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DISTRICT II

July 28, 2021

To:

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Electronic Notice

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

2019AP1760 State of Wisconsin v. Michael J. Whipp (L.C. #1995CF333)

Before Neubauer, C.J., Reilly, P.J., and Davis, 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).

Michael J. Whipp appeals pro se from an order summarily denying his WIS. STAT. § 974.06 (2019-20)[1] postconviction motion. 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. We affirm.

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

In 1996, a jury convicted Whipp of first-degree sexual assault of a child and incest for sexually assaulting S.M., his four-year-old niece. Whipp had been sleeping on a couch in S.M.'s home. The next morning, S.M. told her mother: "Mommy, Uncle Michael pulled my panties down and kissed my kitty." S.M. testified that Whipp came into her bedroom, took off her panties, and kissed her "kitty," meaning her vagina.

In 2019, Whipp filed the WIS. STAT. § 974.06 postconviction motion underlying this appeal. The motion requested a new trial, or in the alternative, a sentence modification, based on newly discovered evidence as follows: (1) a 2011 memorandum from a private investigator indicating that she interviewed S.M. in 2011 and S.M. told her that the assailant had not performed oral sex on her but had rubbed her vagina; and (2) a 2011 polygraph report indicating that Richard Heath, the administrator of the 2011 test, believed that Whipp had truthfully answered "no" when asked about whether he assaulted S.M.

The circuit court denied Whipp's motion without a hearing, finding that the eight-year-old memo "is completely void of any corroborating evidence and gives no feasible motive for the initial false statement." The court observed that the polygraph test did not corroborate S.M.'s recantation statement and that polygraph tests are generally inadmissible in criminal trials.

On appeal, Whipp maintains that S.M.'s 2011 statement to the private investigator constitutes a partial recantation and, along with the polygraph test report, constitutes newly discovered evidence.

A defendant seeking a new trial based on newly discovered evidence must prove by clear and convincing evidence all of the following: (1) the evidence was discovered after trial,

(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. Additionally, when the newly proffered evidence is a recantation of a prior statement, the defendant must corroborate the recantation with other newly discovered evidence. ***State v. McAlister***, 2018 WI 34, ¶57, 380 Wis. 2d 684, 911 N.W.2d 77. This requires both "(1) a feasible motive for the initial false statement; and (2) circumstantial guarantees of the trustworthiness of the recantation." ***Id.***, ¶58.

The circuit court properly exercised its discretion when it denied Whipp's postconviction motion without a hearing because the record conclusively shows that neither the 2011 memo nor the polygraph test constitute newly discovered evidence. ***State v. Balliette***, 2011 WI 79, ¶50, 336 Wis. 2d 358, 805 N.W.2d 334 (circuit court has the discretion to deny a motion without an evidentiary hearing if the record conclusively demonstrates that the movant is not entitled to relief).

With regard to the eight-year-old memo, Whipp has not established either prong of the corroboration test. First, nothing in the investigator's memo, including the statements attributed to S.M., provides a feasible motive for why S.M. would have lied in her initial statement. Indeed, though S.M.'s 2011 statements may differ in detail, she does not suggest that the assault never occurred. Second, Whipp's motion does not provide sufficient circumstantial guarantees of the recantation's trustworthiness. *See* ***McAlister***, 380 Wis. 2d 684, ¶58. The length of time that passed between the 1996 trial and the 2011 memo, and between the 2011 memo and

Whipp's 2019 motion, cuts against the trustworthiness of S.M.'s statements in the memo. ***Id.***, ¶60. Additionally, the investigator's memo summarizing S.M.'s 2011 statement is not signed by S.M., and the statement was neither given under oath nor made to law enforcement. As such, there is no indication that S.M. agrees with the memo or vouches for its accuracy.

We reject Whipp's argument that the polygraph test constitutes new evidence corroborating the memo. At best, the results tend to show that Whipp believed he was telling the truth when answering the administrator's questions. The results do not lend credibility to, and in fact are inconsistent with, the 2011 memo. Whereas the memo contains S.M.'s statements that the assailant rubbed her vagina with his hand and not his mouth, the polygraph indicates that the test administrator believed Whipp was truthful when he denied ever entering S.M.'s room. Since Whipp has provided neither new evidence corroborating the recantation, nor circumstantial guarantees of its trustworthiness, the 2011 memo remains unreliable and the circuit court had sound reasons to exercise its discretion and deny Whipp's motion without a hearing.

To the extent Whipp maintains that he is entitled to a sentence modification based on new factors, we agree with the State that his argument is undeveloped. While a circuit court may permissibly modify a sentence based on the existence of a new factor, it is the movant's burden to prove by clear and convincing evidence both that the facts were not in existence at the time of the original sentencing, and that the facts were highly relevant to the imposition of sentence. ***State v. Harbor***, 2011 WI 28, ¶¶36, 40, 333 Wis. 2d 53, 797 N.W.2d 828. Whipp fails to explain and we cannot otherwise discern how the 2011 memo and polygraph test are highly relevant to the court's original sentence.

Finally, we reject Whipp's request for a new trial in the interest of justice. While "[t]he [Wisconsin] supreme court and the court of appeals may set aside a conviction through the use of [their] discretionary reversal powers . . . such discretionary reversal power is exercised only in 'exceptional cases.'" ***Avery***, 345 Wis. 2d 407, ¶38 (citations omitted). Here, the 2011 memo and polygraph results fail to warrant discretionary reversal for the same reasons they fail to constitute newly discovered evidence—they are unreliable and inadmissible. S.M.'s long-delayed statements are uncorroborated. The polygraph results did not exist until fifteen years after Whipp was convicted, and the results would be inadmissible at trial. *See, e.g.*, ***State v. Ramey***, 121 Wis. 2d 177, 180-81, 359 N.W.2d 402 (Ct. App. 1984) (for public policy reasons, there is a "blanket exclusion" on the admission of polygraph evidence in criminal proceedings).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to 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