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DISTRICT I

April 5, 2022

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

2020AP2043 State of Wisconsin v. Dominique P. Wilder (L.C. # 2013CF4864)

Before Donald, P.J., Dugan 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).

Dominique P. Wilder appeals an order denying the postconviction motion that he filed pursuant to WIS. STAT. § 974.06 (2019-20).[1] He alleges that his trial counsel was ineffective for failing to pursue an alibi defense at trial and that his postconviction counsel was ineffective in turn for failing to challenge trial counsel's effectiveness during the direct appeal proceedings. Wilder further alleges that he has newly discovered evidence in the form of a recantation from

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

one of the witnesses who testified against him. Based upon a review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We reject Wilder's claims and summarily affirm.

The State charged Wilder in an amended information with first-degree reckless homicide by use of a dangerous weapon as a party to a crime and with possession of a firearm by a felon. The matter proceeded to a jury trial at which Wilder was represented by counsel. The evidence at trial showed that E.P. was driving a car when a bullet fired from a second vehicle struck and killed him.[2] Witnesses who were passengers in E.P.'s car at the time of the shooting testified for the State. They identified Wilder as the driver of the second vehicle and Wilder's brother Lewis as the shooter.[3] Among the witnesses was David Harris, who said that he was E.P.'s front-seat passenger and saw Wilder drive a vehicle alongside E.P.'s car. E.P. accelerated, Wilder gave chase, and then Wilder's passenger, Lewis, shot E.P.

The theory of defense was that the witnesses who claimed to have seen Wilder driving the shooter's vehicle were not credible and that Wilder was at his sister's home at the time of the shooting. Wilder argued that the close proximity of the home to the shooting scene explained why cell phone tower data placed a phone associated with him in the area of the shooting when it occurred.

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[2] In a prior appeal arising out of this matter, we elected to identify the victim by his initials. *See* ***State v. Wilder*** (***Wilder I***), No. 2017AP38-CR, unpublished slip op. ¶2 n.3 (WI App Feb. 27, 2018). We continue to do so here.

[3] Because the appellant and his brother both have the surname of Wilder, we refer to the appellant's brother, Lewis Wilder, by only his first name.

The jury convicted Wilder of first-degree reckless homicide by use of a dangerous weapon as a party to a crime and acquitted him of the remaining count. Wilder pursued an appeal with the assistance of successor counsel.[4] He challenged the sufficiency of the evidence and the propriety of a supplemental jury instruction, and he additionally requested discretionary reversal in the interest of justice. We rejected his claims and affirmed. *See* ***State v. Wilder*** (***Wilder I***), No. 2017AP38-CR, unpublished slip op. (WI App Feb. 27, 2018).

Wilder next filed the postconviction motion underlying this appeal. Proceeding *pro se*, he alleged that his trial counsel was ineffective for failing to call alibi witnesses to testify that he was not near the scene of the shooting when it occurred but rather was with a group of people some distance away helping a friend move to a new home. As a second claim, he alleged that he had newly discovered evidence, specifically, an affidavit from Harris recanting his trial testimony and averring that Wilder was not involved in the shooting incident.

The State filed a response to Wilder's postconviction motion, and Wilder thereafter retained an attorney who filed a reply memorandum on Wilder's behalf. After reviewing the written submissions, the circuit court denied Wilder's claims without a hearing. He appeals.

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[4] We observe that Wilder initiated two direct appeals in this case. After he filed his first notice of appeal, he voluntarily dismissed the proceeding to explore a postconviction claim based on an alleged failure to present alibi witnesses. Following that dismissal, his postconviction counsel filed multiple extension motions to permit Wilder to develop his potential claim. In the last of those motions, postconviction counsel explained that he had encountered "difficulty in getting the proposed witnesses ... to cooperate and assist counsel" and that, although postconviction counsel's efforts were ongoing, "Wilder acknowledged that if nothing changes counsel will forgo seeking another extension and will re-file a notice of appeal. Further, that [Wilder] would support counsel's decision to do so." The motion went on to say that counsel subsequently received assurances of cooperation from the witnesses. Approximately one month later, however, counsel filed a second notice of appeal on Wilder's behalf.

