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

October 13, 2020

To:

Hon. David A. Hansher
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233

Sara Lynn Shaeffer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Barrett
Clerk of Circuit Court
821 W. State Street, Rm. 114
Milwaukee, WI 53233

Dominic Lamar Addison 438115
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

Elizabeth A. Longo
Assistant District Attorney
821 W. State St.
Milwaukee, WI 53233

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

2018AP2038 State of Wisconsin v. Dominic Lamar Addison (L.C. # 2004CF600)

Before Brash, P.J., Dugan and Donald, 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).

Dominic Lamar Addison, *pro se*, appeals a circuit court order denying his postconviction motion to withdraw his guilty plea to first-degree reckless homicide by use of a dangerous weapon as a party to a crime. Addison alleges that he has newly discovered evidence. The circuit court determined that no reasonable probability exists that the evidence at issue—which involves claims of police misconduct in a homicide prosecution unrelated to Addison's—would change the outcome of the instant case. Upon our review of the briefs and record, we conclude

at conference that this matter is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2017-18).[1]

On June 12, 2003, Marques Messling was fatally shot while sitting in the driver's seat of a blue truck in the area of 31st and West Capitol Drive in Milwaukee. Four bullets were removed from his body. A firearms expert determined that two different guns were used to fire the shots.

A citizen witness told police that on June 12, 2003, she saw two men with pistols approach a blue truck, point the guns inside the vehicle, and fire multiple shots. A second citizen witness said he heard gun shots and then saw two armed black men run from the area of 31st and West Capitol Drive and climb into a maroon car.

Police questioned Addison several times in the days immediately following the shooting. He denied any involvement, and the police released him. On January 22, 2004, Detective Louis Johnson again questioned Addison. Addison continued to deny involvement, but he implicated Ernest Knox and Michael Miller in the crime.

Police questioned Knox the next day, and he admitted that he owned the red car that fled from the shooting scene. Knox indicated that he, Addison, Miller, and a fourth man were affiliated with a street gang and had hunted Messling to obtain information about a prior gang-related shooting. When the four gang members discovered Messling's location, Knox drove them to the area, and Addison and Miller got out of the car to confront Messling. Knox said that

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

both Addison and Miller were armed as they left the car and headed into an alley. Knox heard gunshots just before Addison and Miller ran back to the car. As Knox drove the four men away from the scene, Miller demonstrated how Messling reacted when he was shot.

Miller gave a statement to police on February 3, 2004, and confessed to shooting Messling. Miller implicated Addison in the crime and said that when they returned to the car after the shooting, Addison said: "I got him good."

On February 5, 2004, the State filed a criminal complaint charging Addison with first-degree intentional homicide while armed, as a party to a crime. Police then obtained an order to produce him for an initial appearance on February 6, 2004. That morning, police took Addison from the Milwaukee Secure Detention Facility, where he was confined in connection with an unrelated battery charge, and transported him to the prisoner processing section of the Milwaukee jail. Later that same day, Detective Gilbert Hernandez introduced himself to Addison and brought him to the detective bureau. There, they were joined by Detective Katherine Hein, and the two detectives questioned Addison about the Messling homicide. During the course of that interrogation, Addison confessed to shooting Messling. The detectives then returned Addison to the Milwaukee Secure Detention Facility. He subsequently made an initial appearance in this case on February 11, 2004.

Addison moved to suppress his confession on the ground that it was the product of an unreasonably lengthy and coercive detention during which he was unable to contact his attorney. The circuit court conducted a hearing to address the claim. Among the witnesses were Hernandez, Hein, and Addison. The circuit court found that Addison was not credible, and it did not believe his testimony that he asked to speak with a lawyer during the interrogation. The

circuit court concluded that Addison's confession was knowing, intelligent, and voluntary and denied his suppression motion.

Addison subsequently pled guilty to a reduced charge of first-degree reckless homicide by use of a dangerous weapon as a party to a crime and then pursued an appeal challenging the circuit court's ruling denying his suppression motion. We affirmed. *See* ***State v. Addison*** (***Addison I***), No. 2009AP2117-CR, unpublished slip op. ¶1 (WI App Sept. 8, 2010).

