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DISTRICT IV

June 17, 2021

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

2020AP234-CR

State of Wisconsin v. Dante R. Voss (L.C. # 2016CF72)

Before Blanchard, Kloppenburg, and Graham, 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).

Dante Voss appeals a judgment of conviction and an order denying his postconviction motion. Voss argues that the circuit court erred by denying his request for plea withdrawal based on newly discovered evidence. Based upon our review of the briefs and the record, we conclude

at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).¹ We affirm.

According to the complaint allegations, Voss was involved in a one-vehicle rollover crash. A law enforcement officer who responded to the scene observed Voss exhibiting signs of intoxication, and Voss stated that he was taking a number of medications. A test of Voss's blood revealed the presence of Hydrocodone and Clonazepam. As part of a plea agreement, Voss pled guilty to one count of operating a motor vehicle while under the influence of an intoxicant, as a sixth offense.

After sentencing, Voss filed his postconviction motion seeking plea withdrawal based on newly discovered evidence. For post-sentencing plea withdrawal based on newly discovered evidence, a defendant must first 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.” *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). “If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.” *Id.*

In his postconviction motion, Voss alleged that the newly discovered evidence consisted of “the existence of an involuntary intoxication defense, of which he was not aware at the time he entered his plea.” Voss submitted affidavits that included medical records showing his

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

prescription medications. In addition, Voss submitted a letter from a toxicologist stating an opinion that Voss was involuntarily intoxicated due to the interaction of his medications.

The circuit court conducted an evidentiary hearing. Voss and the toxicologist both testified. Voss testified that he took several prescription medications, including Hydrocodone and a medication called Bupropion. The toxicologist testified that Voss was involuntarily intoxicated because the Bupropion interfered with Voss's ability to metabolize Hydrocodone, thereby increasing the concentration of Hydrocodone in Voss's blood.

The circuit court denied Voss's postconviction motion. The court concluded that Voss failed to satisfy the third criterion for newly discovered evidence, the materiality requirement. The court determined that Voss would not have been entitled to assert an involuntary intoxication defense at a trial because, among other reasons, the evidence showed that Voss took more Hydrocodone than prescribed.

On appeal, Voss contends that the circuit court's decision was an erroneous exercise of discretion because it was not based on the facts and involved speculation regarding Voss's medications. Voss argues that the court misunderstood the evidence and made erroneous factual findings that are not supported by the record. The State contends that the circuit court reasonably concluded that Voss's proffered involuntary intoxication defense was not material because Voss was not taking his medication as prescribed. We agree with the State.²

² The State advances several alternative grounds for affirming the circuit court. We need not and do not address those grounds.

This court reviews the circuit court’s determination on whether to grant a motion for plea withdrawal based on the newly discovered evidence test for an erroneous exercise of discretion. *McCallum*, 208 Wis. 2d at 473. “Under the erroneous exercise of discretion standard, ‘the circuit court’s determination will be upheld on appeal if it is a reasonable conclusion, based upon a consideration of the appropriate law and facts of record.’” *State v. Salas Gayton*, 2016 WI 58, ¶20, 370 Wis. 2d 264, 882 N.W.2d 459 (quoted source omitted). “[A] reviewing court may search the record for reasons to sustain the circuit court’s exercise of discretion.” *Id.* (alteration in original) (quoted source omitted). Further, a reviewing court will uphold the circuit court’s factual findings unless those findings are clearly erroneous. *See, e.g., State v. Kucharski*, 2015 WI 64, ¶27, 363 Wis. 2d 658, 866 N.W.2d 697.

Here, we perceive no serious dispute that the circuit court considered the appropriate legal standard, and regardless, we agree with the circuit court’s legal conclusion that Voss could not assert the proffered involuntary intoxication defense without evidence that he was taking his medication as prescribed. *See State v. Gardner*, 230 Wis. 2d 32, 41-42, 601 N.W.2d 670 (Ct. App. 1999). More to the point, we conclude that the circuit court’s factual finding that Voss was not taking his Hydrocodone as prescribed is supported by the record and is not clearly erroneous. Voss testified that he had a prescription to take Hydrocodone every four to six hours, and that he had taken the prescribed dosage before the accident. Voss’s medical records, in contrast, showed that his prescription was to take Hydrocodone “up to three times daily.” Based on this evidence, the circuit court reasonably found that Voss exceeded his prescription by taking Hydrocodone as often as every four to six hours—four to six times per day—rather than taking the Hydrocodone no more than three times per day.

Additionally, the circuit court's decision is supported by the court's finding that Voss lacked a prescription or a physician's approval to take Hydrocodone in combination with Bupropion. This finding too is supported by the record and is not clearly erroneous because Voss's medical records showed that the Hydrocodone and the Bupropion were prescribed by different health care providers.³

Voss challenges other factual findings by the circuit court that we have not discussed. We need not address those findings because we are satisfied that the findings discussed adequately support the circuit court's decision to reject Voss's request for plea withdrawal based on newly discovered evidence.

Therefore,

IT IS ORDERED that the circuit court's judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals

³ The transcript of the evidentiary hearing indicates that the circuit court referred to Buprenorphine in at least one instance when, in context, it seems clear that the court meant Bupropion. Voss does not argue that the circuit court erred by conflating these two medications.