We first consider Wilder's claim that his trial counsel was ineffective for mounting a defense that placed Wilder near the shooting scene instead of pursuing an alibi defense that placed him farther away from the incident. Our review begins by recognizing that "[w]e need finality in our litigation." *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Therefore, although WIS. STAT. § 974.06 permits a prisoner such as Wilder to raise claims after the time for a direct appeal has passed, the statute contains a limitation. *See* § 974.06(1), (4). Specifically, a convicted prisoner is procedurally barred from bringing claims under § 974.06 if the prisoner could have raised the claims in a previous postconviction motion or on direct appeal unless the prisoner states a '"sufficient reason"' for failing to raise those claims previously. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82 (citing § 974.06(4)).

In this case, Wilder asserted in his WIS. STAT. § 974.06 motion that his reason for not challenging trial counsel's ineffectiveness previously was the ineffective assistance of his postconviction counsel, who failed to raise the claim. "In some instances, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim in an earlier motion or on direct appeal." ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668. To prevail, however, the defendant must demonstrate that postconviction counsel was in fact ineffective. *See* ***id.***

We assess claims of ineffective assistance of counsel by applying the two-prong test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Balliette***, 2011 WI 79, ¶¶3, 28, 336 Wis. 2d 358, 805 N.W.2d 334. The test requires that the defendant show both a deficiency in counsel's performance and prejudice as a result. *See* ***Strickland***, 466 U.S. at 687. Whether counsel's performance was deficient and whether any deficiency was prejudicial are

both questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

To establish deficient performance based on postconviction counsel's failure to raise particular issues, the defendant must allege and show, *inter alia*, that the neglected issues were clearly stronger than the issues that counsel did present. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. A court examining a claim of ineffective assistance of counsel may consider either prong of the analysis first, and if the defendant fails to make an adequate showing as to one prong, the court need not address the other. *See* ***id.*** at 697.

In this case, the circuit court denied Wilder's claim of ineffective assistance of counsel without a hearing. A circuit court is not required to grant a hearing on such claims unless the defendant's postconviction motion contains 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. Whether the allegations are sufficient to warrant a hearing presents an additional question of law for our independent review. *See* ***id.*** In conducting that review, we examine only the four corners of the postconviction motion. *See* ***id.***, ¶¶9, 27. If the 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. *See* ***id.***, ¶9. We review discretionary decisions with deference. *See* ***id.***

Applying the foregoing standards to Wilder's claim of ineffective assistance of counsel, we conclude that the claim is procedurally barred. The postconviction motion that Wilder filed *pro se* did not include an allegation, much less a showing, that the claim was clearly stronger than the claims that Wilder's counsel pursued on his behalf in ***Wilder I***. We note, as does the State, that Wilder subsequently made efforts to remedy his omission by alleging in his circuit court reply memorandum and his appellate briefs that his ineffective assistance of counsel claim was clearly stronger than the claims raised in ***Wilder I***. Those efforts, however, came too late. We determine the sufficiency of a postconviction motion by reference to the four corners of the motion, not any subsequent memoranda or briefs. *See* ***Allen***, 274 Wis. 2d 568, ¶¶9, 27.

Because Wilder's motion under WIS. STAT. § 974.06 did not demonstrate that the ineffective assistance of counsel claim that postconviction counsel ignored was clearly stronger than the claims raised in ***Wilder I***, the motion failed to provide a sufficient reason for Wilder to seek collateral review of the ignored claim. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶46, 74. Accordingly, the circuit court properly denied Wilder's claim of ineffective assistance of counsel without a hearing.

