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DISTRICT IV

October 8, 2018

To:

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

2017AP1631

State of Wisconsin v. Timothy Lee Stewart, Sr.
(L.C. # 2014CF310)

Before Blanchard, Sherman and Kloppenburg, 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).

Timothy Stewart appeals an order denying his motion to withdraw his plea or for resentencing based on 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).¹ We affirm.

Stewart's motion, filed July 31, 2017, sought relief based on what he argued was a recantation by the victim. The circuit court denied the motion in a letter dated August 9, 2017.

The State argues that Stewart's motion was properly denied because Stewart has previously raised and litigated this claim in the context of ineffective assistance of counsel. We agree.

We addressed Stewart's ineffective-assistance claim that was based on his counsel's failure to obtain a recantation in an opinion issued before Stewart filed his current motion. *See State v. Stewart*, No. 2016AP1581-CR, unpublished slip op. ¶¶18-19 (WI App May 4, 2017). Among other conclusions, we stated that Stewart was not prejudiced by counsel's claimed failure. We stated that Stewart did not suffer prejudice "in light of the other overwhelming evidence against Stewart—including K.A.'s immediate report of the abuse to the responding officers, the police documentation of K.A.'s injuries, and other medical evidence as to K.A.'s injuries and reports that Stewart had caused them." *Id.*, ¶19.

The State argues that Stewart's current claim is barred by *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). We regard Stewart's current motion based on newly discovered evidence as a

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

repackaging of his claim of ineffective assistance of counsel. And, once placed in that context, the claim has already been litigated. Our previous conclusion that Stewart was not prejudiced by failure to obtain a recantation necessarily leads to the conclusion that, on the last element of a claim of newly discovered evidence, Stewart cannot show a reasonable probability of a different result in a trial with the new evidence. *See State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997) (elements of claim).

In reply, Stewart argues that we should not consider the above argument by the State because it is being made for the first time on appeal. We reject this argument because it appears that the circuit court denied Stewart's motion after nine days without receiving or seeking argument from the State. The State cannot be faulted for not arguing in circuit court something it was never given the opportunity to argue.

IT IS ORDERED that the order appealed is summarily affirmed under 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