In March 2018, Addison filed the postconviction motion underlying this appeal. He alleged that he was entitled to relief from his conviction based on newly discovered evidence about an unrelated homicide. The documents that he filed in support of the motion show that Hernandez and Hein were involved in a homicide investigation that led to the 2004 conviction of William Avery. Avery's homicide conviction was later overturned, however, when physical evidence revealed that another man committed the crime. Avery filed a federal lawsuit alleging, as relevant here, that Hernandez fabricated Avery's confession to the homicide, and that Hernandez, Hein, and two other officers fabricated statements from jailhouse informants. *See* ***Avery v. City of Milwaukee***, 847 F.3d 433, 437 (7th Cir. 2017). The matter proceeded to trial, where the jury found Hernandez liable for fabricating evidence but did not find Hein liable in any respect.[2] *See* ***id.***

Addison argued in his postconviction motion that the information developed in ***Avery*** warranted allowing him to withdraw his plea in this case and then granting him a new

[2] In addition to Hernandez, a second detective was found liable for fabricating a confession in Avery's case. *See* ***Avery v. City of Milwaukee***, 847 F.3d 433, 437 (7th Cir. 2017). Addison does not suggest that the second detective was involved in the instant case.

suppression hearing where he could use the information uncovered in ***Avery*** to impeach the credibility of Hernandez and Hein and show that they "violated Addison's invocation of [his] right to counsel." The circuit court rejected the arguments and denied Addison's postconviction motion without a hearing.[3] The circuit court determined that Addison failed to show a reasonable probability that the ***Avery*** evidence would either lead to a finding that Addison requested counsel or result in suppression of his statement. We set forth the circuit court's cogent reasoning in some detail:

> Detective Gilbert Hernandez testified at the suppression hearing that [Addison] had never asked for a lawyer during the interrogation that [Hernandez] conducted on February 6, 2004. The [***Avery***] proceedings related to the use of Hernandez's tactics in the ***Avery*** case operate to cast some clouds over certain aspects of his credibility, but this court's findings were not predicated on his testimony alone. Detective Kathy Hein [and Addison] ... also testified. Detective Hein ... conducted the interrogation of [Addison] jointly with Detective Hernandez. She testified at the suppression hearing that [Addison] never asked for an attorney on February 6, 2004, at any time after he was read his ***Miranda*** rights....[4]
>
> On cross-examination [of Addison], the State established that [he] had participated in five different interviews with police since June of 2003 with regard to the offense in this case, and that he did not exercise his right to a lawyer in any of the first four interviews after being advised of his ***Miranda*** rights. The court found this to be fatal to [Addison's] credibility concerning his claim that he had asked for a lawyer during his fifth interview. Further, [Addison's] credibility was seriously put into issue after the State demonstrated, by [his] own admissions, that he hadn't

[3] The Honorable David A. Hansher, who presided over the suppression hearing, also presided over the postconviction motion.

[4] Pursuant to ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966), officers must, before questioning a suspect in custody, inform the suspect of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one.

been truthful with police about his involvement in the first four interviews.

The court made the following findings at the end of the suppression hearing:

> ["]He's been interrogated before. He'd been denying this.... He was comfortable he wasn't going to be charged. He was comfortable that Miller and Knox were possibly going to be charged and he was home free.... [T]hen he was blindsided with the testimony or information that basically implicated him. And it was information that I guess he couldn't deny, and eventually he made a statement[.]
>
> I do not believe [Addison's] testimony that he asked for an attorney .... He never said ['']speak to my attorney['] the previous times. Why this one time?...
>
> I think it was [hubris] on his part figuring hey, I can deny it. That's the impression I got from his testimony here. They weren't going to get anything out of [him], but finally they threw a trump card down, and he decided to confess.
>
> So I find that the State has proven ... that the confession was voluntary. It was given of his free will, and that he did not exercise his right to have an attorney present.["]

Although the court gave credence to Detective Hernandez's testimony at the time, it also found [Addison's] testimony incredible on its own two feet. Thus, even if the court were to disregard Detective Hernandez's testimony and not consider it ... [the court] would nevertheless have found Detective Hein's testimony more credible than [Addison's] self-serving testimony for the same reasons the court stated above; and therefore, the court is satisfied there is not a reasonable probability that it would have altered its findings based on the newly discovered developments with respect to Detective Hernandez's character and use of improper tactics in another homicide case.