Wilder also claims that he has newly discovered evidence. As grounds, he offers a 2019 affidavit from Harris in which Harris recants his testimony implicating Wilder in E.P.'s death.

The discovery of new evidence may constitute a sufficient reason for a second or subsequent postconviction proceeding under WIS. STAT. § 974.06. *See* ***State v. Love***, 2005 WI 116, ¶¶21, 56, 284 Wis. 2d 111, 700 N.W.2d 62. To prevail, however, the movant must carry the burden of proving that the evidence at issue is newly discovered. *See* ***id.***, ¶43.

In most cases, 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 those four requirements, "then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" *See* ***id.***, ¶44 (citation omitted).

Wilder's alleged newly discovered evidence is a recantation, however, and "[r]ecantations are inherently unreliable." *See* ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997). Therefore, when alleged newly discovered evidence is a recantation, a defendant must satisfy a requirement in addition to the five-factor test described in ***Love***. Specifically, "recantation evidence must be corroborated by other newly discovered evidence." ***McCallum***, 208 Wis. 2d at 476. The corroboration requirement itself has two distinct components: "Corroboration requires newly discovered evidence of both: (1) a feasible motive for the initial false statement; and (2) circumstantial guarantees of the trustworthiness of the recantation." ***State v. McAlister***, 2018 WI 34, ¶58, 380 Wis. 2d 684, 911 N.W.2d 77.

A circuit court soundly exercises its discretion by denying relief without a hearing when a defendant claims to have newly discovered recantation evidence but fails to corroborate it. *See* ***id.***, ¶63. Accordingly, we begin our examination of Wilder's newly discovered evidence claim by considering whether Wilder has satisfied the corroboration requirement. We conclude that he has not done so because Harris's recantation lacks any newly discovered circumstantial guarantees of trustworthiness. *See* ***id.***, ¶58.

Harris's recantation is set forth in a two-page affidavit, the provisions of which are flatly inconsistent. Harris begins by averring that he "blacked out" in E.P.'s car and that the "only thing" he remembers about the day of the homicide is that he "was the front seat passenger in the vehicle with [E.P.]" Harris goes on to emphasize that "there is no way of me remembering what happened that day.... To this day, I still cannot recollect what really happened that day." At the conclusion of the affidavit however, he avers: "The person that I believed is responsible for [E.P.'s] death is a dark skin, heavyset, bald head guy with a bread [sic]. He was by himself when he carried out the act, and it was a case of road rage."

We agree with the State that Harris's affidavit is inherently incredible. *See* ***State v. King***, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994) (explaining that allegations are inherently incredible if they conflict with the uniform course of nature). Harris cannot both lack any recollection of the events surrounding E.P.'s death and at the same time recall the appearance of the person who shot E.P. and the motivation for the shooter's action. Accordingly, Harris's affidavit is incredible as a matter of law and necessarily lacks circumstantial guarantees of trustworthiness.

Wilder disagrees. He contends that Harris's recantation has circumstantial guarantees of trustworthiness because it is consistent with a pretrial statement in which Harris told detectives that he "'blacked out' and couldn't remember much about the day E.P. was shot and killed." Wilder also contends that the recantation has circumstantial guarantees of trustworthiness because, prior to trial, "Harris made three statements to police and in none of those prior statements did Harris identify Wilder as the driver of the car from which shots were fired." These pretrial statements cannot satisfy the ***McAlister*** test for demonstrating circumstantial guarantees of trustworthiness because they are not themselves "newly discovered." *See* ***id.***, 380

Wis. 2d 684, ¶58. To the contrary, Wilder cross-examined Harris at trial about the various statements that he gave to investigators and about his assertions that he hit his head and was "knocked unconscious" in the car when E.P. accelerated. Regardless, the irreconcilable inconsistencies within the affidavit render it incredible as a matter of law. *See* ***King***, 187 Wis. 2d at 562. Therefore, the recantation lacks any guarantee of trustworthiness. 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