

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 9, 2002

Cornelia G. Clark
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. 01-0931-CR
STATE OF WISCONSIN**

Cir. Ct. No. 91-CF-105

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES SANICKI, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. James Sanicki, Jr., appeals a judgment convicting him of first-degree intentional homicide. He also appeals an order denying his

motion for postconviction relief.¹ Sanicki argues that the trial court misused its discretion by denying his motion for a new trial based on newly-discovered evidence. Alternatively, Sanicki urges this court to exercise its discretionary power of reversal pursuant to WIS. STAT. § 752.35² because justice has miscarried and the real controversy has not been fully tried. We reject Sanicki's arguments and affirm the judgment and order.

BACKGROUND

¶2 In July 1991, Sanicki and James Behnke were charged with first-degree intentional homicide arising from the shooting death of Michael Smith. Shortly before the trial against the co-defendants was to commence, Behnke pled guilty to first-degree intentional homicide as party to a crime. At Sanicki's trial,

¹ The only issue properly before this court is whether the trial court erred by denying Sanicki's postconviction motion for a new trial based on newly-discovered evidence. On appeal, Sanicki attempts to raise issues arising from the judgment of conviction and to expand the issues to include challenges to the effectiveness of his trial counsel, jury selection, sufficiency of the evidence to support his conviction and the trial court's sentencing discretion. Sanicki also attempts to raise claims of prosecutorial misconduct and trial court error.

Based on the assertion that his May 14, 1993 postconviction motion was filed pursuant to WIS. STAT. RULE 809.30, by order dated December 29, 2000, we extended the time for the trial court to hear and decide his original postconviction motion. The order additionally denied Sanicki's request to supplement his original motion with additional issues. Upon our review of the record, however, we conclude that the original postconviction motion was necessarily a motion under WIS. STAT. § 974.06 because the time for commencing a RULE 809.30 motion had expired. Therefore, our jurisdiction is limited to reviewing the order denying Sanicki's § 974.06 motion and the issues raised in that motion.

In our December 29, 2000 order, we also suggested that as long as there was no appeal pending, and assuming Sanicki could show sufficient reason for not raising the issues in his first motion, he could attempt to present the additional issues by motion under WIS. STAT. § 974.06. It appears that he has not filed a second § 974.06 motion.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Behnke testified that Sanicki was the trigger man. A jury ultimately convicted Sanicki and the court sentenced him to life in prison. In June of 1992, Behnke committed suicide while incarcerated at the Green Bay Correctional Institution.

¶3 In May 1993, Sanicki filed a motion for postconviction relief requesting a new trial based on newly-discovered evidence. Specifically, Sanicki claimed that sometime before Behnke committed suicide, he confessed to another inmate that he was the shooter responsible for Smith's death. For unexplained reasons, the trial court did not rule on Sanicki's postconviction motion.

¶4 In December 2000, Sanicki filed a motion with this court to extend the time for filing a supplemental postconviction motion. Sanicki sought to introduce legal and corroborating factual support for his original postconviction motion and also sought to supplement his original postconviction motion with several issues unrelated to the original postconviction motion, "including ineffective assistance of trial counsel, denial of the requisite number of peremptory challenges per statute, sentencing errors, prosecutorial misconduct and erroneous exercise of the trial court's discretion."

¶5 By order dated December 29, 2000, this court extended the time for the trial court to hear and decide Sanicki's original postconviction motion, thus allowing him to present any legal or factual support relating to that motion. We denied, however, Sanicki's motion to supplement his original postconviction motion with new issues. Sanicki subsequently filed a memorandum in support of his original motion for postconviction relief, asserting that both before and after Sanicki's trial, Behnke had made statements to three individuals that he was the shooter. After a hearing, the trial court denied Sanicki's motion for postconviction relief and this appeal followed.

ANALYSIS

I. Newly-Discovered Evidence

¶6 Sanicki argues that the trial court misused its discretion by denying his motion for a new trial based on the newly-discovered evidence of Behnke's pre-trial confession and post-trial recantations. The standard of review afforded a request for a new trial based upon a recanting witness is set out in *State v. Terrance J.W.*, 202 Wis. 2d 496, 550 N.W.2d 445 (Ct. App. 1996). "We will affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record." *Id.* at 500.

¶7 A trial court may grant a new trial based on newly-discovered evidence if the following requirements are met: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. *Id.* "If the newly-discovered evidence fails to meet any of these tests, the moving party is not entitled to a new trial." *State v. Avery*, 213 Wis. 2d 228, 234, 570 N.W.2d 573 (Ct. App. 1997). Additionally, when the new evidence presented in a motion for new trial is the recantation of a trial witness's testimony, the recantation must be corroborated by other newly-discovered evidence. *Nicholas v. State*, 49 Wis. 2d 683, 694, 183 N.W.2d 11 (1971).

¶8 The State concedes that Sanicki discovered the new evidence after his conviction, that he was not negligent in seeking to discover it and that the evidence is material to an issue in this case. The State argues, however, that

Sanicki has failed to satisfy the other requirements for obtaining a new trial—significantly, that he has failed to establish a reasonable probability that a different result would be reached at a new trial. We agree.

¶9 Regarding his pre-trial confession, Sanicki's newly-discovered evidence is merely cumulative of trial testimony that Behnke had claimed to be the shooter. Several of the State's witnesses testified that Behnke gave the police oral and written statements asserting that he was the person who shot Smith, that he took the police to the scene of the crime and that he twice demonstrated how he shot Smith. The defense also called a witness who testified that Behnke had admitted to the police that he was the person who shot Smith. Additionally, Behnke testified at trial that he had lied to police about being the shooter because he feared Sanicki. Finally, on cross-examination, defense counsel questioned Behnke about his conflicting statements. Because the jury was aware that Behnke had, in contradiction to his trial testimony, claimed to have been the shooter, we conclude that newly-discovered evidence of an additional pre-trial confession was merely cumulative to the trial evidence.

¶10 With respect to Behnke's post-trial recantations to fellow inmates, evidence introduced at the hearing on Sanicki's postconviction motion indicated that Behnke had also made several post-trial statements that were consistent with his trial testimony identifying Sanicki as the shooter. Because Behnke made post-trial statements recounting a version of the murder that was consistent with his trial testimony, the probative force of Behnke's post-trial recantations is substantially diminished.

¶11 Finally, Behnke's testimony was not the only evidence that Sanicki was the shooter. The jury also heard testimony of three witnesses that Sanicki had

admitted to shooting Smith. In applying the requisite test to the evidence submitted here, we conclude that Sanicki has failed to show that Behnke's pre-trial confession was anything more than cumulative. Significantly, however, Sanicki has failed to show a reasonable probability that a different result would be reached at a new trial. See *Terrance J.W.*, 202 Wis. 2d at 500. Therefore, we conclude that the trial court properly exercised its discretion when it denied Sanicki's motion for a new trial.

II. Discretionary Power of Reversal

¶12 Alternatively, Sanicki seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced “that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” In order to establish that the real controversy has not been fully tried, Sanicki must convince us “that the jury was precluded from considering ‘important testimony that bore on an important issue’ or that certain evidence which was improperly received ‘clouded a crucial issue’ in the case.” *State v. Darcy N.K.*, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Sanicki “must convince us ‘there is a substantial degree of probability that a new trial would produce a different result.’” *Darcy*, 218 Wis. 2d at 667 (quoting *State v. Caban*, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice “only in exceptional cases.” *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶13 Sanicki's assertion that there has been a miscarriage of justice incorporates without further elaboration many of the arguments made on issues

that are not properly before this court. For instance, many of his arguments form the basis for his ineffective assistance of trial counsel claims. However, this court has recognized that a request for a new trial in the interest of justice is not a substitute for a properly developed claim of ineffective assistance of counsel. *See State v. Flynn*, 190 Wis. 2d 31, 49 n.5, 527 N.W.2d 343 (Ct. App. 1994). Upon our review of the record, we conclude that Sanicki has failed to show that the real controversy has not been fully tried or that justice has for any reason miscarried. Therefore, we decline to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Sanicki a new trial.

By the Court.—Judgment and order affirmed.

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