(Record citations omitted; some ellipses in original.)

Addison appeals. He contends that the evidence presented in his postconviction motion warrants plea withdrawal and a new suppression hearing to address whether he voluntarily

confessed and whether he requested counsel. He also contends that the record, when viewed in light of the new evidence, shows violations of his "right to [an] initial appearance and right to counsel thereto."

A defendant who seeks to withdraw a guilty plea must establish that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Whether to grant relief rests in the circuit court's discretion. ***Id.*** We "search the record for reasons to sustain the circuit court's discretionary decision[s]," and we affirm them "if they have a reasonable basis and are made in accord with the facts of record." *See* ***State v. Thiel***, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388.

Although "[n]ewly discovered evidence may be sufficient to establish that a manifest injustice has occurred," *see* ***McCallum***, 208 Wis. 2d at 473, we approach claims of newly discovered evidence with great caution, *see* ***State v. Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d 369, 706 N.W.2d 152. To prevail, the defendant "must prove, 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." ***McCallum***, 208 Wis. 2d at 473. If the defendant 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.*** The supreme court has explained: "[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* ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (citation and two sets of brackets omitted). The five-part test is equally applicable both to

motions for plea withdrawal and for a new trial. *See* ***State v. Krieger***, 163 Wis. 2d 241, 255, 471 N.W.2d 599 (Ct. App. 1991); *see also* ***McCallum***, 208 Wis. 2d at 474.

The circuit court in this case concluded that Addison satisfied the first four components of the newly discovered evidence test but failed to satisfy the fifth. On appeal, the State argues that Addison not only failed to show a reasonable probability of a different result at trial—the fifth component—but also failed to show that the proposed newly discovered evidence satisfied the materiality requirement set forth in the third component. A proponent of newly discovered evidence must, however, satisfy all five components of the test to obtain relief, *see* ***McCallum***, 208 Wis. 2d at 473, and, for the reasons that follow, we conclude that the circuit court correctly determined that Addison failed to satisfy the fifth component. Accordingly, we will not consider the State's argument regarding the third. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) ("An appellate court should decide cases on the narrowest possible grounds.").

We turn, then, to our review of the circuit court's analysis. We begin by addressing Addison's procedural complaint, namely, that the circuit court erred when it assigned Addison the burden to demonstrate a reasonably probability that the new evidence would have led to a different outcome in his case. Addison is wrong. A defendant who seeks relief based on a claim of newly discovered evidence has the burden to satisfy every component of the newly discovered evidence test. *See* ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999).

As to the substantive issue, Addison argued in his postconviction motion that, because the newly discovered evidence would have impeached the detectives in his case, he showed: "a reasonable probability that [the detectives] violated Addison's invocation of [his] right to

counsel"; that "a reasonable probability exist[s] that [the] newly discovered evidence would have resulted in suppression of Addison's confession"; and that Addison therefore would not have pled guilty but instead would have proceeded to trial. The circuit court rejected the arguments, finding that the evidence would not have affected the outcome of the suppression motion.

The circuit court's decision turned on the finding that Addison's testimony at the suppression hearing was "incredible on its own two feet." Specifically, Addison "did not exercise his right to a lawyer in any of the first four interviews after being advised of his ***Miranda*** rights," and the circuit court "found this to be fatal to [Addison's] credibility concerning his claim that he had asked for a lawyer during his fifth interview." The circuit court further found that Addison's "credibility was seriously put into issue after the State demonstrated, by [Addison's] own admissions, that he hadn't been truthful with police about his involvement in the first four interviews." Thus, while the circuit court agreed that the information Addison uncovered in regard to Hernandez tarnished that detective's credibility, the circuit court's assessment of Addison's credibility remained unchanged.

A circuit court's credibility assessments are generally unassailable. *See* ***Turner v. State***, 76 Wis. 2d 1, 18, 250 N.W.2d 706 (1977). Nonetheless, Addison argues that the circuit court erroneously assessed his credibility here because the circuit court placed "reliance on the truthfulness of Addison's confession" even though "the truthfulness of a confession can play no role in determining whether the confession was voluntarily given." In support, he cites ***State v. Agnello***, 226 Wis. 2d 164, 174, 593 N.W.2d 427 (1999). ***Agnello***, however, does not assist Addison. The circuit court did not rely on the truthfulness of his confession to determine that it was voluntary. The circuit court relied on Addison's admittedly false prior statements to conclude that he was not a credible witness.

Moreover, Hein also testified at the suppression hearing, and the circuit court believed her testimony. Addison's postconviction motion showed that she was not found liable for any misconduct in ***Avery***, and the circuit court therefore determined that, "even if it were to disregard [] Hernandez's testimony ... [the circuit court] nevertheless would have found [] Hein's testimony more credible than [Addison's] self-serving testimony."

Addison responds by directing our attention to his testimony that he made a request for an attorney while he and Hernandez were alone. Hernandez testified that Addison never made such a request, and Addison reasons that, if the circuit court were to reject Hernandez's testimony as unreliable, then Addison's testimony about requesting an attorney "would be an undisputed fact demonstrating that his right to counsel was not honored."

Addison reasons from a false premise. A fact finder is not required to believe a witness's testimony merely because it was not contradicted by the testimony of another witness.[5] *See* ***State v. Kimbrough***, 2001 WI App 138, ¶28, 246 Wis. 2d 648, 630 N.W.2d 752. A circuit court has the duty to assess the credibility of each witness and may reject uncontroverted testimony, "especially ... when the witness is the sole possessor of the relevant facts." ***Id.***, ¶29. Here, the circuit court found during pretrial proceedings that Addison was not credible, and it did not believe his testimony at the suppression hearing. In postconviction proceedings, the circuit court reiterated that Addison's testimony was "incredible on its own two feet" and determined that

[5] We add that the detectives' testimony was not the only evidence presented at the suppression hearing to prove that Addison failed to request an attorney during the February 6, 2004 interrogation. The State also offered his history of talking to the police without requesting counsel, and his signature on a document stating that he had received ***Miranda*** warnings, understood his rights, and wished to waive them. Additionally, the circuit court heard testimony from the attorney who represented Addison in February 2004 on an unrelated battery charge. The attorney said that he did not receive any complaints from Addison after February 6, 2004, that detectives had ignored his requests to contact counsel.

additional information about Hernandez did not affect the assessment of Addison's credibility or the findings that flowed from that assessment.

Finally, citing ***State v. Missouri***, 2006 WI App 74, ¶¶15-25, 291 Wis. 2d 466, 714 N.W.2d 595, Addison asserts that a new suppression hearing would allow him to cross-examine Hein about the allegations in ***Avery***, even though she was not found liable in that case, because "evidence of officer misconduct [is] relevant to officer credibility."[6] The postconviction proceedings reflect, however, that in the circuit court's assessment, the allegations of misconduct rejected by the ***Avery*** jury did not diminish the credibility of Hein's testimony at the suppression hearing. Those allegations also had no effect on the circuit court's finding that Addison was incredible. "'[C]redibility is crucial to the application of the proper legal standard'" governing the newly discovered evidence test. *See* ***Carnemolla***, 229 Wis. 2d at 660 (citing ***McCallum***, 208 Wis. 2d at 479). We defer to the circuit court's credibility assessments. *See* ***Carnemolla***, 229 Wis. 2d at 661.

In sum, the circuit court found that the outcome of the suppression hearing would have been the same if Addison had presented his evidence about the ***Avery*** case in that hearing. Specifically, the circuit court would have found that Addison lacked credibility, disbelieved his testimony that he asked for a lawyer during the interrogation, and concluded that he knowingly, intelligently, and voluntarily agreed to waive his ***Miranda*** rights and confess his involvement in

[6] We observe that Addison fails to show that he has evidence that Hein engaged in misconduct. The verdict in ***Avery***, which the State filed as a postconviction exhibit in this case, reflects that the jury not only found Hein "not liable" but also answered "no" to the questions of whether she acted improperly, specifically finding that she did not fabricate evidence, did not fail to intervene to prevent the use of fabricated evidence, and did not conspire to use fabricated evidence.

killing Messling. Accordingly, the circuit court would not have suppressed Addison's inculpatory statements and would have permitted the State to introduce those statements at trial.

