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October 30, 2018

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

2017AP1967 State of Wisconsin v. Sylvester Townsend (L.C. # 2000CF1679)

Before Kessler, 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).

Sylvester Townsend, *pro se*, appeals an order denying his motion seeking postconviction relief based on newly discovered evidence. He claims he recently learned that when Erica Joseph testified at his trial in August 2000, she was married both to him and to a second man she had not divorced. He contends that this information warrants a new trial. Upon our review of

the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

In April 2000, the State charged Townsend with first-degree reckless homicide and two counts of first-degree recklessly endangering safety, all as a party to a crime. The charges arose from a shooting on March 25, 2000, that left a child dead and put two other people at risk of harm. The matter proceeded to a jury trial.

The State's evidence at trial included statements Townsend made to police admitting that on March 25, 2000, he provided guns and ammunition to third parties so that they could "shoot at the guys that shot at" his cousin the previous night. In addition to Townsend's inculpatory statements, the evidence showed that both Joseph and Townsend's aunt, Rose Townsend, told police that on March 25, 2000, Townsend supplied guns and ammunition to third parties for use in a retaliatory shooting. The jury found Townsend guilty as charged.

In September 2017, Townsend filed a postconviction motion, his fifth since he was convicted, seeking a new trial. He alleged that in 2013, while Joseph's petition to divorce him was pending in the circuit court, he learned that Joseph had married Billy Joseph in 1993, and the marriage had never been dissolved. Further, he showed that in January 2015, a family court judge denied Joseph's petition for divorce and granted Townsend's petition for an annulment. Townsend therefore claimed that Joseph was a bigamist at the time of his criminal trial and that she perjured herself when she testified that she was his wife. He argued that if the jury had heard evidence concerning Joseph's bigamy and alleged perjury, the jury would probably have had a reasonable doubt about his guilt and would therefore have acquitted him. The circuit court rejected the claim, and he appeals.

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

A person seeking relief based on a claim of newly discovered evidence must establish "by clear and convincing evidence that '(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.'" ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citations omitted). If the person satisfies these four requirements, "then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" *See* ***id.***, ¶44 (citations omitted). ***Love*** explains that "[a] reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt.'" *See* ***id.*** (citation and two sets of brackets omitted). A person must satisfy all five prongs of the newly discovered evidence test to earn relief. *See* ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

No dispute exists that Townsend satisfied the first two prongs of the newly discovered evidence test, so we turn to the third. According to Townsend, the evidence about Joseph's marital status is material to his criminal case because the evidence proves that Joseph perjured herself at trial when she testified that she was married to Townsend. The circuit court disagreed, concluding:

> Joseph did not perjure herself when she testified that she and the defendant were husband and wife. They were, in fact, married at the time [of trial]. It was only later, when it was discovered that [] Joseph was legally married to someone else, that her marriage to the defendant was annulled.

The circuit court was correct. Joseph did not perjure herself by testifying that she was married to Townsend because, although their marriage was voidable, it was not void. Our supreme court discussed the difference in ***Smith v. Smith***, 52 Wis. 2d 262, 190 N.W.2d 174 (1971). There, a party claimed that a marriage was void because at the time of the marriage, the wife was married to another living man. *See* ***id.*** at 265. The ***Smith*** court explained: "a marriage

may be considered voidable although prohibited by law when it is possible, under any circumstances, for the parties to contract the marriage, or subsequently to ratify it." ***Id.*** at 269 (citations omitted). On the other hand, a marriage "should be considered void if it is impossible for [the parties] under the law to contract it, and if it is impossible for them subsequently by any conduct to ratify it, and if the statute expressly declares that the marriage is void." *See* ***id.*** (citations omitted). In the case of Townsend and Joseph, a circumstance exists in which they could contract a marriage, namely, the circumstance that neither party was married to another living person.[2] Accordingly, their marriage was not void. It was merely voidable, and at the time of Townsend's criminal trial, the marriage had not yet been annulled. Therefore, Joseph did not give untruthful testimony at trial when she said that she was married to Townsend.

Moreover, we agree with the circuit court that Townsend did not satisfy the fifth prong of the newly discovered evidence test. Specifically, he failed to demonstrate a reasonable probability of a different result at a new trial that includes testimony about Joseph's two marriages. According to Townsend, a retrial in which he could confront Joseph about her bigamy would undermine her credibility, but "new evidence which merely impeaches the credibility of a witness is not a basis for a new trial on that ground alone." ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972). Wisconsin has long recognized that such evidence does not carry with it a reasonable probability of a different result in a second trial. *See* ***id.***

Townsend argues that his case presents an exception to the rule that mere impeachment evidence is not a basis for a new trial, and in support he directs our attention to ***United States v. Taglia***, 922 F.2d 413 (7th Cir. 1991). That court opined: "[i]f the government's case rested

[2] By contrast, and by way of example, a purported marriage between brother and sister or mother and child is void because no circumstance exists under which those parties could contract a marriage. *See* WIS. STAT. § 765.03(1) (prohibiting a marriage between persons who are nearer of kin than second cousins with specified exceptions for first cousins).

entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial." ***Id.*** at 415. The ***Taglia*** court concluded, however, that "it will be the rare case in which impeaching evidence warrants a new trial, because ordinarily such evidence will cast doubt at most on the testimony of only one of the witnesses." *See* ***id.***

This is not the rare case contemplated by ***Taglia*** in which the defendant's criminal convictions rest entirely, or almost entirely, on a single witness subsequently challenged as unworthy of belief. *See* ***id.*** To the contrary, Joseph's testimony was but one component of the trial evidence. The jury heard that Townsend confessed to police that he provided guns and ammunition so that his acquaintances could conduct a retaliatory shooting. The jury also heard that Townsend's aunt, Rose Townsend, told police that she was present when Townsend provided guns and ammunition for use in such a shooting. Further, the jury heard that police searched the crime scene and found a shell casing fired from the same type of weapon that Townsend admitted he supplied. Thus, Townsend's trial included substantial evidence supporting the convictions regardless of any information from Joseph. Casting doubt on Joseph's veracity would not undermine that other evidence. *See* ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968) (stating that impeachment evidence did not warrant a new trial where "[t]here was ample evidence to sustain the finding of guilt without the testimony of [the challenged witness]").

Finally, we observe that at trial, Joseph—who testified as a witness for the State—recanted testimony she gave at a pretrial hearing at which she incriminated Townsend. When the State confronted Joseph with her earlier testimony, she responded that she had previously "lied." In closing argument, the State suggested that Joseph was "something less than truthful" at trial. In sum, Joseph was thoroughly discredited as a witness during Townsend's trial. Under these circumstances, additional evidence impeaching her credibility would not change the verdict.

That is, no reasonable probability exists that a jury looking at the new impeachment evidence and the original evidence presented at trial would have a reasonable doubt about Townsend's guilt. *See* ***Love***, 284 Wis. 2d 111, ¶44. For all the foregoing reasons, we affirm.

IT IS ORDERED that the order is summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals