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DISTRICT II

June 15, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
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Michael R. Hess, #250088
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You are hereby notified that the Court has entered the following opinion and order:

2020AP2025 State of Wisconsin v. Michael R. Hess (L.C.# 2005CF356)
2020AP2026 State of Wisconsin v. Michael R. Hess (L.C.# 2011CF267)

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

In these consolidated appeals, Michael R. Hess appeals pro se from a circuit court order denying his WIS. STAT. § 974.06 (2019-20)[1] motion without an evidentiary hearing. 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 the circuit court.

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

In 2007, Hess pled guilty to operating under the influence with a minor child in the vehicle (sixth offense). In 2011, Hess pled guilty to operating under the influence (seventh offense). In both cases, the circuit court counted as prior offenses two revocations for refusing a test: a 2002[2] revocation in Illinois and a 2003 revocation in Wisconsin. In 2020, Hess moved the circuit court to vacate his 2007 and 2011 convictions because these revocations were not valid prior offenses under WIS. STAT. § 343.307.[3] The circuit court denied the motion without a hearing because the motion did not establish that Hess's prior offenses were improperly counted under § 343.307. Hess appeals.

A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

> The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted).

[2] The refusal occurred in 2001. The consequence of the refusal was imposed in 2002. We refer to this revocation as the 2002 revocation.

[3] WISCONSIN STAT. § 343.307(1)(e) (2019-20) states that in determining an operating while intoxicated penalty, the circuit court "shall count:"

> Operating privilege suspensions or revocations under the law of another jurisdiction arising out of a refusal to submit to chemical testing.

In challenging his 2007 and 2011 convictions, Hess relies upon a body of law that precludes counting as a prior offense revocations arising from refusing a warrantless blood draw. *See* ***State v. Forrett***, 2021 WI App 31, ¶19, 398 Wis. 2d 371, 961 N.W.2d 132, *review granted*, No. 2019AP1850-CR (Sept. 14, 2021); *see also* ***Birchfield v. North Dakota***, 579 U.S. 438, 477 (2016) (criminal penalties for refusing a blood test violate the Fourth Amendment right to be free from an unreasonable search).

We must determine whether Hess's WIS. STAT. § 974.06 motion made the requisite showing to bring his cases within the warrantless blood draw law upon which he relies. To that end, we review the record before the circuit court on Hess's § 974.06 motion.

Hess's WIS. STAT. § 974.06 motion alleges in a conclusory fashion that his 2002 and 2003 revocations occurred because he refused blood tests. The State's respondent's brief argues that Hess has not made the requisite showing that he refused blood tests in 2002 and 2003. The State points us to a section of the presentence investigation report in the 2007 case that describes the 2003 driver's license consequence as arising from a refusal to submit to a breathalyzer test. At sentencing in the 2007 case, Hess did not offer any corrections to the presentence investigation report when given the opportunity. With regard to the 2002 Illinois revocation, the record is devoid of proof as to the type of test Hess refused. Hess's reply brief does not direct us

to that portion of the record on appeal that rebuts the State's argument or that supports his claim that the 2002 and 2003 refusals were for blood, as opposed to breath, tests.[4]

Hess relies upon materials in the appendix to his appellant's brief that are not included in the record on appeal. We will not consider any material not part of the record before the circuit court at the time the circuit court rendered the decision challenged on appeal. Our role is to correct errors the circuit court made, not to rule on materials never presented to or considered by that court. *See* ***State v. Hanna***, 163 Wis. 2d 193, 201, 471 N.W.2d 238 (Ct. App. 1991).

We agree with the State that Hess did not meet his threshold burden to show that he refused blood tests (as opposed to breath tests) in 2002 and 2003. *See* ***State v. Allen***, 2010 WI 89, ¶83, 328 Wis. 2d 1, 786 N.W.2d 124 (burden of proof in a WIS. STAT. § 974.06 motion is on the defendant). A defendant seeking to overturn a conviction is required to prove by clear and convincing evidence an entitlement to such relief. ***State v. Walberg***, 109 Wis. 2d 96, 104, 325 N.W.2d 687 (1982). The circuit court did not err when it denied Hess's § 974.06 motion because the record conclusively demonstrates that he is not entitled to relief. ***Allen***, 274 Wis. 2d 568, ¶12.

Upon the foregoing reasons,

[4] Hess's appellant's and reply briefs rely upon an excerpt from what Hess contends was a brief filed by the State in ***State v. Hess***, No. 2015AP2423, unpublished slip op. (WI App Jul. 20, 2016), that described the 2003 revocation as arising from refusing a blood test. However, Hess offers no legal argument to this court as to why this excerpt should carry any weight on the question of the basis for that revocation. "We cannot serve as both advocate and judge," ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992), and "we will not abandon our neutrality to develop arguments" for Hess, *see* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

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