Because Addison fails to show that the evidence presented in the postconviction proceedings would have altered the outcome of the suppression hearing, it follows that the evidence does not support a reasonable probability of an acquittal at trial. Addison's confession would not be suppressed, so the jury would hear his statements admitting his guilt along with the testimony of citizens and accomplices incriminating him.[7] Addison's briefs in this court fail to develop any argument showing the existence of a reasonable probability that, under these facts, "a jury would have had a reasonable doubt as to his guilt." *See* ***Love***, 284 Wis. 2d 111, ¶44. We decline to develop an argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

We turn to the second issue that Addison raises on appeal. He claims that the record, when viewed in light of the ***Avery*** evidence, demonstrates that "his right to [an] initial appearance and counsel was violated when police misconduct prevented him from his initial appearance and right to counsel thereto." The State in response observes that Addison made an initial appearance with counsel on February 11, 2004, and posits that Addison is actually claiming that the detectives held him in custody to prevent him from meeting with his counsel before that date. Addison filed a reply brief rebuffing the State's effort to recast his argument. He asserts that the State "seeks to mislead the court," and he reiterates his argument that police

[7] The State pointed out in its postconviction submissions that it would not call Hernandez to testify should the matter proceed to trial.

misconduct denied him his "original initial appearance [on February 6, 2004] and right to counsel thereto." Accordingly, we address that allegation. We reject the claim.

In ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991), the Supreme Court held that a judicial determination of probable cause within forty-eight hours after an arrest would normally satisfy the constitutional requirement for a prompt post-arrest probable cause determination. *See* ***State v. Harris***, 174 Wis. 2d 367, 376, 497 N.W.2d 742 (Ct. App. 1993). However, "the forty-eight-hour rule announced in ***County of Riverside*** does not apply to persons already in the State's lawful custody." ***Harris***, 174 Wis. 2d at 377. Similarly, WIS. STAT. § 970.01(1) provides that "[a]ny person who is arrested shall be taken within a reasonable time before a judge," *see* ***id.***, but, "absent either prejudice or other unforeseen circumstances[,] ... the interval between an 'arrest' and an initial appearance is never unreasonable where the arrested suspect is already in the lawful physical custody of the State," *see* ***Harris***, 174 Wis. 2d at 375.

Here, Addison was in lawful custody for an unrelated matter when the State filed a complaint against him in the instant case on February 5, 2004. *See* ***Addison I***, No. 2009AP2117-CR, ¶¶4, 13. Moreover, Addison cannot show prejudice or unforeseen circumstances that rendered a delayed initial appearance unreasonable. His custodial status belies any concerns that the delay "'unjustly imperil[ed his] job, interrupt[ed] his source of income, and impair[ed] his family relationships.'" *See* ***Harris***, 174 Wis. 2d at 376 (citations and one set of quotation marks omitted). We have also previously determined that "there was nothing improper in the detectives choosing to question Addison after he had been turned over to their custody," and we have deemed "inconsequential" that detectives questioned him "after the issuance of an [o]rder to [p]roduce." *See* ***Addison I***, No. 2009AP2117-CR, ¶13. Therefore, Addison may not relitigate

those conclusions. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

In sum, because Addison was in lawful custody when he was charged in this case, he fails to demonstrate that he had a right—statutory or constitutional—to an initial appearance on any particular date or within any particular timeframe. Accordingly, his claim that he had a right to make an initial appearance on February 6, 2004, is meritless. Further, the record is uncontroverted that the State afforded him an initial appearance with counsel on February 11, 2004.[8] As ***Harris*** makes clear, the timing of that appearance satisfied the statutory and constitutional requirement of reasonableness. *See* ***id.***, 174 Wis. 2d at 375, 377. For all the foregoing reasons, we affirm.

IT IS ORDERED that the circuit court's 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

[8] Addison appears to imply at some points in his appellate briefs that his initial appearance was held in his absence on February 6, 2004. If that is his argument, it lacks support in the record, and we reject it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).