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DISTRICT I

February 27, 2024

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Milwaukee County Safety Building
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1328-CR State of Wisconsin v. Lekesha Marie Robinson
(L.C. # 2019CF1541)

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

Lekesha Marie Robinson appeals his[1] judgment of conviction, entered upon a jury's verdict, of second-degree recklessly endangering safety, fleeing an officer, and possession of methamphetamine with the intent to deliver. He also appeals the order denying his postconviction motion for deoxyribonucleic acid (DNA) testing of the plastic bag that contained the drugs, pursuant to WIS. STAT. § 974.07 (2021-22).[2] Based upon our review of the briefs and

[1] Robinson was identified using feminine pronouns in the complaint and at other times during these proceedings, but has expressed a preference for using he/him/his pronouns.

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

The charges against Robinson stem from a traffic incident that occurred in April 2019. According to the criminal complaint, two officers from the Milwaukee Police Department who were out on patrol observed a black Dodge Durango, with two occupants, drive through a red light; it moved into the bus lane, without slowing down, to get around traffic that was stopped. The officers, who were in a marked squad car, activated the lights and siren and attempted to pull over the Durango. However, the Durango did not stop, and instead accelerated away from the squad.

The police pursued the Durango, which continued driving recklessly on surface streets, including in residential areas. It reached speeds of approximately eighty miles an hour, disregarding traffic lights and stop signs, until it failed to negotiate a turn and crashed into a fire hydrant. When the officers approached the vehicle, the person they had seen driving—a Black individual wearing a green shirt or jacket, later identified as Robinson—had climbed over the center console towards the back of the vehicle. A plastic bag filled with smaller bags of various drugs was discovered wedged into the third row of seats in the vehicle. Robinson was arrested and charged with second-degree recklessly endangering safety, fleeing an officer, and possession of methamphetamine with the intent to deliver.

At a pretrial conference in October 2019, the State requested an adjournment of the trial date set for the following month, because DNA testing of the bag containing the drugs had not been completed. The circuit court granted the adjournment.

At a subsequent pretrial conference in December 2019, the State still had not received the DNA results from the bag. The circuit court indicated that it was not inclined to grant another adjournment of the rescheduled trial date set for February 2020 if the State still had not received the DNA results. The court observed that the DNA results would only "make the State's case stronger or weaker"; that is, evidence of the presence of Robinson's DNA on the bag would strengthen the State's case, but without any DNA evidence the State would have to "prove possession the old fashioned way, which is where it's found and what control [Robinson] may have had over the area where it was found."

The DNA results were still unavailable when the trial started in February 2020. After hearing arguments by the parties, the circuit court ruled that testimony relating to the issue of DNA on the bag containing the drugs would be limited to asking the police officers called as witnesses whether they had any knowledge of Robinson's DNA being on the bag.

At trial, witnesses for the State included the two arresting officers involved in the pursuit of the Durango. Both officers described finding Robinson laying the length of the vehicle, parallel to the floor, facing down, in the narrow aisle between the captains' chairs in the second row of seats, with his head in the third row of seats in close proximity to where the bag of drugs was found. Both officers also testified that there was only one other person in the vehicle, and that no one had exited the vehicle before or after the crash.

The supervising officer who responded to the scene also testified. He explained that the amount of drugs found was indicative of dealing, and that the bag had to have been placed in the third row of seats by someone, as opposed to having been tossed around during the crash from

another area of the vehicle. He also stated that there was no known DNA or fingerprint evidence on the bag.

Robinson testified in his own defense. He stated that there was another male driving the Durango that night who he knew as "Jaws," and that Jaws had jumped out of the vehicle and fled just before it hit the fire hydrant. Robinson said he had been sitting behind the driver's seat in the vehicle; when it crashed, he said he was thrown from his seat, ending up on the floor between the captains' chairs in the second row of seats, with his head toward the third row of seats. Robinson admitted that he had smoked marijuana while in the Durango that night, but denied knowing anything about the other drugs that were found.

The jury found Robinson guilty of all three charges. The circuit court imposed consecutive sentences totaling six years of initial confinement followed by seven years of extended supervision.

Robinson filed a postconviction motion in May 2022 seeking DNA testing of the bag containing the drugs. Robinson argued that the testing was mandatory under WIS. STAT. § 974.07(7)(a). Specifically, Robinson asserted there was a reasonable probability that he would not have been convicted of the methamphetamine possession charge had the allegedly exculpatory DNA evidence been available at trial. *See* § 974.07(7)(a)2.

The circuit court rejected Robinson's argument. It observed that even if the DNA results had been available at trial and had not shown Robinson's DNA to be present, it was not necessary for the State to prove that Robinson had touched the bag in order to establish possession. Therefore, based on the other evidence at trial, the court concluded that there was not a reasonable probability of a different outcome.

As a result, the circuit court denied Robinson's postconviction motion.[3] This appeal follows.

On appeal, Robinson renews his claim seeking postconviction DNA testing of the bag containing the drugs. Under WIS. STAT. § 974.07(2), a defendant may file a motion for DNA testing at any time after conviction if the evidence (1) is relevant to the prosecution that resulted in the conviction; (2) is in the possession of the State; and (3) has not previously been tested.

In deciding such a motion, there are two standards under which DNA testing can be ordered: a mandatory standard where the court is required to order testing, set forth in WIS. STAT. § 974.07(7)(a); and a standard where testing is ordered at the discretion of the court, set forth in § 974.07(7)(b). Robinson asserts that the mandatory standard for ordering postconviction DNA testing is applicable here.

Under that mandatory standard, the court must order DNA testing if (1) the defendant claims that he or she is innocent of the offense related to the evidence at issue; (2) it is "reasonably probable that the [defendant] would not have been prosecuted [or] convicted … [of] the offense at issue … if exculpatory [DNA] testing results had been available before the prosecution [or] conviction"; (3) the evidence at issue meets all of the conditions of WIS. STAT.

[3] Robinson also requested in his postconviction motion to "hold open" the motion pending the results of the DNA testing, such that he could seek a new trial based on claims of newly discovered evidence and ineffective assistance of counsel. The State asserts that there is no legal authority for this request, and the circuit court in its decision did not address the request except to note that Robinson had no viable Sixth Amendment claim. Robinson does not raise this issue on appeal, and we will not discuss it further. *See* ***Cosio v. Medical Coll. of Wis., Inc.***, 139 Wis. 2d 241, 242-43, 407 N.W.2d 302 (Ct. App. 1987) (explaining that issues raised but not briefed on appeal are deemed abandoned).

§ 974.07(2), as set forth above; and (4) the chain of custody has not been tampered with. Sec. 974.07(7)(a).

Robinson's argument focuses on the second requirement—whether it is reasonably probable that Robinson would not have been prosecuted or convicted had exculpatory DNA test results from the bag of drugs found in the Durango been available. *See* WIS. STAT. § 974.07(7)(a)2.[4] Our standard of review for this claim is not clear-cut. As Robinson observed in his brief, the Wisconsin Supreme Court declined to determine the proper standard of review for such claims in ***State v. Denny***, 2017 WI 17, ¶75, 373 Wis. 2d 390, 891 N.W.2d 144. Rather, the ***Denny*** court decided that the defendant's claim for postconviction DNA testing in that case failed regardless of whether it "review[ed] the circuit court's conclusions under a deferential standard or *de novo*." ***Id.*** We adopt that approach here, and conclude that under either standard, Robinson's claim fails.[5] We will apply the *de novo* standard of review for purposes of our analysis in this matter.

In our review of Robinson's claim, "we are to assume for purposes of this analysis that if DNA testing were to occur, the results would be 'exculpatory.'" *See* ***id.***, ¶76. In this case, the exculpatory nature of those results would be the absence of Robinson's DNA on the bag of drugs

[4] The other elements that must be satisfied under this statute are not in dispute.

[5] We previously adopted this same approach in ***State v. Reas-Mendez***, 2017AP2452-CR, unpublished slip op. ¶17 (WI App Dec. 11, 2018). *See* WIS. STAT. RULE 809.23(3)(b) (allowing for unpublished opinions issued on or after July 1, 2009, which are authored by a member of a three-judge panel, to be cited for persuasive value). In contrast, the State urges us to utilize the erroneous exercise of discretion standard this court adopted in ***State v. Hudson***, 2004 WI App 99, ¶16, 273 Wis. 2d 707, 681 N.W.2d 316, for our review of this claim. However, given that our supreme court does not consider the standard of review issue "settle[d]" for such claims, *see* ***State v. Denny***, 2017 WI 17, ¶74, 373 Wis. 2d 390, 891 N.W.2d 144, and that we need not determine the standard of review for our analysis here, we decline to do so.

found in the Durango. However, the absence of physical evidence is not necessarily exculpatory because, as Robinson has conceded, a person can touch an item and not leave any detectable DNA.

Physical evidence is not required to prove possession. Rather, it must be shown that the defendant "knowingly had actual physical control of a substance," or that the item was "in an area over which the [defendant] has control and … intend[ed] to exercise control over the item." WIS JI—CRIMINAL 6035*; see also* ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977) ("Possession of an illicit drug may be imputed when the contraband is found in a place immediately accessible to the accused and subject to his [or her] exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the drug."). In other words, proving the possession charge did not require showing that Robinson had touched the bag of drugs. *See* ***id.***

Moreover, presuming the absence of Robinson's DNA on the bag does not negate the circumstantial evidence presented in this case. During the trial, the jury heard the arresting officers' testimony about how they found Robinson in the vehicle after the crash—laying the length of the vehicle with his head toward the third row of seats, in close proximity to where the drugs were subsequently found. Those officers also testified that Robinson had been driving, that no one had exited the car during the pursuit or after the crash, and that the other passenger in the car was seated "normally" in the front seat after the crash. This offsets Robinson's testimony explaining his position after the crash—that he had been seated in the second row of seats and was thrown to the floor from the impact of the crash—allowing for an inference to be made that Robinson had moved from the driver seat after the crash toward the back of the vehicle's interior to hide the bag of drugs.

Additionally, the jury heard the supervising officer's testimony that the amount of drugs found was indicative of dealing. That officer also stated that driving a vehicle with tinted windows, as the Durango had, and fleeing from police are consistent with actions of mobile drug dealers.

In short, even though no physical evidence linked Robinson to the bag of drugs, the circumstantial evidence that was presented—the testimony of the police officers—was sufficient to support the inferences the jury made in concluding that the bag of drugs was in Robinson's possession. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990) ("It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence."). In fact, the jury reached its verdict after it heard testimony from the supervising police officer that there was no known DNA or fingerprint evidence on the bag.

Therefore, we conclude that Robinson has not demonstrated that it is reasonably probable that he would not have been prosecuted or convicted of the possession charge even if DNA testing yielding exculpatory results had been available for trial. *See* WIS. STAT. § 974.07(7)(a)2. As a result, he is not entitled to postconviction DNA testing. *See* ***Denny***, 373 Wis. 2d 390, ¶73. Accordingly, we affirm his judgment of conviction and the order denying his postconviction motion.[6]

[6] We note that the circuit court, in denying Robinson's postconviction motion, concluded that Robinson's motion had "not met the requirements for postconviction DNA testing under WIS. STAT. § 974.07(7)(b)," the discretionary standard for ordering testing, as opposed to § 974.07(7)(a), the mandatory standard, which was argued by Robinson. Nevertheless, we may affirm the circuit court if it "reached the correct result, even if we employ different reasoning[.]" ***State v. Thames***, 2005 WI App 101, ¶10, 281 Wis. 2d 772, 700 N.W.2d 285.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals