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DISTRICT I

January 25, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
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Will Haywood 556634
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You are hereby notified that the Court has entered the following opinion and order:

2019AP2209	State of Wisconsin v. Will Haywood (L.C. # 2009CF1966)
2019AP2210	State of Wisconsin v. Will Haywood (L.C. # 2009CF2064)

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

Will Haywood, *pro se*, appeals an order that denied his motion for postconviction relief filed pursuant to WIS. STAT. § 974.06 (2019-20).[1] He claims that newly discovered evidence warrants a new trial in these matters. Upon review of the briefs and records, we conclude at conference that these consolidated appeals are appropriate for summary disposition. Because Haywood's claims are barred, we summarily affirm.

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

A jury found Haywood guilty of two counts of child enticement and three counts each of kidnapping, second-degree sexual assault, and first-degree sexual assault. The charges arose from incidents in 2009 involving three minors, E.L., Q.K. and J.C., all of whom testified at Haywood's trial.[2] E.L. and J.C. described violent sexual encounters with Haywood. Q.K. testified that Haywood forced Q.K. into a car at gunpoint but Q.K. escaped by jumping out of the car when it stopped for a red light. The circuit court also permitted evidence of another sexual assault as other acts evidence. Pursuant to that ruling, D.J. testified that in 2007, when he was in high school, he was raped by a stranger. D.J. identified Haywood in court as the rapist. Haywood testified on his own behalf and said that he had consensual intercourse with J.C. in February 2009 and consensual intercourse with Q.K. in March 2009. Haywood said that on April 21, 2009, E.L. and another young man attacked Haywood on North 42nd Street in Milwaukee. Haywood then saw Q.K. and a man with a gun. Haywood further indicated that the gunman forced Haywood to fellate all four attackers, and one of them raped Haywood. The jury rejected Haywood's defense.

Haywood pursued a direct appeal of his convictions, arguing that the circuit court erroneously admitted D.J.'s testimony. We rejected his claim and affirmed. *See **State v. Haywood*** (***Haywood I***), Nos. 2011AP809-CR and 2011AP810-CR, unpublished slip op. (WI App May 30, 2012). Our supreme court denied his petition for review.

In 2013, Haywood filed a postconviction motion alleging that he had newly discovered evidence, specifically, that "Jonathan Clark" was the name of the gunman that Haywood had

[2] The charges against Haywood were set forth in two separate circuit court cases that were consolidated for trial.

described at trial. The circuit court rejected the claim and denied two requests for reconsideration. Haywood appealed, and we affirmed. *See* ***State v. Haywood*** (***Haywood II***), Nos. 2014AP484 and 2014AP485, unpublished slip op. (WI App Jan. 21, 2015).

In May 2016, Haywood filed a postconviction motion in one of his two circuit court cases, claiming that he had newly discovered evidence. In the motion, he alleged that a fellow inmate, Andre Simpson-Lackey, "had seen what happened" in 2009. The circuit court denied the motion as conclusory. Haywood moved to reconsider, adding some additional explanation in regard to Simpson-Lackey's alleged observations. The circuit court denied reconsideration. Haywood moved a second time for reconsideration, this time referencing both of his circuit court cases. With this motion he included a two-page handwritten statement signed "Andre Simpson-Lackey." In the statement, Simpson-Lackey said that on April 21, 2009, he was fifteen years old and truant from school when he observed an unidentified man under attack from two other unidentified men on "42 and Capitol" in Milwaukee. The circuit court denied the motion as "completely insufficient" and devoid of anything that "satisfies th[e] criteria [for] obtaining a new trial based on newly discovered evidence." Haywood did not appeal.

On September 20, 2019, Haywood filed the postconviction motion underlying the instant appeals. The motion referenced both of Haywood's circuit court cases and stated in its entirety: "I am in receipt of a pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the following is true and a sworn in affidavit from Andre T. Simpson-Lackey Im am asking for relief based on this new evidence [sic][.]"

Attached to the motion was Simpson-Lackey's notarized affidavit dated August 1, 2019, and a copy of Simpson-Lackey's 2016 statement. In the affidavit, Simpson-Lackey said that he,

along with E.L., Q.K., J.C., and "Jonathan Clark," conspired with Darius Pottinger—Haywood's former boyfriend—to attack Haywood as punishment for his "cheating on" Pottinger. Simpson-Lackey further averred that after the conspirators ambushed Haywood on North 42nd Street, they forced Haywood to perform sexual acts, and then Simpson-Lackey raped Haywood.

