



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

January 20, 2021

To:

Hon. Jeffrey A. Wagner
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

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

Sonya Bice
Wisconsin Department of Justice
17 W Main St.
Madison, WI 53703

Elizabeth A. Longo
Assistant District Attorney
District Attorney's Office
821 W. State. St. - Ste. 405
Milwaukee, WI 53233

Tony Phillip Rogers 261489
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2019AP2124

State of Wisconsin v. Tony Phillip Rogers (L.C. # 2012CF4899)

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

Tony Phillip Rogers, *pro se*, appeals the circuit court's order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06 (2017-18).¹ Rogers argues that: (1) he is entitled to a new trial based on newly discovered evidence; (2) he is entitled to a new trial in the interests of justice; and (3) the circuit court clerk erred by failing to file his petition to commence

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

visitation with his child. After review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Rogers was convicted after a jury trial of four counts of first-degree sexual assault of a child and one count of incest with a child. He was sentenced to twenty-five years of initial confinement and fifteen years of extended supervision. Rogers unsuccessfully moved for a new trial. On appeal, we affirmed. Rogers then brought this collateral attack on his conviction. The circuit court denied his motion.

Rogers first argues that he should be retried for his crimes based on an autopsy report of the victim's aunt. To obtain a new trial based on newly discovered evidence, a defendant must establish 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. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citation omitted). If the defendant establishes all four of these criteria, then the court must determine "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." *Id.* This determination is a question of law. *Id.*, ¶33.

Rogers contends that the victim's aunt's autopsy report shows that she died from a brain tumor that could have been caused by a hereditary medical condition. Rogers contends that the victim may suffer from the same condition, which caused her to be delusional and falsely accuse him of assaulting her. Rogers' argument is unavailing. Rogers wholly failed to address the four *Plude* criteria in his motion to the circuit court or in his appellate brief. As the circuit court aptly stated, Rogers' "entire motion is predicated on sheer speculation." Rogers has not shown that

the victim suffers from a medical condition and has not shown that the autopsy report had any bearing on the victim's veracity when she testified at trial that he repeatedly assaulted her. Thus, he has failed to establish that the evidence is material to an issue in the case. *See id.*

Rogers next argues that he is entitled to a new trial in the interest of justice. We have discretionary authority under WIS. STAT. § 752.35 to order a new trial on the grounds that the real controversy was not fully tried or justice has miscarried. We see no reason to exercise our discretionary authority under § 752.35 in this case.

Finally, Rogers argues that the circuit court clerk erred by not filing his petition to commence visitation with his child. Rogers did not raise this argument in the circuit court; therefore, he may not raise it on appeal. *See State v. Rogers*, 196 Wis. 2d 817, 826, 539 N.W.2d 897 (Ct. App. 1995) (“[A] party seeking reversal may not advance arguments on appeal which were not presented to the trial court.”).²

Upon the foregoing,

IT IS ORDERED that the order of the circuit court 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

² Rogers' brief rambles. To the extent it could be read to raise additional issues not raised in the circuit court, those issues meet the same fate.