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**DISTRICT I**

September 28, 2016

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

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2015AP673

State v. Terrence L. Johnson (L.C. # 2011CF1601)

Before Curley, P.J., Kessler and Brennan, JJ.

Terrence L. Johnson, *pro se*, appeals an order denying his motion for a new trial and an order denying his motion for reconsideration.<sup>1</sup> He claims he has newly discovered evidence warranting a new trial. Upon our review of the briefs and record, we conclude at conference that

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<sup>1</sup> Johnson has pursued the instant appeal as “Terrence L. Johnson.” We identify him according to that spelling of his name, as we also did in our prior decision arising out this case. *See State v. Johnson*, No. 2013AP1429-CR, unpublished slip op. (WI App July 29, 2014). To avoid the potential for confusion, however, we note here that the circuit court record reflects that Johnson’s given name is spelled “Terrance” and that “Terrence L. Johnson” is one of Johnson’s several aliases.

this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>2</sup> We summarily affirm.

A jury found Johnson guilty in 2012 of three counts of theft by fraud, four counts of forgery, and five counts of identity theft, all as a party to a crime. The jury also found him guilty of an additional count of identity theft that did not include the party-to-a-crime modifier.

Johnson, who represented himself at trial, pursued an appeal *pro se* alleging that the evidence was insufficient as to seven of the crimes and that the State lacked jurisdiction as to another five of the offenses. *State v. Johnson*, No. 2013AP1429-CR, unpublished slip op. (WI App July 29, 2014) (*Johnson I*). As we discussed at greater length in *Johnson I*, the evidence showed that Johnson, in concert with confederates that included his fiancée Sharbondee Credit, made fraudulent checks and deposited them into bank accounts, or presented them to be cashed, or offered them at car dealerships to purchase vehicles. *See id.*, ¶¶3-9. When police executed a search warrant at Johnson’s home, they found multiple items for use in creating fraudulent checks, including “various types of checks, check stock and blank checks in various stages of completion.” *Id.*, ¶9. We affirmed Johnson’s thirteen convictions, rejecting his claims of insufficient evidence and jurisdictional defects. *Id.*, ¶1.

Johnson next filed a *pro se* postconviction motion asking the circuit court to vacate his convictions. He supported the motion with, *inter alia*, an affidavit from Latonjala Lewis. Lewis averred that she participated with various co-actors in many of the crimes at issue in this case, that Johnson was not involved in the crimes, and that a police detective, Cheryl Welch, pressured

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Lewis to inculcate Johnson. The circuit court denied the postconviction motion, and Johnson did not appeal.

Soon after the circuit court rejected Johnson's motion to vacate his convictions, Johnson, still *pro se*, filed the postconviction motion underlying this appeal. He claimed that he had newly discovered evidence demonstrating that, as to four of the charges, the jury convicted him even though no crime was committed and that, as to the remaining charges, the jury convicted him of crimes committed by other people.

Johnson offered five documents in support of his motion. Each is titled "affidavit" and each has a jurat reflecting that it is signed by a Wisconsin notary with a surname of "Capelle" and a given name that begins with "R" but is otherwise illegible. As to each document, the affiant is "Charles W. Smith." He describes himself in one affidavit as a "legal investigator in the State of Wisconsin," and in the other four affidavits he states he is "an investigator for the law office procured by the defendant."<sup>3</sup> Three of the Smith documents describe Smith's alleged conversations with various employees of banks victimized by Johnson's crimes. In those conversations, the employees purportedly exculpated Johnson and denied giving incriminating information about him to Welch. As to the remaining two Smith affidavits, one is purportedly co-signed by Lewis and the other is purportedly co-signed by Credit. In those affidavits, Smith relays information purportedly from Lewis and Credit exculpating Johnson and, in addition, Credit acknowledges her own guilt in Johnson's crimes and admits perjuring herself at his trial.

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<sup>3</sup> Nothing in the record identifies the law office or the lawyer purportedly involved in Johnson's postconviction activity. As indicated, Johnson proceeded *pro se* in circuit court, as he does in this court.

A criminal defendant seeking a new trial on the basis of newly discovered evidence must establish by clear and convincing evidence that: (1) the defendant discovered the evidence after trial; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *See State v. Love*, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62. If the defendant makes those showings, the circuit court must determine whether a reasonable probability exists that a new trial would produce a different result. *See id.*, ¶44. In this case, the circuit court denied Johnson’s claim of newly discovered evidence, concluding that some of the alleged newly discovered evidence was hearsay, some was an uncorroborated recantation, and none was sufficient to earn Johnson any relief. The circuit court also denied Johnson’s motion for reconsideration. He filed an appeal.

