

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 5, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2006AP2300-CR

Cir. Ct. No. 1999CF5150

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LISIMBA LITEEF LOVE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY DUGAN, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Lisimba Liteef Love appeals an order denying his WIS. STAT. § 974.06 (2005-06)¹ motion for relief from an armed robbery conviction. Love's motion alleged newly discovered evidence and ineffective assistance of trial counsel. The trial court denied both claims after evidentiary hearings. We affirm.

¶2 Love was convicted for a 1999 armed robbery. The jury trial focused on whether the victim correctly identified Love as one of two men who held him up at gun point. Following an unsuccessful appeal, Love moved for relief under WIS. STAT. § 974.06. He alleged recently discovered evidence that a Green Bay Correctional Institution inmate, Floyd Smith, Jr., committed the 1999 robbery without Love's involvement. Love also alleged that trial counsel provided ineffective representation because she failed to interview a witness who offered to provide significant exculpatory information several weeks before his trial.

¶3 The trial court denied Love's motion without a hearing. Love appealed and this court affirmed. However, the supreme court accepted Love's petition for review and reversed, concluding that Love was entitled to an evidentiary hearing on his claims. *State v. Love*, 2005 WI 116, ¶56, 284 Wis. 2d 111, 700 N.W.2d 62. On remand Love received hearings on his claims and presented witnesses in support of both.

¶4 The source of the evidence that Love asserted was newly discovered was his longtime friend, Christopher Hawley. In an affidavit attached to Love's motion, Hawley attested that, while he and Smith were imprisoned at Green Bay,

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Smith admitted responsibility for the robbery and declared Love innocent. At the hearing on Love's motion, Hawley testified that the confession came from a fellow inmate he knew as Baylo, and that Baylo said he was Love's cousin. He testified that he did not know Baylo's full name.

¶5 Smith also appeared at the hearing and testified that he was Love's cousin. "Baylo" was tattooed on Smith's arms, and he had formerly occupied a cell close to Hawley's at Green Bay. However, Smith denied ever discussing the robbery with Hawley. When asked directly about his involvement in the robbery, Smith invoked his right against self-incrimination. When Smith was brought into the courtroom, Hawley testified that Smith was not the man who confessed to him. Hawley also disavowed that part of his affidavit in which he identified Smith as the confessor.

¶6 Jerees Veasley testified in support of Love's ineffective assistance of counsel claim, as the man who had offered to help exonerate Love before his trial. He testified that he was at the scene of the robbery the night it occurred and saw a man named Michael Cooks there. Cooks later admitted to the robbery while he and Veasley were imprisoned together at the Racine Correctional Institution. Veasley stated that Love's trial counsel never contacted him before Love's trial although, according to Love, she knew that Veasley was offering exculpatory information.

¶7 To rebut Veasley's testimony, the State offered trial counsel's testimony that she did, in fact, interview Veasley when she learned of his offer to help the defense. She testified that Veasley did not tell her that he was present at the crime scene, nor provide the name of the person he said committed the crime or any other useful information. She had the impression that Veasley was trying

to get information from her in order to concoct a story. Consequently, she decided not to call him as a witness and informed Love of her decision. The State also introduced evidence that Veasley was not imprisoned at the Racine Correctional Institution, or any other state institution, at or near the time he allegedly heard Cooks confess.

¶8 After the hearing the trial court denied Love's newly discovered evidence claim based on its finding "that the testimony of Mr. Hawley was such that I didn't find it to be credible and that clearly Hawley was trying to help his friend, the defendant, in any way that he could." He denied the ineffective-assistance-of-counsel claim as well, finding that counsel truthfully testified about her interview with Veasley, and that Veasley did not truthfully testify about meeting counsel or hearing Cooks' confession. The court also found that, in any event, Love did not meet his burden on either claim because the testimony from Hawley and Veasley, even if true, was inadmissible hearsay.

¶9 A trial court may grant the defendant a retrial on newly discovered evidence if a reasonable probability exists that it would cause a fact-finder, combining the old and new evidence, to reasonably doubt the defendant's guilt. *See State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Decisions to retry based on newly discovered evidence are discretionary. *State v. Terrance J.W.*, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). We will affirm a discretionary determination if the record shows that the trial court applied the correct legal standard to the facts of record and reached a reasonable result. *State v. Carnemolla*, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999).

¶10 The trial court reasonably concluded that Hawley did not offer credible testimony that a jury could believe. Hawley admitted that he was a close

friend of Love's, giving him a motive to lie on Love's behalf. He identified Smith as the confessor in his affidavit, and in testimony described the confessor as a person who could only have been Smith. Yet he then testified that Smith was not the alleged confessor. When asked to explain why he identified Smith by name in his affidavit, Hawley denied responsibility for the contents of his own affidavit. He also denied knowing Smith before meeting him at Green Bay, although he was Love's close friend and Smith was not only related to Love, but Love's roommate for a time as well. While Hawley's affidavit states that Smith gave him "in depth details" of the robbery in the course of several discussions, Hawley testified that he only spoke to Smith once or twice about the robbery and Smith did not give him any details of it. Under these circumstances, Love has no reasonable basis to challenge the trial court's assessment of Hawley's credibility, and a finding that the new witness is not credible is equivalent to a finding that a jury would not reach a different verdict on retrial. *See Carnemolla*, 229 Wis. 2d at 661. Although Love contends otherwise, in our view the court's credibility determination extended to both Hawley's testimony and his affidavit.

¶11 We also conclude that Love failed to offer sufficient proof of trial counsel's alleged ineffectiveness. In the trial court Love contended that counsel's omission was her failure to interview Veasley after learning that he was offering exculpatory information.² However, the trial court believed trial counsel's testimony that she did, in fact, interview Veasley and it disbelieved Veasley's testimony to the contrary.

² Love's brief on his postconviction motion states that "trial counsel was ineffective for failing to adequately investigate the case and for failing to properly interview Jerees Veasley and to follow-up on exculpatory information that Veasley could have provided."

¶12 Apparently recognizing the futility of challenging the trial court's finding that counsel interviewed Veasley, Love now contends that counsel's error was her subsequent strategic decision not to call Veasley as a witness. However, Love's argument assumes that Veasley identified Cooks and reliably described his confession to counsel. We reject that assumption because the trial court believed counsel's testimony that Veasley did not give her Cooks' name or any other specific, reliable information about the robbery, and we have no basis to overturn that credibility determination. *See State v. Daniels*, 117 Wis. 2d 9, 17-18, 343 N.W.2d 411 (Ct. App. 1983) (reviewing court will not overrule a circuit court's credibility determination unless it is inherently or patently incredible or in conflict with the uniform course of nature or fully established or conceded facts). Love offers no other grounds to conclude that counsel made an unreasonable strategic decision.

¶13 In conclusion, we affirm because Love failed to meet his burden on both his claims for relief. Our decision makes it unnecessary to review whether the testimony Love offered in support of his motion was inadmissible hearsay.

By the Court.—Order affirmed.

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

