OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

May 29, 2019

To:

Hon. Mark A. Sanders
Circuit Court Judge
821 W. State St., Rm. 620
Milwaukee, WI 53233-1427

Abigail Potts
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Barrett
Clerk of Circuit Court
821 W. State Street, Room G-8
Milwaukee, WI 53233

Corey Miriell Wright 296539
Stanley Correctional Inst.
100 Corrections Drive
Stanley, WI 54768

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

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

2016AP728 State of Wisconsin v. Corey Miriell Wright (L.C. # 2006CF1408)

Before Kessler, P.J., Brennan and Brash, 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).

Corey Miriell Wright,[1] *pro se*, appeals circuit court orders denying postconviction motions filed under WIS. STAT. § 974.06 (2017-18).[2] He alleges that prosecutorial misconduct, ineffective assistance of trial counsel, and newly discovered evidence warrant postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition.[3] *See* WIS. STAT. RULE 809.21. We affirm.

In 2006, the State filed a criminal complaint alleging that Wright and his brothers, Marcus Lee and Brandon Williams, robbed a jewelry store and its employees. A jury subsequently found Wright guilty of two counts of armed robbery as a party to a crime. Wright, by counsel, filed a postconviction motion in 2007, alleging errors in pretrial and trial proceedings and further alleging newly discovered evidence of a federal investigation involving one of the robbery victims. The circuit court denied relief, and we affirmed. *See* ***State v. Wright*** (***Wright I***), No. 2007AP2229-CR, unpublished slip op. (WI App June 10, 2008).

Proceeding *pro se*, Wright filed a postconviction motion in 2010, seeking a new trial based on alleged prosecutorial misconduct and circuit court error. The circuit court denied the

[1] The circuit court docket reflects that Cory Miriell Wright is also known as Corey Miriell Wright. Wright used the latter spelling of his given name in this proceeding.

[2] Wright filed the first of the postconviction motions underlying this appeal while the 2015-16 version of the Wisconsin Statutes was in effect. He filed the last of those motions under the current, 2017-18 version. In this opinion, we discuss not only those motions but also motions that Wright filed under earlier versions of the statutes. The current versions of the relevant Wisconsin statutes are not materially different from the versions in effect when Wright pursued his prior litigation. Therefore, all references to the Wisconsin Statutes are to the 2017-18 version.

[3] Our review of the record reveals that item R.65 is a four-page document that does not pertain to Wright or to this proceeding and was apparently misfiled in this case due to clerical error. Upon remittitur, we direct the circuit court to oversee removal of the document from the record in the instant matter. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (clerical error may be corrected any time).

motion, and we affirmed. *See* ***State v. Wright*** (***Wright II***), No. 2010AP1370, unpublished op. and order (WI App Oct. 14, 2011).

In 2016, Wright, again proceeding *pro se*, filed the first of the several postconviction motions underlying this appeal. Pursuant to WIS. STAT. § 974.06, he alleged that misconduct by police and prosecutors and the errors of his trial counsel violated his constitutional rights to due process and to the effective assistance of counsel. He also alleged that he had newly discovered evidence, namely, unsworn statements prepared in 2014 by an inmate, Derek Thomas, and an affidavit prepared in 2015 by a second inmate, Robert Cartledge. The Thomas and Cartledge documents all contain allegations that Thomas, Lee, and Williams were the only participants in the jewelry store robberies and that Wright was not involved. The circuit court denied the postconviction motion and then denied Wright's motion to reconsider. Wright filed an appeal.

While the appeal was pending, Wright retained an attorney, and we granted counsel's motion to remand the record to the circuit court for further action. In 2017, following remand, counsel filed a supplemental motion under WIS. STAT. § 974.06, raising additional claims that Wright's trial counsel was ineffective. The circuit court denied the motion, and Wright's retained counsel thereafter withdrew. The matter has now returned to this court for disposition.

WISCONSIN STAT. § 974.06 is the mechanism that permits convicted prisoners to raise constitutional and jurisdictional claims after the time for an appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶¶52-53, 328 Wis. 2d 544, 787 N.W.2d 350. There is, however, a limitation, because "[w]e need finality in our litigation." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Accordingly, "[a]ll grounds for relief available to a person under [§ 974.06] must be raised in his or her original, supplemental or amended motion." *See* § 974.06(4). Successive postconviction motions raising claims under § 974.06 are

procedurally barred unless the movant presents a sufficient reason that the claim was not previously raised. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184. Whether a movant has alleged a sufficient reason to avoid the procedural bar imposed by § 974.06 is a question of law that we review *de novo*. *See* ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

Wright claims that he has two reasons allowing him to raise claims of ineffective assistance of trial counsel and prosecutorial misconduct in his most recent postconviction motions. First, he argues that he did not previously raise those claims due to the ineffective assistance of the postconviction lawyer appointed to represent him in the proceedings underlying ***Wright I***. We must reject this argument. In some circumstances, alleged ineffective assistance by a defendant's postconviction counsel can be a sufficient reason for permitting an additional postconviction motion under WIS. STAT. § 974.06. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996). Postconviction counsel's alleged ineffectiveness, however, does not permit a convicted person to file multiple successive postconviction motions. In this case, postconviction counsel's alleged ineffectiveness in failing to raise claims in 2007 does not explain Wright's own failure to present all of his claims in 2010, when he filed his first *pro se* postconviction motion. Thus, Wright's allegation that his postconviction counsel was ineffective is not a sufficient reason for permitting him now to raise his claims of ineffective assistance of trial counsel and prosecutorial misconduct.

Second, Wright asserts that his current claims should not be barred because in 2010 he relied on WIS. STAT. § 805.15(1)—not WIS. STAT. § 974.06—as the mechanism for obtaining postconviction review of his claims. Wright recognizes that the circuit court in 2010 construed the postconviction motion as arising under § 974.06, but, says Wright, the circuit court erred in doing so. Wright is mistaken. As we explained in ***Wright II***, § 805.15(1) is not available as a

mechanism to mount collateral attacks on criminal convictions. *See* ***Wright II***, No. 2010AP1370, at 2. Accordingly, the circuit court in 2010 properly relabeled Wright's submission as a postconviction motion under § 974.06. *See* ***Wright II***, No. 2010AP1370, at 2. Moreover, we reject Wright's suggestion that, notwithstanding our conclusion in ***Wright II***, we should nonetheless now treat his 2010 submission as something other than a motion under § 974.06. If courts were to permit convicted persons to evade the procedural bar imposed by § 974.06 merely by citing a different statute in support of their collateral attacks, no litigant would ever cite § 974.06, and the statutory scheme prescribed for postconviction review would be rendered irrelevant. *Cf.* ***Henley***, 328 Wis. 2d 544, ¶55. In sum, Wright fails to present a sufficient reason for failing to raise and address his claims of ineffective assistance of counsel and prosecutorial misconduct in earlier litigation. Those claims are therefore barred.

Wright also asserts that the documents prepared by Thomas and Cartledge constitute newly discovered evidence warranting an additional motion for postconviction relief. An allegation of newly discovered evidence raises constitutional due process concerns, and therefore the claim is governed by WIS. STAT. § 974.06. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 251-52, 409 N.W.2d 432 (Ct. App. 1987). Here, the circuit court found that the statements from Thomas originated in 2014, and the circuit court went on to consider whether Wright had "set forth a viable newly discovered evidence claim." Because neither Thomas's statements nor Cartledge's affidavit existed at the time of trial or at the time that Wright brought his prior postconviction motions, we conclude that § 974.06 does not bar Wright's newly-discovered-evidence claim. We turn to whether the circuit court correctly denied that claim without a hearing.

"The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion." ***State v. Avery***, 2013 WI 13, ¶22, 345

Wis. 2d 407, 826 N.W.2d 60. We will sustain the circuit court's decision "as long as it has a reasonable basis and is made in accordance with accepted legal standards and facts of record." *See* ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152.

The standards governing a claim of newly discovered evidence are well known. A person seeking relief on this basis 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 those four requirements, "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.***, ¶44 (citation omitted). A reasonable probability of a different result at a new trial "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." ***Id.*** (citation and brackets omitted). Whether such a reasonable probability exists is a question of law. *See* ***State v. Plude***, 2008 WI 58, ¶33, 310 Wis. 2d 28, 750 N.W.2d 42. We review questions of law *de novo*. *See* ***Kletzien***, 331 Wis. 2d 640, ¶16.

A convicted person cannot succeed on a claim of newly discovered evidence unless the person satisfies all five components of the newly discovered evidence test. *See* ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). Here, we need not consider whether Wright satisfied the first four components because we conclude as a matter of law that he failed to establish the fifth, namely, a reasonable probability that a jury looking at the old and the new evidence would have had a reasonable doubt about his guilt.

The evidence at trial showed that Wright entered H.G.'s jewelry store shortly before the close of business hours on March 6, 2006. *See* ***Wright I***, No. 2007AP2229-CR, ¶4. H.G. and L.F.—the store owner and an employee—were in the store. *See* ***id.*** Wright indicated that he wanted to sell and to purchase some jewelry, but H.G. found Wright's behavior suspicious. *See* ***id.*** Meanwhile, Lee and Williams entered the store:

> [H.G.] attended to them while [L.F.] waited on Wright. [H.G.]'s suspicions were further heightened when he surmised that none of the three men seemed intent upon purchasing any jewelry. Sensing a robbery was to occur, [H.G.] went to his office and activated a silent alarm.
>
> [L.F.], for her part, noted that after Lee and Williams entered the store, Wright used his cell phone. In short sequence, Lee and Williams pulled out pistols and announced a robbery. They forced [H.G.] and Wright to go to [H.G.]'s back office. There they ordered both to the floor. [H.G.] was placed on his stomach and his hands were secured behind his back with shoelaces. Wright's hands were not tied. Lee and Williams then forced [L.F.] at gunpoint to place numerous items of jewelry into plastic bags that they had brought with them. While [L.F.] was collecting the items of jewelry located on [H.G.]'s desk, she also pressed the silent alarm system, and while doing so made eye contact with Wright, who then told Lee and Williams that "they got everything, just leave." Lee and Williams left the store, taking with them jewelry and cash from the store and personal property from H.G. They were apprehended on their way out of the building.

Id., ¶¶4-5.

Although Wright, Lee, and Williams are biological brothers, the evidence at trial showed that Wright did not acknowledge during the robbery that he knew the two gunmen, and they did not acknowledge knowing Wright. *See* ***id.***, ¶6. Nonetheless, L.F. observed that Wright appeared to be signaling to the gunmen and directing their actions. L.F. testified that after Lee and Williams left the store, she asked Wright directly if he knew the two robbers, and Wright responded that he "didn't know those cats."

Lee also testified. He admitted that while in custody the police interviewed him in the presence of his lawyer, and he told them that the robbery was Wright's idea. Lee also admitted telling police that he, Williams, and Wright travelled to the jewelry store in Lee's car, that Wright entered first, gave the signal to start the robbery, and then directed Lee and Williams to leave.

Lee further testified, however, that he had lied to the police. Lee went on to tell the jury that he robbed the jewelry store with Williams alone. Lee testified that a person he knew only as "Demose" drove Lee to the jewelry store and then left the area. Lee said that Demose "had no idea that [Lee would] be needing a quick ri[de] out of there," that Demose "didn't know nothing about it," and that Demose was not present during the one conversation that Lee and Williams had about robbing the store. Lee asserted that no one else but he and Williams played a role in the robbery, and Wright was not involved.

As newly discovered evidence, Wright now offers, first, two nearly identical written statements that Thomas submitted to his prison social workers in 2014. The second of those statements provided:

> I found out about a guy named Cory Wright who [is] also an inmate here at W[aupun] C[orrectional] I[nstitution] ... who [is] doing time for an armed robbery that he had nothing to do with. I know this to be a fact because I personally was involved in the robbery, but I was never convicted of it because I was never caught. The robbery I'm talking about is that of the H.[] G.[] jewelry store ... in March of 2006. I met Cory Wright for the first time in here at WCI but I know Cory's brother Marcus Lee very well. I along with Cory Wright's brothers Marcus Lee very well. [Sic.] I along with Cory Wright's brothers Marcus Lee and Brandon were [the] only ones involved in robbing that store.

Second, Wright offers an affidavit prepared by Cartledge and dated November 6, 2015. Cartledge stated that in the summer of 2015, he spoke to a fellow inmate named "Derek 'D-Mos'

Thomas." According to Cartledge, Thomas said that he "along with a guy named Marcus [Lee] and Marcus's brother Brandon all planned and robbed [sic] a jewelry store ... back in 2006." Further, Thomas allegedly told Cartledge: "Wright played no part in the planning nor was [] Wright present []or on the phone while ... Marcus was planning the robbery with Brandon. Thomas ... was the getaway driver and ... Cory Wright was not in the car with him at all."

When viewed in light of the evidence presented at trial, no reasonable probability exists that a jury hearing both the original trial evidence and the new statements from Thomas and Cartledge would have a reasonable doubt about Wright's guilt. First, the evidence against Wright was exceptionally compelling. He was present in H.G.'s jewelry store and behaving in a way that aroused suspicion when his brothers Lee and Williams entered and robbed the store at gunpoint. During the robbery, L.F. observed that Wright appeared to be signaling to the gunmen. Nonetheless, despite interacting with the gunmen at close range, Wright did not acknowledge during the robbery that he knew them, nor did they acknowledge their relationship with him. When the robbery was over, L.F. asked Wright directly if he knew the gunmen, and he lied in response. Lee subsequently admitted to police that Wright was a party to the robbery and in fact had planned the crime.

Second, the statements from Thomas and Cartledge, even if fully credited by a factfinder, do not undermine the trial evidence. If Thomas drove only Lee and Williams to the site of the robbery, that does not exonerate Wright, who was incontrovertibly already present in the jewelry store when Lee and Williams arrived. If Thomas heard only one of the brothers on the telephone planning the robbery, that does not reveal who was at the other end of the telephone conversation. If Thomas was present when only Lee and Williams were planning the robbery,

that does not mean that the three brothers lacked the opportunity to make plans together when Thomas was absent.

Moreover, we do not agree with Wright's assertion that the statements from Thomas and Cartledge would serve to corroborate Lee's trial testimony. According to Thomas and Cartledge, Thomas—allegedly also known as "Demose"—helped plan the robbery and was personally involved in its commission. Lee, by contrast, testified that "Demose" played no part in the robbery, knew "nothing about it," and did not participate in planning it. Thus the evidence from Thomas and Cartledge would serve merely to impeach Lee. Evidence that serves only to impeach the credibility of a witness is not a basis for a new trial.[4] *See* ***State v. Kimpel***, 153 Wis. 2d 697, 701, 451 N.W.2d 790 (Ct. App. 1989). Given the insignificance of the statements now offered by Thomas and Cartledge and the compelling evidence of Wright's guilt, we conclude as a matter of law that the statements do not create a reasonable probability of a different result at a retrial. *See* ***Love***, 284 Wis. 2d 111, ¶44. Accordingly, the circuit court properly denied Wright's newly-discovered-evidence claim. *See* ***Kaster***, 148 Wis. 2d at 801.

Last, Wright claims that he is entitled to a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. This court has the power to reverse under § 752.35, but our discretionary reversal power is reserved for use in only the most exceptional of cases. *See* ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469. Wright fails to persuade us that this is such a case.

Therefore,

IT IS ORDERED that the circuit court's orders 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

---

[4] Wright also suggests that the Thomas and Cartledge statements satisfy the newly-discovered-evidence test because they corroborate a statement that Williams gave to the police after his arrest. Wright is again mistaken. Williams did not testify at trial and his statement was not admitted as evidence. Because Williams's custodial statement is not new and because it was not presented to the jury at the original trial, Williams's statement is wholly irrelevant to our assessment of the fifth prong of the newly-discovered-evidence test. *See* ***State v. Love***, 2005 WI 116, ¶¶43-44, 284 Wis. 2d 111, 700 N.W.2d 62.