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DISTRICT I

May 22, 2018

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

2017AP1404-CR State of Wisconsin v. Shontrevious Dequan Harmon
(L.C. # 2011CF003463)

Before Brennan, P.J., 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).

Shontrevious Dequan Harmon appeals the judgment convicting him of first-degree intentional homicide by use of a dangerous weapon, possession of a firearm by a person

adjudged delinquent for a felony, and intimidation of a witness by a person charged with a felony. *See* WIS. STAT. §§ 940.01(1)(a), 939.63(1)(b), 941.29(2)(b), 940.43(7) (2011-12).¹ He also appeals the order denying his postconviction motion.² The sole issue on appeal is whether the postconviction court should have held a hearing on Harmon's postconviction motion alleging 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. Because the postconviction court properly denied Harmon's motion, we affirm.

Background

In 2011, Harmon was charged with first-degree intentional homicide and with possession of a firearm by a person adjudged delinquent for a felony. An amended complaint subsequently added a charge of intimidation of a witness by a person charged with a felony.

A jury found Harmon guilty of all three crimes. On the charge of first-degree intentional homicide, the trial court sentenced Harmon to life in prison with eligibility to petition for release to extended supervision after forty years. On the charge of possession of a firearm by person adjudged delinquent for a felony, the trial court sentenced him to two years of initial confinement and two years of extended supervision, and on the charge of intimidation of a witness, the trial court sentenced him to three years of initial confinement and two years of extended supervision.

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

² The Honorable Richard J. Sankovitz presided over Harmon's jury trial and entered the judgment of conviction. The Honorable Jeffrey A. Conen entered the order denying Harmon's postconviction motion.

The latter two sentences were to be served concurrently with the homicide sentence and with each other.

Harmon eventually sought postconviction relief based on newly discovered evidence.³ In support of the motion, Harmon submitted his own affidavit describing how a fellow inmate, Kenneth Thomas, came forward and confessed that he was the one who shot the victim. Harmon also submitted Thomas's affidavit confessing to the crime. The postconviction court denied the motion without an evidentiary hearing.

Discussion

The question before us is whether Harmon is entitled to an evidentiary hearing on his postconviction motion. We begin by setting forth the standard we employ when reviewing such motions:

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review *de novo*. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Love, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W. 2d 62 (citations omitted).

³ Prior to the postconviction motion underlying this appeal, Harmon, *pro se*, sought other forms of postconviction relief. The denial of those motions is not at issue on appeal.

Although Harmon fails to mention it in his brief, we next set forth the standard that applies to newly discovered evidence. To prevail on such a claim, a defendant must prove the following four criteria by clear and convincing evidence: “(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.” *Id.*, ¶43 (citation omitted). If a defendant clears the hurdle of the first four criteria, “then ‘the [trial] court must determine whether a reasonable probability exists that a different result would be reached in a trial.’” *State v. McAlister*, 2018 WI 34, ¶32, ___ Wis. 2d ___, ___ N.W.2d ___ (citations omitted). “A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant’s guilt.” *Id.* (citation omitted).

Harmon relies on *Love* as support for his argument that the postconviction court erred when it found that Thomas’s affidavit was not credible because that inquiry is not relevant at this stage in the proceedings. *See id.*, 284 Wis. 2d 111, ¶54 (“Whether that testimony [that the defendant was not the assailant] is credible is not relevant for our purposes here. It must be accepted as true.”). Harmon argues that because the affidavit contained sufficient facts that must be accepted as true, he should have received a hearing.

In *Love*, the evidence of guilt was far less than the overwhelming evidence presented here. In that case, which largely centered on the reliability of eyewitness identification, the victim’s physical description of the assailant did not align with the defendant’s physical description and more accurately matched the person who claimed to have committed the crime for which the defendant was convicted. *See id.*, ¶48. Additionally, the person who claimed to have committed the crime provided in-depth details about its commission. *See id.*, ¶49. In

concluding that the defendant was entitled to an evidentiary hearing, the Wisconsin Supreme Court explained: “[V]iewing the new evidence, particularly in light of the identification discrepancies, there is a reasonable probability that a jury, looking at both, would have a reasonable doubt as to [the defendant]’s guilt.” *See id.*, ¶55.

The same cannot be said here. Contrary to Harmon’s representation, the postconviction court did not deny Harmon a hearing “primarily because it found the Thomas affidavit not credible.” Rather, it was the overwhelming evidence of Harmon’s guilt *in combination with* the implausibility of Thomas’s affidavit that led the postconviction court to conclude there was not a reasonable probability of a different result at a new trial.

In its decision and order, the postconviction court detailed the evidence of Harmon’s guilt that was presented at trial. This evidence included multiple eyewitnesses who unequivocally identified Harmon at trial, including one individual who had known him for years and another who knew him from the neighborhood. Additionally, the postconviction court highlighted the testimony of Courtney Stokes, who was in a dating relationship with Harmon and had a child in common with him. Stokes testified that Harmon confessed to her that he shot the victim. The postconviction court went on to reference the State’s evidence reflecting Harmon’s efforts to evade police and to dissuade Stokes from cooperating with the investigation and prosecution.

The postconviction court’s conclusion that Thomas’s affidavit was “implausible and suspicious” was based on its finding that Thomas does not resemble Harmon, which made it unlikely that the eyewitnesses who had known Harmon for years would have misidentified him. The postconviction court also took into account other circumstantial evidence such as the fact that Thomas was three years younger than Harmon, which made him only sixteen years old when

the homicide took place, and the fact that Thomas was going to be in prison until 2060 for another crime.

In light of these findings, even if we accept for purposes of this appeal that Harmon cleared the first hurdle by satisfying the four criteria for newly discovered evidence, the postconviction court properly concluded that Harmon had not shown a reasonable probability that a different result would be reached in a trial where the jury was presented with the purported confession by Thomas. Because the record conclusively demonstrates Harmon is not entitled to relief, we affirm the postconviction court's discretionary denial of Harmon's motion without a hearing.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals