COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1530 **Cir. Ct. No. 2008CF957**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN D. TIGGS, JR., N/K/A AKINBO JIHAD SURU HASHIM, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] John D. Tiggs, Jr., n/k/a Akinbo Jihad Suru Hashim, Jr., appeals pro se from a postconviction order denying his motion for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

plea withdrawal. We conclude that Hashim failed to make the necessary showing for postsentencing plea withdrawal and, as such, the circuit court properly exercised its discretion in denying his motion. We affirm the order.

¶2 Hashim was convicted of misdemeanor battery after entering a no contest plea on May 21, 2009. The charge was based on an allegation that Hashim bit an individual above the eyebrow and struck the individual with a belt during an alleged sexual assault. As part of the plea deal, the State dismissed two counts of second-degree sexual assault. Hashim was sentenced on the misdemeanor battery conviction the same day. Approximately one year later, on May 10, 2010, Hashim filed a motion to withdraw his no contest plea. As grounds for withdrawal, Hashim asserted that (1) "newly discovered evidence received from the State conclusively demonstrates that the DNA tests conducted on [the victim's] bite mark contains solely [the victim's] DNA," and (2) his no contest plea was not entered knowingly and intelligently because the crime laboratory DNA tests results were not disclosed to Hashim prior to his entering a plea. The circuit court held a motion hearing on June 15, 2010, at the close of which it denied Hashim's motion for failure to demonstrate a manifest injustice. Hashim appeals.

¶3 A defendant seeking to withdraw a guilty or no contest plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). This court reviews the circuit court's decision on postsentence plea withdrawal for an erroneous exercise of discretion. ***Id.*** For plea withdrawal based on a claim of newly discovered evidence, the defendant must prove by clear and convincing evidence that: (1) the evidence was discovered after conviction, (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. ***Id.*** If those four criteria are met, the circuit court "must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.***

¶4 Hashim contends that his "no contest [plea] was not made knowingly and intelligently based on all of the evidence available to the State who chose not to disclose relevant and material DNA evidence from the alleged victim who claimed to have been battered." In support, Hashim cites to a DNA analysis report conducted by the State Crime Laboratory and dated May 21, 2009. The DNA test of the victim's bite wound did not uncover Hashim's DNA. Hashim acknowledges that the State did not receive the DNA results until May 22, 2009, but nevertheless contends that "[e]ven if the Wisconsin Crime Lab was the government entity in the possession of the DNA test results in question here, it does not negate the State disclosing that information to Mr. Hashim … prior to [his] entering his plea of no contest." We disagree with Hashim's characterization of events and reject his argument.

¶5 We have reviewed the transcript of the plea hearing, at which Hashim appeared pro se, and recite those portions pertinent to our review.

> [STATE]: Judge … I just handed Mr. Hashim … an offer to resolve the case and it's a substantial departure from the previous offer, and he is just reading it for the first time right now.
>
> ….
>
> The only matter that I don't have this morning that has been the subject of various motions and other pretrial discussion, is [the] Crime Lab Analysis of the DNA. And I did speak with the Crime Lab earlier this week. We—the original analyst who was assigned to the case and now a new analyst who was assigned because the original analyst had a death in the family, so it has been transferred to another analyst. They don't have a result for me as of the

> moment. *She indicated that she would have something by this afternoon*.
>
> So, at this moment I do not have anything regarding the DNA analysis that has been submitted to the Crime Lab, *but I anticipate that that would be forthcoming at least in a preliminary sense by way of a phone call from the Crime Lab this afternoon*.
>
> [THE COURT]: Were you anticipating calling that person as a witness at trial?
>
> [STATE]: Well, it depends on the results of the analysis, Judge. [T]hose results … are significant, because both Mr. Hashim submitted evidence, the victim submitted evidence, and there is an assertion by Mr. Hashim that there was some voluntary contact on behalf of the victim with his person, the defendant's person. So if the DNA evidence supports that that has a significant bearing on the State's view of the case, *it would be potentially exculpatory evidence for the Defense*.
>
> Beyond that there is other DNA evidence that was submitted that may or may not corroborate the State's case, I really don't know at this point, Judge, it depends on the results.
>
> ….
>
> [THE COURT]: I know that you have these motions and we'll deal with those, Mr. Hashim. Did you want to say anything about what [the State] just told us?
>
> [HASHIM]: No, your Honor. I just wanted to ask the Court for five minutes to speak with [the State] about the letter here and maybe we can resolve it without a trial.

(Emphases added.)

¶6 The transcript reflects that there was then a recess during which Hashim conferred with the assistant district attorney. When the parties reconvened, the court indicated that the parties had reached a plea agreement. The court conducted a very thorough plea colloquy, during which it addressed Hashim's decision to proceed pro se, ascertained that he had completed his

secondary education and some higher education, including a two-year paralegal certificate. After the colloquy, Hashim stated, "My plea to the charge of battery, Class A misdemeanor is no contest, your Honor."

¶7 Applying the test set forth in ***McCallum*** to Hashim's claim that his plea was not knowingly and voluntarily entered because of the "newly discovered" DNA test results, we turn first to whether the evidence was discovered after conviction. *See* ***McCallum***, 208 Wis. 2d at 473. It was not. The record reflects that the evidence was known to exist, it was known to be forthcoming in just hours, and it was explicitly discussed just prior to the entry of Hashim's plea. Next, we consider whether Hashim was negligent in seeking the DNA evidence. We conclude, as did the circuit court, that he was. As the circuit court observed: "[Hashim] knew it was available. There is nothing that's changed about its level of materiality or importance. It was his own decision, and if it was a wrong decision, it was because of his negligence in not waiting to get that evidence." Based on these two criteria alone, Hashim cannot establish that his plea was not knowing and intelligent based on newly discovered evidence.

¶8 While the first two criteria are dispositive, we nevertheless note as to the third and fourth criteria of the ***McCallum*** test that the circuit court determined that the DNA test result was not material to the issue of whether Hashim bit the victim and was merely cumulative to other evidence. *See* ***State v. Garrity***, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (evidence is material when there is a reasonable probability that its disclosure would have led to a different result in the proceeding). The circuit court noted that one would not necessarily expect to find DNA in a minor bite wound and the fact that Hashim's DNA was not found in the bite mark would not disprove his involvement, but "it would be the other evidence that would resolve the case." The other evidence would have

included the victim's testimony and the additional results from the DNA testing which indicated that while the victim's DNA was not found on the swabs taken from Hashim's body, DNA matching Hashim's profile was found on the swabs taken from the victim's neck. For this reason, we also conclude that there is no reasonable probability that the DNA test results of the bite mark alone would have resulted in a different outcome at trial.

¶9 Hashim has failed to demonstrate a manifest injustice in support of his request for postsentence plea withdrawal. His request, which is premised on a claim of newly discovered evidence, simply fails to set forth any evidence of which he was not aware at the time of his no contest plea. We therefore conclude that the circuit court properly exercised its discretion in denying his postconviction motion. We affirm the order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.