The circuit court denied the postconviction motion, stating that Haywood failed "to set forth a legal and factual basis to support his newly discovered evidence claim." He appeals.

WISCONSIN STAT. § 974.06 permits a convicted prisoner to raise constitutional and jurisdictional claims in a postconviction motion after the time for an appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶¶52-53, 328 Wis. 2d 544, 787 N.W.2d 350. A circuit court is not required to grant a hearing on a postconviction motion, however, unless it contains sufficient allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This presents a question of law for our independent review. *See* ***id.*** If the postconviction motion does not include sufficient allegations of material fact that, if true, entitle the defendant to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. We review discretionary decisions with deference. *See* ***id.***

Our review process is familiar. When we assess the sufficiency of postconviction claims, we consider only the content of the postconviction motion, not the movant's briefs. *See* ***id.***, ¶27. Our inquiry is whether the defendant alleged, within the four corners of the postconviction

motion itself, "the five 'w's and one 'h'; that is, who, what, where, when, why, and how."[3] *See* ***id.***, ¶23.

Also familiar is the rule that litigation under WIS. STAT. § 974.06 is barred unless the convicted person presents a sufficient reason that the postconviction claim was not previously asserted or was not adequately raised in a prior postconviction motion or appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-86, 517 N.W.2d 157 (1994). Whether a prisoner has alleged a sufficient reason to avoid the procedural bar is a question of law that we review *de novo*. *See* ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

A second or subsequent postconviction motion that alleges newly discovered evidence may in some cases proceed under WIS. STAT. § 974.06. *See* ***State v. Love***, 2005 WI 116, ¶¶21, 56, 284 Wis. 2d 111, 700 N.W.2d 62. The movant must show, however, that the evidence at issue is newly discovered. *See* ***id.***, ¶43.

To obtain relief based on newly discovered evidence, a convicted person must establish "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.'" ***Id.***, ¶43 (citations omitted). If the person satisfies these four requirements, "then 'the circuit court must determine whether a reasonable

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[3] The appendix that Haywood filed with his appellant's brief includes an affidavit from Johnny Ray Bibbins, another inmate. This affidavit was not filed in circuit court during the postconviction proceedings at issue here and is not part of the appellate record. Moreover, Bibbins signed the affidavit after Haywood filed a notice of appeal in these matters. Accordingly, we have not considered the Bibbins affidavit or any discussion of that affidavit in Haywood's appellate submissions. *See* ***Verex Assur., Inc. v. AABREC, Inc.***, 148 Wis. 2d 730, 734 n.1, 436 N.W.2d 876 (Ct. App. 1989) (explaining that this court is limited to the record, which may not be enlarged by materials that postdate the notice of appeal).

probability exists that a different result would be reached in a trial.'" *See* ***id.***, ¶44 (citations omitted). A convicted person must satisfy all five components of the newly discovered evidence test to earn relief. *See* ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

Here, Haywood submitted an affidavit to the circuit court without offering any of the analysis that ***Allen*** and ***Love*** require. Haywood, not the circuit court and not this court, was required to articulate clearly and within the four corners of his postconviction motion why the evidence at issue warranted a hearing. *See* ***State v. McAlister***, 2018 WI 34, ¶28, 380 Wis. 2d 684, 911 N.W.2d 77; *see also* ***Allen***, 274 Wis. 2d 568, ¶¶23, 27. Because Haywood failed to do so, his postconviction motion was insufficient to earn him relief as a matter of law.

Moreover, we agree with the State that Haywood seeks to relitigate the postconviction motions that he pursued in 2016. In those proceedings, he claimed to have a newly discovered witness—Simpson-Lackey—who would testify that on April 21, 2009, Haywood was the victim rather than the perpetrator of an attack. The circuit court repeatedly denied relief. Now, Haywood offers a detailed affidavit from the same proposed witness along with the witness's original statement. Haywood, however, has already litigated and lost the claim that testimony from Simpson-Lackey constitutes newly discovered evidence. He cannot litigate the issue again, no matter how much embellishment he may add to the original narrative. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (holding that "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue"). For all the foregoing reasons, we affirm.

IT IS ORDERED that the postconviction 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