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 II

September 29, 2021

To:

Hon. Rebecca L. Persick
Circuit Court Judge
Electronic Notice

Melody Lorge
Clerk of Circuit Court

Sheboygan County
Electronic Notice

Scott E. Rosenow
Electronic Notice

Joel Urmanski
Electronic Notice

Dorian M. Torres, #632692
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2018AP2174 State of Wisconsin v. Dorian M. Torres (L.C. #2014CF67)

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

Dorian M. Torres, pro se, appeals orders denying his postconviction motions in which he sought a new trial based on newly discovered evidence.[1] The circuit court determined that

---

[1] Torres' motions were ostensibly made under WIS. STAT. § 971.31 (2019-20). As the State notes, that statute governs the timing of pretrial motions in the circuit court. We agree with the State's assessment that Torres' motions are properly construed as postconviction motions under WIS. STAT. § 974.06 (2019-20). We review all of Torres' pro se filings cognizant of the general rule that we afford pro se litigants "a degree of leeway" given their possible unfamiliarity with the procedural rules and substantive law governing their claims. *See* ***State ex rel. Wren v. Richardson***, 2019 WI 110, ¶25, 389 Wis. 2d 516, 936 N.W.2d 587, *cert. denied sub nom.*, ***Wisconsin ex rel. Wren v. Richardson***, 140 S. Ct. 2831 (2020).

(continued)

neither motion raised matters satisfying the criteria for newly discovered evidence, and it denied the motions without a hearing. On appeal, Torres argues his motions were sufficient to entitle him to a hearing. He also argues that both his trial and appellate counsel provided constitutionally ineffective assistance and that his conviction should be reversed in the interest of justice under WIS. STAT. § 752.35. 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 summarily affirm.

In 2015, Torres was convicted of killing his father, Emilio, following a bench trial. Torres admitted to the killing, but argued it had been done in self-defense and had not been premediated.[2] On direct appeal, Torres renewed his pretrial argument that his mother, Shelly, lacked authority to consent to a search of Emilio's residence, where his body was found. *See* ***State v. Torres***, 2018 WI App 23, ¶21, 381 Wis. 2d 268, 911 N.W.2d 388. We rejected his argument and held that Shelly, who had a key to Emilio's apartment, had apparent authority to consent to the search. ***Id.***, ¶28.

In late 2018, Torres filed two motions seeking a new trial based on newly discovered evidence. The first motion was accompanied by an affidavit from Shelly, in which she asserted that she did not have authority to consent to the search of Emilio's residence. Shelly averred, among other things, that Emilio would contact her if he needed her to enter his apartment, and she never went late at night or brought strangers. Shelly claimed that she had not talked to

---

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

[2] Torres testified he had killed his father with a mallet after his father pushed and slapped him. He denied suffocating Emilio; rather, he testified that Emilio was dead at the time he placed a plastic bag over his head and that he had done so only to contain the blood.

Torres about these matters previously because she had been "coerced" into believing Torres had participated in satanic rituals and resented him for that.

The second motion was accompanied by an affidavit from Steven Khail, who averred he was cell mates with Torres and Tyler Harrier. At Torres' trial, Harrier had testified that while they were incarcerated, Torres told him he had hit his father on the head with a bat near the residence's entryway and had suffocated him after he fell. Khail averred that he was always present when Harrier and Torres were together in confinement and that Torres had never stated he killed his dad with a bat or suffocated him. Khail asserted that Torres' statements while in confinement were consistent with Torres' trial testimony that he had placed a plastic bag over Emilio's head only to contain the blood. The circuit court found both motions insufficient and denied them without a hearing.

On appeal, Torres argues the circuit court erroneously denied his motions without first holding an evidentiary hearing. A defendant is entitled to a hearing only if 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. We review that issue de novo. ***Id.*** If the motion does not raise sufficient facts to warrant relief, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the decision to grant a hearing is within the circuit court's discretion. ***Id.***, ¶26. To prevail on a newly discovered evidence claim, the defendant must show by clear and convincing evidence 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. ***Id.***, ¶31.

As a general matter, we agree with the State's observation that Torres' motions failed to meaningfully develop any newly discovered evidence claim so as to entitle him to a hearing. The motions consisted of only conclusory statements that the information was new to him but failed to address the other requirements for newly discovered evidence. Our review of a motion's sufficiency is generally limited to the allegations contained within the document's four corners, and we do not consider any additional allegations contained in an appellate brief. ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433.

Even if, in recognition of Torres' pro se status, we overlook Torres' failure to develop his arguments before the circuit court, he fares no better. Torres was not entitled to a hearing on his motion concerning Shelly's testimony, nor did the circuit court erroneously exercise its discretion by denying his motion without holding one. In Torres' direct appeal, we declined to address Shelly's actual authority to enter the apartment, concluding instead that the police reasonably relied on her apparent authority over the premises. *See* ***Torres***, 381 Wis. 2d 268, ¶20 & n.5. Shelly's new averments do not materially undercut the basis for our holding. Additionally, Shelly testified at the suppression hearing and was cross-examined by defense counsel, at which time defense counsel could have explored any of the matters contained in Shelly's affidavit—for example, whether she had ever been to Emilio's apartment at night. To the extent Shelly's affidavit can be viewed as recanting some of her prior testimony, Torres has failed to corroborate the recantation with additional newly discovered evidence. *See* ***McAlister***, 380 Wis. 2d 684, ¶33.

Torres also was not entitled to a hearing on his newly discovered evidence claim concerning Khail's affidavit, nor did the circuit court erroneously exercise its discretion when it denied his motion without holding one. If, as Khail claims, he was present at all times that

Torres and Harrier were together, Torres must have been aware that Khail could impugn Harrier's trial testimony. The information he now seeks to present was therefore within his own personal knowledge prior to his conviction and does not constitute newly discovered evidence. *See* ***State v. Shanks***, 2002 WI App 93, ¶21, 253 Wis. 2d 600, 644 N.W.2d 275. Additionally, Torres fails to explain why Khail's testimony is not cumulative to his own trial testimony, in which Torres denied that he had made some of the statements Harrier testified to.

Additionally, and for the first time on appeal, Torres raises issues regarding the effectiveness of his trial and appellate counsel. We cannot review a claim alleging ineffective assistance of trial counsel unless the defendant first files a postconviction motion with the circuit court and preserves counsel's testimony. ***State v. Balliette***, 2011 WI 79, ¶¶29, 31, 336 Wis. 2d 358, 805 N.W.2d 334; *see also* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A claim that appellate counsel was ineffective must be brought via a petition for habeas corpus with the appellate court that heard the appeal. ***Balliette***, 336 Wis. 2d 358, ¶32 (citing ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992)). We therefore will not consider Torres' ineffective assistance of counsel arguments.

Finally, Torres vaguely suggests that he is entitled to a reversal in the interest of justice under WIS. STAT. § 752.35 because the real controversy was not fully tried. A controversy may not have been fully tried when the jury was erroneously deprived of the opportunity to hear testimony that bore on an important issue in the case or when the jury had before it evidence not properly admitted that clouded a crucial issue. ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). We exercise our power of discretionary reversal sparingly and only in exceptional cases. ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456. We are not persuaded this is such a case.

Therefore,

IT IS ORDERED that the orders are 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