COURT OF APPEALS DECISION DATED AND FILED

September 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2260-CR

Cir. Ct. No. 2011CF1651

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CYRUS LINTON BROOKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD SANKOVITZ and JEFFREY WAGNER, Judges. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Cyrus Brooks appeals a judgment convicting him of first degree reckless homicide as a party to a crime and an order denying his

postconviction motion.[1] He argues: (1) the case should have been dismissed because the State violated his constitutional right to a speedy trial; (2) he is entitled to a new trial based on newly discovered evidence; and (3) his trial counsel was ineffective. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Brooks and his co-defendant, Maurice Stokes, were charged with shooting and killing Terry Baker. They were tried separately. At Brooks' trial, Julius Turner described incidents that occurred the night before the shooting and on the day of the shooting. He said the night before the shooting, as he was walking back from a gas station, Brooks, Stokes and another man approached him looking for Baker. Brooks told Turner he had better stop hanging around Baker because Baker was a dead man. Brooks then showed Turner a handgun.

¶3 The next morning, Baker left Turner's house on his bicycle. Turner got in his car and traveled in the same direction. Turner then heard three or four gunshots and saw a green vehicle parked in an alley that he recognized as usually being occupied by Brooks and Stokes. He said he saw both Brooks and Stokes aim their guns at Baker, and Brooks fired at Baker as Baker was jumping a fence.

¶4 Michael Henderson's preliminary hearing testimony was read to the jury. He was at a different location than Turner at the time of the shooting, about two houses away. He testified he saw Stokes with a gun, chasing Baker, and saw

[1] Judge Sankovitz presided over the trial. Judge Wagner decided the postconviction motion.

Stokes fire toward Baker. He did not see anyone else chasing or shooting at Baker.

DISCUSSION

Speedy Trial

¶5 Brooks' argument regarding his speedy trial right conflates his constitutional right with his statutory right. He attempts to apply the remedy for a constitutional violation to the time limits set forth in WIS. STAT. § 971.10(4) (2011-12). We reject that approach. The remedy for violation of the statutory speedy trial right is discharge from custody prior to trial, not dismissal of the case. ***Day v. State***, 60 Wis. 2d 742, 744, 211 N.W.2d 466 (1973).

¶6 Brooks' constitutional right to a speedy trial was not violated. The threshold factor is the length of the delay from charging to trial. ***Norwood v. State***, 74 Wis. 2d 343, 353, 246 N.W.2d 801 (1976). The length of delay must be deemed "presumptively prejudicial" before it is necessary to inquire into any other factors. ***Id.*** Courts have generally found a delay that approaches one year to be presumptively prejudicial. ***Doggett v. United States***, 505 U.S. 647, 652, n.1 (1992). Here, the trial began less than seven months after the complaint was filed. A delay of seven months is not presumptively prejudicial. ***Beckett v. State***, 37 Wis. 2d 345, 350, 243 N.W.2d 472 (1976).

Newly Discovered Evidence

¶7 Whether to grant a new trial based on newly discovered evidence is committed to the circuit court's discretion. ***State v. Brunton***, 203 Wis. 2d 195, 201-02, 552 N.W.2d 452 (Ct. App. 1996). Motions for a new trial based on newly discovered evidence are entertained with great caution. ***State v. Terrance J. W.***,

202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). This court will affirm the circuit court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and facts of record. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). A request for a new trial based on newly discovered evidence must be supported by proof that: (1) the evidence was discovered after the conviction; (2) the defendant was not negligent is seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not cumulative; and (5) it is reasonably probable that a new trial will reach a new result. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

¶8 Brooks' claim of newly discovered evidence is based on two affidavits. First, Brandon Brumfeld averred that he was with Turner when Turner was walking back from the gas station. Three African-American men approached them and told them Baker was going to get what he had coming to him. Brumfeld knew Brooks and Stokes, and he stated they were not with the group that threatened Baker. A short time later, Brumfeld saw one of the men who was looking for Baker and soon after heard shots about one-half block away. Brumfeld also averred that the Baker family wanted him to say he saw Brooks and Stokes at the scene, and offered him money.

¶9 The circuit court properly concluded that Brumfeld's affidavit did not meet the test for newly discovered evidence. It is not reasonably probable that his testimony would result in a different verdict. Brumfeld does not claim to have witnessed the shooting. His testimony that other men were looking for Baker shortly before the shooting does not contradict Turner's testimony that he saw Brooks shoot at Baker or that Brooks was looking for Baker and threatened him

the night before the shooting. At best, Brumfeld's testimony would suggest a larger number of parties to the crime, but would not exonerate Brooks.

¶10 Brooks' second affidavit in support of his claim of newly discovered evidence came from Shawnrell Simmons who was in the Milwaukee County Jail with Turner. He averred that Turner told him he did not want to testify because he "didn't even see his friend being murdered," but that he accepted cash from someone to testify against two men. Turner allegedly told Simmons he took the money and went back to Texas.

¶11 The circuit court properly rejected Simmons' affidavit. It was based on hearsay and was not supported by any corroborating evidence. *See* ***Nicholas v. State***, 49 Wis. 2d 683, 694, 183 N.W.2d 11 (1971). Evidence that merely impeaches the credibility of a witness without corroborating evidence does not warrant a new trial on the ground of newly discovered evidence. ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968).

Ineffective Assistance of Counsel

¶12 Brooks contends his trial counsel was ineffective for failing to subpoena Michael Henderson. Henderson was on the State's witness list and Brooks' trial counsel believed he could rely on the State's subpoena to produce Henderson for trial. Henderson's preliminary hearing testimony was read to the jury. Henderson testified at Stokes' trial, contradicting his testimony at Brooks' preliminary hearing. At Stokes' trial, Henderson said he saw another person with "Reece," referring to Maurice Stokes. The other person was caramel-skinned with braids. Baker approached these two men on his bicycle, but then jumped off the bicycle and ran between the houses, out of Henderson's sight. Henderson then heard gunshots, but did not see who was shooting. Brooks claims he was

prejudiced by his counsel's failure to have Henderson testify about the caramel-skinned person involved in the shooting.

¶13 To establish ineffective assistance of counsel, Brooks must establish prejudice to his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). He must show a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. ***Id.*** at 694. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** The circuit court correctly concluded counsel's failure to subpoena Henderson did not prejudice Brooks' defense. The jury heard Henderson's preliminary hearing testimony in which he denied the existence of a second shooter. That evidence was more favorable to Brooks than Henderson's testimony at Stokes' trial. Henderson's testimony at Stokes' trial regarding the caramel-skinned man with braided hair whose face was partially obscured would not have excluded Brooks as the second shooter. Because Brooks' motion provided no basis for believing that, had his counsel subpoenaed Henderson, the result of the trial would have been different, the court properly rejected Brooks' claim of ineffective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).