the investigator's interview with Marion was conducted on March 24, 2016, more than three years after the offense. The fact that the witness recalled some events somewhat differently than either he or the officer had previously testified after that much time at most creates a question of credibility. It does not, as Weber suggests, prove that the officer perjured herself. Therefore, the circuit court properly denied Weber's motion for a new trial based upon newly discovered evidence.

As to any additional claims that Weber asserted in his amended and supplemental postconviction motion, we conclude that they are procedurally barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), which holds that claims that could have been raised on a prior direct appeal or postconviction motion from a criminal judgment of conviction cannot be the basis for a subsequent WIS. STAT. § 974.06 motion unless the court finds there was sufficient reason for failing to raise the claim in the earlier proceeding.

IT IS ORDERED that the postconviction order is summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals