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

2018AP801-CR State of Wisconsin v. Kelvis T. Johnson (L.C. # 2013CF995)

Before Brash, P.J., Dugan 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).

Kelvis T. Johnson appeals judgments of conviction, entered upon a jury's verdicts, finding him guilty of four crimes. He also appeals an order that rejected his claims for postconviction relief. He alleges that a forensic psychologist's report prepared after his convictions constitutes

newly discovered evidence supporting his claims that he was not guilty by reason of mental disease or defect and was not competent to proceed to trial. He further alleges that his trial counsel was ineffective for failing to obtain an expert's report to support such claims. Upon review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] Therefore, we affirm.

The State filed a criminal complaint charging Johnson with the felony offenses of attempted first-degree intentional homicide, endangering safety, and burglary, all by use of a dangerous weapon, and with the misdemeanor offenses of violating a harassment injunction and battery. The charges arose from an incident at his parents' home on February 21, 2013, during which Johnson shot his girlfriend while she attempted to shield their three children from harm.

At arraignment, Johnson entered pleas of not guilty and special pleas of not guilty by reason of mental disease or defect (NGI) as to all of the counts. The parties subsequently stipulated to the appointment of a psychiatrist, Dr. Robert Rawski, as the court-appointed expert to examine Johnson in connection with his special pleas.

In July 2013, Dr. Rawski filed a nineteen-page report based on his psychiatric interview with Johnson and on reviews of the criminal case file and medical records provided by the Milwaukee County Criminal Justice Facility.[2] The report reflects that the collateral source material that Dr. Rawski received included, among other matters, information that Johnson had a

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] Dr. Rawski's report indicates that the medical records provided by the criminal justice facility documented treatment that Johnson received during his pretrial confinement in connection with the instant case as well as mental health evaluations conducted during his periods of confinement in 2007 and 2012.

"twenty-year history of interpersonal difficulties with associated irritability; persecutory perspectives; interpersonal jealous[]y, overreaction to perceived transgressions, a propensity for the use of intimidation, emotional and physical abuse; and dramatic demands to be euthanized in an effort to explain his acute anxiety and frustration." Dr. Rawski also took into account information from Johnson that he carried a diagnosis of post-traumatic stress disorder associated with his work in the military. Dr. Rawski determined that Johnson suffered from a treatable mood disorder with demonstrated aspects of a maladaptive personality.

Dr. Rawski further determined, however, that he was unable to support Johnson's NGI pleas because he could not conclude that the symptoms of Johnson's disorder "resulted in a lack of substantial capacity to appreciate the wrongfulness of [Johnson's] actions or to conform [Johnson's] conduct to the requirements of the law at the time of the alleged incident."[3] Dr. Rawski explained that his reasoning relied, *inter alia*, on information that: (1) Johnson exhibited knowledge of wrongful behavior during the incident when he said he "was "going to jail anyway" while his father attempted to prevent Johnson from harming anyone; (2) within minutes after the incident ended, Johnson began blaming his behavior on the police and, within three hours, he refused to discuss the matter without an attorney present, reflecting an appreciation of his wrongful conduct; and (3) Johnson denied wrongdoing and suggested that his behavior was justified because his family was trying to dissuade him from having contact with his children. Dr. Rawski further supported his conclusions with the observations that Johnson's "thought processes were goal directed when [Johnson] so chose" and that Johnson did not discuss anything "overtly delusional."

[3] Pursuant to WIS. STAT. § 971.15(1), "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law."

Following receipt of Dr. Rawski's report, Johnson filed a motion to adjourn the scheduled November 2013 trial on the ground that he had not completed his trial preparation. At a subsequent hearing, the State advised that it did not object to an adjournment based on the State's understanding that Johnson was "look[ing] at a different NGI evaluator to look at the matter and to assess the defendant." Johnson, by counsel, concurred and reiterated his need for additional time to prepare for trial. The circuit court granted the requested adjournment.

At a January 2014 pretrial hearing to resolve evidentiary disputes, the circuit court observed that the next court date would have to be scheduled in a way that allowed the defense sufficient time to address matters related to the NGI pleas and to file an expert's report. Defense counsel and the State both agreed. When the parties next convened, the State noted for the record that Johnson had not pursued an additional NGI report. Eleven days later, on the first day of trial, Johnson formally withdrew his NGI pleas.

The jury found Johnson not guilty of burglary but guilty of the other four crimes. At sentencing, the circuit court imposed an aggregate forty-four-year term of imprisonment.

Johnson filed a postconviction motion for a new trial on the ground that he had newly discovered evidence, specifically, a report by psychologist Diane Mosnik that would allegedly support claims that he was not guilty by reason of mental disease or defect and was not competent to proceed to trial. Relatedly, he alleged that his trial counsel was ineffective for failing to retain a forensic psychologist to support his NGI pleas and for failing to raise a challenge to Johnson's competency.

Johnson submitted Dr. Mosnik's twenty-one page report along with his postconviction motion. The report reflected that Dr. Mosnik met with Johnson over a two-day period in 2017 and

conducted forensic interviews and a battery of cognitive tests. She also reviewed records from his past criminal cases and from the litigation here, treatment records created during his incarceration, and Dr. Rawski's report. In assessing the information, Dr. Mosnik was highly critical of Dr. Rawski's methodology, particularly emphasizing that Dr. Rawski did not use standardized testing or objective symptom measurements in reaching his conclusions. Dr. Mosnik found, based on her forensic interviews, testing, and record review, that Johnson was suffering from Delusional Disorder, which she characterized as "serious." She further found that Johnson's diagnosis "was very likely present ... at the time of the offense," and that Johnson "would have lacked substantial capacity to conform his conduct to the requirements of the law at the time of the offense." She then opined that "this finding raises the question of [an NGI plea] for [Johnson] and that this diagnosis and plea should have been, but [were] not, considered adequately at the time of his trial." Finally, Dr. Mosnik opined that Johnson "very likely may have lacked substantial mental capacity to understand the proceedings or assist in his defense at the time of his trial" and that Johnson's competency "was not adequately assessed" at that time.

The circuit court denied Johnson's postconviction motion without a hearing. Johnson appeals.

A defendant seeking a new trial on the basis 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 the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (citations and some quotation marks omitted). If the defendant 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.*** (citation omitted). "Newly

discovered evidence, however, does not include the 'new appreciation of the importance of evidence previously known but not used.'" ***State v. Fosnow***, 2001 WI App 2, ¶9, 240 Wis. 2d 699, 624 N.W.2d 883 (citation omitted). Here, the State asserts that Dr. Mosnik's psychological assessment constitutes only newly appreciated evidence. Whether an item of alleged newly discovered evidence instead falls within the scope of newly appreciated evidence is a question of law for our *de novo* review. *See* ***id.***, ¶12. Upon our independent review, we agree with the State.

Wisconsin courts have repeatedly held that a mental health diagnosis obtained after conviction constitutes evidence that is newly appreciated rather than newly discovered. *See* ***id.***, ¶¶13-16. For example, in ***Vara v. State***, 56 Wis. 2d 390, 393-94, 202 N.W.2d 10 (1972), our supreme court considered a defendant's claim that he should receive a new homicide trial based on medical evidence that the defendant's pre-existing brain injury, coupled with the alcohol that the defendant consumed on the night of the crime, supported an insanity defense. The supreme court rejected the claim, reasoning that the evidence was not newly discovered because the defendant and his attorney knew about the brain injury before trial even though they did not recognize the injury's alleged significance until after conviction. *See* ***id.*** at 394.

In ***State v. Krieger***, 163 Wis. 2d 241, 246-48, 471 N.W.2d 599 (Ct. App. 1991), a defendant who had pled guilty to multiple counts of sexual assault and exploitation of children moved for plea withdrawal and sentence modification based on alleged newly discovered evidence in the form of an expert opinion that the defendant carried a diagnosis of pedophilia. This court rejected the claim, explaining that prior to sentencing counsel had voluminous information available about the defendant's mental health but "failed to obtain any diagnosis that [the defendant's] sexual addiction met the standards [for a finding of not guilty by reason of mental disease or defect]."

See ***id.*** at 256. We concluded that the expert's "opinion was nothing more than the newly discovered importance of existing evidence." ***Id.***

In ***Fosnow***, three psychiatrists examined the defendant before he pled guilty to multiple crimes, and all three concluded that the defendant was not suffering from a mental disease or defect at the time of the offenses. *See* ***id.***, 240 Wis. 2d 699, ¶3. After conviction, the defendant sought to withdraw his pleas on the basis of alleged newly discovered evidence, specifically, the opinion of a psychiatrist who treated the defendant in prison and concluded that the defendant was not criminally responsible for his crimes because he suffered from a mental illness when he committed them. *See* ***id.***, ¶5. The circuit court denied relief, and we affirmed. We concluded that the defendant and his trial attorney were both aware of the defendant's prior history of mental health treatment, and that the "new expert opinion is 'nothing more than the newly discovered importance of existing evidence,' not newly discovered evidence." ***Id.***, ¶¶19, 25 (citation omitted).

Johnson argues that his case is different from the foregoing authorities because "the evaluation performed by Dr. Rawski was inadequate in that he failed to give Johnson any standard psychological tests or talk to any family members." Therefore, he says, Dr. Rawski's conclusion was "not credible or reliable." We are not persuaded that Johnson's characterization of Dr. Rawski's evaluation meaningfully distinguishes this case from ***Vara***, ***Krieger***, and ***Fosnow***. As the State correctly explains, the decision in each of those three cases turns on the mental health information known to the defendant and the defendant's attorney before conviction, not on the specifics of the pretrial mental health assessments that the defendant obtained. Indeed, the opinion in ***Vara*** does not suggest that the defendant had any pretrial psychiatric evaluation. *See* ***id.***, 56 Wis. 2d 390, *passim*. The supreme court nonetheless concluded in ***Vara*** that because the defendant knew before trial about the brain injury underlying his postconviction claim of mental illness, his

claim was based on the "newly-discovered importance of evidence previously known and not used." *See* ***id.*** at 394.

Here, Johnson and his trial counsel knew that he had a history of mental health problems but nonetheless did not pursue a second pretrial mental health evaluation after Dr. Rawski concluded that he was unable to support Johnson's NGI pleas. Only following conviction did Johnson obtain a further evaluation, but that postconviction assessment is, like the postconviction evaluations in ***Vara***, ***Krieger***, and ***Fosnow***, "simply 'the newly discovered importance of existing evidence,' rather than newly discovered evidence." *See* ***Fosnow***, 240 Wis. 2d 699, ¶16 (citing ***Krieger***, 163 Wis. 2d at 256, ***Vara***, 56 Wis. 2d at 394). Accordingly, we reject Johnson's claim that he has newly discovered evidence warranting a new trial.

Johnson also claims that Dr. Mosnik's report constitutes newly discovered evidence that he was not competent to proceed to trial. As we have seen, the report states Dr. Mosnik's view that Johnson "very likely may have lacked substantial mental capacity to understand the proceedings or assist in his own defense at the time of his trial," and goes on to offer an "opinion ... that [Johnson's] competency was not adequately assessed at the time of his trial." Relying on this opinion, Johnson asserts: "Dr. Mosnik's conclusion that Johnson is not competent is clearly newly-discovered evidence." The circuit court rejected this claim as conclusory. We agree.

A motion for postconviction relief must include "sufficient material facts that, if true, would entitle the defendant to relief." *See* ***State v. Allen***, 2004 WI 106, ¶¶12, 14, 274 Wis. 2d 568, 682 N.W.2d 433. Therefore, a convicted defendant cannot rely on allegations that are merely subjective opinions, *see* ***id.***, ¶18, but must offer allegations that are "factual-objective," *see* ***State***

v. Saunders, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995). Postconviction motions with allegations of sufficient "material factual objectivity" as to satisfy the pleading standard will normally "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *See* ***Allen***, 274 Wis. 2d 568, ¶23.

Here, Johnson claimed to have newly discovered evidence that he was not competent to stand trial. "[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. When doubt exists as to a defendant's competency, a court must appoint one or more examiners to perform a competency examination and report his or her findings regarding the defendant's mental capacity. *See* ***id.***, ¶30. Competency to stand trial, however, "constitutes a judicial inquiry, not a medical determination." ***Id.***, ¶31. Thus, "[a]lthough a defendant may have a history of psychiatric illness, a medical condition does not necessarily render the defendant incompetent to stand trial. To determine legal competency, the court considers a defendant's present mental capacity to understand and assist at the time of the proceedings." ***Id.*** (citation omitted).

Johnson's postconviction motion failed to identify any facts to support a claim that, at the time of trial, Johnson lacked either the capacity to understand the proceedings or the ability to assist his trial counsel. He offered only an opinion that such a claim was not sufficiently explored. Accordingly, the circuit court correctly rejected his claim as "completely conclusory."

We turn to the claims that Johnson received ineffective assistance from his trial counsel because trial counsel did not obtain an expert's opinion to support his NGI pleas and did not seek a competency evaluation. To prevail on a claim of ineffective assistance of counsel, a defendant

must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If the defendant fails to satisfy one component of the analysis, a court need not consider the other. *See* ***id.*** at 697. To prove deficiency, the defendant must show that trial counsel's actions or omissions were "professionally unreasonable." *See* ***id.*** at 691. To prove prejudice, the defendant must show that trial counsel's errors "actually had an adverse effect on the defense." *See* ***id***. at 693. When we review a claim of ineffective assistance of counsel, we uphold the circuit court findings of fact unless they are clearly erroneous. *See* ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. Whether the facts satisfy the deficiency and prejudice components are questions of law that we review *de novo*. *See* ***id.***

A defendant pursuing a claim of ineffective assistance of counsel is normally required to preserve the counsel's testimony at an evidentiary hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). In this case, however, the circuit court found, and neither party disputes, that trial counsel passed away before Johnson filed his postconviction motion. An exception to the ***Machner*** rule therefore applies:

> If the counsel in question cannot appear to explain or rebut the defendant's contentions because of death, insanity or unavailability for other reasons, then the defendant should not, by uncorroborated allegations, be allowed to make a case for ineffectiveness. The defendant must support his allegations with corroborating evidence. Such evidence could be letters from the attorney to the client, transcripts of statements made by the attorney or any other tangible evidence which would show the attorney's ineffective representation.... *In other words, we will presume that counsel had a reasonable basis for his actions, and the defendant cannot by his own words rebut this presumption*.

See ***State v. Lukasik***, 115 Wis.2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983) (emphasis added).

Here, Johnson offered Dr. Mosnik's report to demonstrate that his trial counsel acted unreasonably in not pursuing an additional examination to support NGI pleas, but "[c]ompetent representation does not demand that counsel seek repetitive examinations of the defendant until an expert is found who will offer a supportive opinion." *See* ***State v. Oswald***, 2000 WI App 2, ¶77, 232 Wis. 2d 62, 606 N.W.2d 207 (citation omitted). Indeed, good reasons exist to forgo retention of an expert in support of an NGI plea. Such a strategy might allow the State to gain access to material about the defendant's state of mind that would hurt the defense, *see* WIS. STAT. § 971.16(4) (permitting the State to examine and observe a defendant who elects to be examined by a physician of his or her own choice); or pursuit of an NGI plea might run counter to the defense that counsel concluded was the strongest, *see* ***Oswald***, 232 Wis. 2d 62, ¶75.

Thus, although Johnson submitted Dr. Mosnik's postconviction "'supportive opinion,'" *see* ***id.***, ¶77 (citation omitted), he failed to satisfy the ***Lukasik*** requirement to present trial counsel's letters, statements, or other tangible evidence to rebut the presumption that trial counsel acted reasonably in forgoing retention of an expert to examine Johnson before trial. *See* ***id.***, 115 Wis. 2d at 140. As the State points out, the failure to offer such evidence is particularly notable because the record shows that Johnson's trial counsel did consider retaining an expert but ultimately did not do so. Johnson has not explained what his trial counsel took into account in deciding not to request a further examination, or how the decision was made, or who his trial counsel consulted regarding that decision, or why or when trial counsel ultimately made the decision. *See* ***Allen***, 274 Wis. 2d 568, ¶23. Johnson therefore has not shown that his trial counsel performed deficiently. *See* ***Lukasik***, 115 Wis. 2d at 140. Because Johnson failed to satisfy the deficiency component of the ***Strickland*** analysis, we reject his claim that trial counsel was ineffective for not retaining an expert to support NGI pleas in this matter. *See* ***id.***, 466 U.S. at 697.

Finally, Johnson alleges that his trial counsel was ineffective for failing to obtain a competency evaluation. We also reject this claim.

A defense attorney performs deficiently if that attorney has reason to doubt the defendant's competency and fails to raise the issue with the circuit court. *See* ***State v. Johnson***, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986). A reason to doubt competency can arise in various ways, including from the defendant's demeanor in the courtroom or colloquies with the judge, *see* ***Byrge***, 237 Wis. 2d 197, ¶29, but the mere fact of mental illness does not alone provide a reason to doubt competency, *see* ***State v. Weber***, 146 Wis. 2d 817, 827-28, 433 N.W.2d 583 (Ct. App. 1988).

Here, Johnson's postconviction motion offered evidence that Johnson was mentally ill but failed to identify anything that should have caused trial counsel to doubt Johnson's competency at the time of trial. The motion did not describe any courtroom behavior or interpersonal interaction that should have alerted trial counsel that Johnson did not understand the proceedings, or could not consult with counsel, or was unable to assist in his defense. Moreover, the record shows that trial counsel had in hand the report of an independent psychiatrist who examined Johnson and opined that he suffered from a treatable mood disorder that neither prevented him from providing "goal directed" responses nor gave rise to "overtly delusional" remarks.

In sum, Johnson did not point to any fact available to his trial counsel that objectively called into question his competency at the time of trial. He therefore failed to show that his trial counsel performed deficiently by not requesting a competency examination. *See* ***Johnson***, 133 Wis. 2d at 220. Accordingly, the circuit court properly rejected the claim that trial counsel was ineffective for not seeking such an examination. *See* ***Strickland***, 466 U.S. at 697. For all the foregoing reasons, we affirm.

IT IS ORDERED that the judgments of conviction and postconviction order are summarily affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals