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DISTRICT II

June 24, 2020

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

2018AP2111 State of Wisconsin v. Ronnie F. Nicholson (L.C. #1991CF111)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Ronnie F. Nicholson appeals an order denying his postconviction motion without an evidentiary hearing. 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 (2017-18).[1] We affirm the order of the circuit court.

Nicholson was convicted in 1992 of first-degree intentional homicide, as a party to a crime, for his involvement in the murder of J.H. An accomplice, M.L. Walker, also was found guilty in a separate, subsequent trial. Nicholson had subpoenaed Walker to testify at Nicholson's trial in support of Nicholson's claim of innocence, but Walker invoked his Fifth Amendment right against self-incrimination and did not testify. Nicholson appealed his conviction on ineffective assistance of counsel grounds, but we ultimately affirmed his conviction. ***State v. Nicholson,*** 187 Wis. 2d 688, 523 N.W.2d 573 (Ct. App. 1994).

Decades later, in 2018, Nicholson filed this postconviction motion, claiming he is entitled to a new trial based upon newly discovered evidence, such evidence primarily[2] being that the convicted Walker, Nicholson's cousin, has now provided from prison an affidavit indicating that Nicholson did not participate in the murder and that Walker forced Nicholson, at gunpoint, to assist Walker in hiding J.H.'s body. Nicholson claims this is newly discovered evidence entitling him to a new trial and relatedly complains that he was not afforded an evidentiary hearing on his newly discovered evidence claim. We conclude Walker's affidavit does not constitute newly discovered evidence, and Nicholson was not entitled to a hearing.

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

[2] Nicholson also submitted affidavits from three individuals who claim Walker told them that Nicholson did not assist in the murder. These hearsay statements were submitted by Nicholson as claimed "corroboration" of Walker's affidavit. The parties focus on Walker's affidavit, as will we.

To decide whether Nicholson's WIS. STAT. § 974.06 motion for a new trial is sufficient to entitle him to an evidentiary hearing based on a newly discovered evidence claim, we "[f]irst … determine whether the motion on its face alleges sufficient facts that, if true, would entitle the defendant to relief." ***State v. McAlister***, 2018 WI 34, ¶25, 380 Wis. 2d 684, 911 N.W.2d 77 (quoting ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433). This is a question of law, which we review independently, based on the specific factual allegations made and the record as a whole. ***McAlister***, 380 Wis. 2d 684, ¶25. If the motion alleges sufficient material facts, "the circuit court must hold a hearing." ***Allen***, 274 Wis. 2d 568, ¶12. "'[I]f 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 decision to grant or deny a hearing is within the circuit court's discretion." ***McAlister***, 380 Wis. 2d 684, ¶26 (quoting ***Allen***, 274 Wis. 2d 568, ¶9).

One of several criteria a defendant seeking a new trial based on newly discovered evidence must prove is that "the evidence was discovered after conviction." ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). A court "must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify." ***State v. Jackson***, 188 Wis. 2d 187, 199-200, 525 N.W.2d 739 (Ct. App. 1994).

"The reason for this caution is two-fold:

> First, the substance of the testimony is not in fact new evidence, since it was always known by the defendant seeking a retrial. Second, and equally important, the once-unavailable defendant who now seeks to exculpate his co-defendant lacks credibility, since he has nothing to lose by testifying untruthfully regarding the alleged innocence of the defendant seeking a retrial.

Id. at 200 (citation omitted). In discussing the inherent untrustworthiness of such "newly available" evidence in ***Jackson***, we embraced another court's observation that after a co-defendant is sentenced, there is "very little to deter" the co-defendant "from untruthfully swearing out an affidavit in which he purports to shoulder the entire blame." ***Id.*** at 200 n.5 (quoting ***United States. v. La Duca***, 447 F. Supp. 779, 783 (D.N.J. 1978)). We were "persuaded by the rationale of the federal courts" in rejecting such evidence as "newly discovered," stating that "as a matter of law … newly available testimony from a co-defendant is not newly discovered evidence necessitating a new trial for the defendant where, (1) the defendant was aware of that possible testimony before or at trial, and (2) the co-defendant previously declined to testify for fear of self-incrimination." ***Jackson***, 188 Wis. 2d at 201.

This is the case here. At his trial, Nicholson testified that he and Walker drove to J.H.'s house together the night J.H. was murdered and that both he and Walker were inside the house when J.H. was murdered. Nicholson claimed he was upstairs when Walker called for him to come downstairs, and when Nicholson did so, he found that Walker had just finished murdering J.H. by himself. Nicholson further testified that Walker then forced him at gunpoint to assist Walker in moving the body into the car. In his affidavit in support of Nicholson's motion for a new trial, Walker avers that he and Nicholson went to J.H.'s house together the night J.H. was murdered, that he went into the basement by himself and murdered J.H. by himself, and that

"[s]ometime during the struggling I called for … Nicholson to come down stairs, but he showed up after the struggling between [J.H.] and I had stop[ped]." Walker further avers that he forced Nicholson at gunpoint to help him load the body into the car.

Thus, before and at his trial, Nicholson was aware of Walker's possible testimony. Nicholson had subpoenaed Walker to testify on Nicholson's behalf, but Walker invoked his Fifth Amendment right against self-incrimination and refused to testify. His affidavit now merely provides newly available evidence—the subsequently-convicted Walker is now willing to testify—not newly discovered evidence.[3] As a result, Nicholson was not entitled to a hearing on his postconviction motion. Furthermore, Nicholson does not argue and we fail to see any basis for concluding that the circuit court erroneously exercised its discretion in denying the motion without a hearing. Because the evidence at issue—Walker's version of the facts related to J.H.'s murder—was only newly available and not newly discovered, the circuit court "had sound reasons to exercise its discretion and to deny [Nicholson's] motion for a new trial without an evidentiary hearing." *See* ***McAlister***, 380 Wis. 2d 684, ¶63.

Therefore,

[3] Indeed, in his brief-in-chief on appeal, Nicholson acknowledges that at the time of his trial he "had always been aware of Walker having killed J.H. on his own," but that he just "had no way of proving it."

IT IS ORDERED that the order is 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