When the appeal reached this court, we noted a variety of anomalies in the five documents titled “affidavit.” We therefore remanded this matter pursuant to WIS. STAT. § 808.075(6), for a hearing to determine the authenticity of the documents.

On remand, Johnson did not present any evidence or call any witnesses. The State presented testimony from Welch, and the circuit court received her investigative report as an exhibit.<sup>4</sup> Welch testified that the only “R. Capelle” with a notary commission in Wisconsin is Roxanne Capelle, an employee at Stanley Correctional Institution. At Welch’s request, Capelle examined the Smith documents and determined that she did not notarize them: the signature of the purported notary does not match hers and the documents lack the raised seal that she always

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<sup>4</sup> Judge Timothy M. Witkowiak presided over the postconviction motion and motion for reconsideration underlying Johnson’s notice of appeal. Judge Dennis Cimpl presided over the proceedings on remand.

uses when she notarizes a document. Capelle also reviewed her daily log in which she documents the items that she notarizes. She determined that the Smith documents were not entered in her log.

Welch went on to testify that she spoke to two of the bank employees who purportedly gave statements to Smith. Welch told the circuit court that both employees denied ever speaking to Smith or making the statements attributed to them in the Smith documents. Welch further testified that Wisconsin law requires investigators to have a state license, but her investigation revealed that no one named “Charles Smith” has a Wisconsin private detective’s license.

Following the hearing, the circuit court entered written findings of fact and an order. As relevant here, the circuit court determined that no Wisconsin notary signed any of the five documents titled “affidavit” that Johnson submitted as support for his postconviction motion. The circuit court further found that the five affidavits are invalid.

Johnson objects to the circuit court’s findings, but his objections are groundless. He claims that “Detective Welch did not speak to Roxann[e] Capelle,” that “Capelle states that she never spoke to Detective Welch and never reviewed any faxed documents,” and that Welch “falsified the contents of her investigation as well as her testimony.” No evidence supports these allegations, and we do not consider assertions of fact that are not supported by evidence in the record. See *Nelson v. Schreiner*, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991). To the extent Johnson’s assertions challenge Welch’s credibility, the challenge fails. As reflected by the circuit court’s findings, the circuit court relied on Welch’s testimony and thus implicitly found her credible. See *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) (when circuit court does not make express credibility findings, we

assume it made implicit findings regarding witness credibility when analyzing the evidence). We defer to a circuit court's credibility determinations. See *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979) ("trial judge is the ultimate arbiter of the credibility of the witnesses").

Accordingly, we accept the circuit court's findings. They are supported by the record and are not clearly erroneous. See *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530.

In light of the proceedings on remand, we affirm both the circuit court's order denying Johnson's claim for relief based on alleged newly discovered evidence and the order denying reconsideration. As Wisconsin courts have long recognized, a claim of newly discovery evidence requires actual new evidence. See *State v. Fosnow*, 2001 WI App 2, ¶9, 240 Wis. 2d 699, 624 N.W.2d 883. Here, Johnson's newly discovered evidence consists of nothing other than five documents that the circuit court has determined are invalid. Because each document falsely states that it was signed by a Wisconsin notary, and in light of the proceedings at the post-remand hearing, no basis exists to conclude that the documents are authentic or describe statements from knowledgeable witnesses. Accordingly, nothing supports Johnson's claims for relief, and those claims must fail. Therefore, we affirm the orders of the circuit court. See *State v. Trecroci*, 2001 WI App 126, ¶45, 246 Wis. 2d 261, 630 N.W.2d 555 (we may sustain circuit court's decision on a basis different from that relied on by the circuit court).

Upon the foregoing,

IT IS ORDERED that the hold previously imposed in this matter is lifted.

IT IS FURTHER ORDERED that the order denying postconviction relief and the order denying reconsideration are summarily affirmed.

IT IS FURTHER ORDERED that the documents that appear in the record as R.100:7-11 shall be maintained in paper form and shall not be destroyed. Following any necessary steps to permit electronic retention of the documents, the clerk of the circuit court shall maintain the original documents either in the circuit court's paper record or in the circuit court's residual paper file, or the clerk of the circuit court may, as appropriate, arrange for the Milwaukee County district attorney to maintain custody of the five documents.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*