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DISTRICT II

September 23, 2020

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

2018AP15 State of Wisconsin v. Ronald W. Wolfe (L.C. #2000CF877)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Ronald W. Wolfe, pro se, appeals from an order denying his WIS. STAT. §§ 974.06 and 974.07 (2017-18)[1] motions for postconviction relief. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. For the reasons that follow, we affirm.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

In 2001, a jury found Wolfe guilty of first-degree intentional homicide in the stabbing death of Ronald Carter. Wolfe admitted stabbing Carter but argued that he acted in self-defense. Wolfe told police that Carter wanted a sexual relationship and came at him with a steak knife. Wolfe said he wrestled the knife from Carter and stabbed him in the neck and that, though Carter was bleeding profusely, he told Wolfe not to call for help. Wolfe said he passed out for hours, woke up to find Carter dead, and left Carter's house. On direct appeal, this court affirmed the judgment and an order denying Wolfe's postconviction motion.

After his direct appeal, Wolfe filed a ***Knight***[2] petition and two WIS. STAT. § 974.06 motions seeking a new trial. He unsuccessfully raised numerous claims of circuit court error, ineffective assistance of counsel, and newly discovered evidence.

This appeal involves a third WIS. STAT. § 974.06 postconviction motion presenting three grounds for relief: (1) newly discovered evidence in the form of an anonymous letter received by Wolfe in 2015, along with police reports from 2001 referring to a surveillance video as well as the surveillance video itself, and screen captures from the video; (2) a ***Brady***[3] claim alleging that the State withheld the police reports and surveillance video; and (3) a claim that trial counsel performed ineffectively in advancing Wolfe's theory of self-defense. The circuit court held a nonevidentiary hearing and denied Wolfe's motion.

On appeal, Wolfe maintains that an anonymous letter he received in 2015 constitutes newly discovered evidence. The unsigned typewritten letter purports to be from "a friend," and

[2] ***State v. Knight,*** 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

[3] ***Brady v. Maryland***, 373 U.S. 83 (1963) (State violates a defendant's due process right to a fair trial when it suppresses materially exculpatory evidence).

alleges that Wolfe's cousin told the writer that he and "a black guy from Milwaukee" had entered Carter's apartment on the night of his death. Carter was naked and bleeding and Wolfe was asleep on the couch. Carter told them to leave and "the black guy pulled out an ice pick and started stabbing [Carter]." According to Wolfe, the letter proved that the "the black guy" actually killed Carter.

A defendant seeking a new trial based on newly discovered evidence must prove by clear and convincing evidence all of the following: (1) the evidence was discovered 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. ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60. If all four factors are proven, "then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. We review the circuit court's decision for an erroneous exercise of discretion. ***State v. Edmunds***, 2008 WI App 33, ¶14, 308 Wis. 2d 374, 746 N.W.2d 590.

The 2015 anonymous letter does not entitle Wolfe to a new trial. First, as the State argues in its brief, the letter is patently inadmissible hearsay, and Wolfe's motion fails to explain how he would lay the foundation necessary to admit the letter over the inevitable authentication and hearsay objections at a new trial. Further, the circuit court properly exercised its discretion in determining that as unsigned hearsay, the anonymous letter lacked credibility and deserved little weight. Given its unreliability, the letter was immaterial. The court also found that the letter directly conflicted with trial evidence and statements made by Wolfe before trial and that "Mr. Wolfe's representations that this other individual was responsible for Mr. Carter's death are

wholly speculative." Given the uncorroborated, speculative nature of this inadmissible evidence, the circuit court properly denied relief without holding an evidentiary hearing.

Similarly, the circuit court properly denied Wolfe's claim concerning newly discovered surveillance video evidence. Here, Wolfe asserted that police reports and surveillance videos placed him in a grocery store shortly after the murder, wearing shoes that could not have left imprints found at the crime scene. The circuit court viewed the video and screen captures and found that: "[A]s far as identifying the person, as far as identifying any other aspect of the clothing, as far as identifying anything regarding footwear, I am absolutely 100 percent convinced that there is no way anybody could reasonably do that to any level of certainty." The video and the screen captures had "little to no value in any respect as it relates to Mr. Wolfe's case." The court's findings are not clearly erroneous. As such, the video and images are immaterial. Further, as to all of Wolfe's proffered new evidence, there is no reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt regarding Wolfe's guilt.

The circuit court also correctly concluded that Wolfe's motion failed to sufficiently allege a ***Brady*** violation. To prove the State's failure to disclose, Wolfe's motion offered only an unsworn letter from his trial counsel saying "if you did not get a tape it's because I didn't get it." We agree with the circuit court that the letter is insufficiently probative to establish nondisclosure. Further, Wolfe failed to establish in his motion or on appeal that the video and screen captures were material. Due to their poor quality, there is no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See* ***State v. Harris***, 2004 WI 64, ¶¶14-15, 272 Wis. 2d 80, 680 N.W.2d 737 (defining materiality for purposes of ***Brady*** analysis).

Turning to Wolfe's ineffective assistance of counsel claims, we agree with the circuit court that they are procedurally barred. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994) (when a defendant files a WIS. STAT. § 974.06 motion after having filed a previous postconviction motion or direct appeal, the claim is barred unless the circuit court ascertains that a sufficient reason exists for the failure to raise the issue earlier). Wolfe raised ineffective assistance claims in each of his previous postconviction motions. Once again, he alleges that trial counsel failed to adequately consult with him, review discovery, and challenge evidence concerning stolen jewelry. Wolfe cannot simply recharacterize previous ineffective counsel claims in a never-ending series of attempts to obtain a new trial. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991). To the extent Wolfe is trying to challenge trial counsel's performance as it relates to the newly discovered evidence, the allegations in his motion are too speculative and conclusory to warrant an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

Wolfe's final claim for a new trial asks this court to exercise its statutory authority under WIS. STAT. § 752.35 to determine that the real controversy was not fully tried. We refused Wolfe's request to do so in the appeal from the denial of his last WIS. STAT. § 974.06 motion. Here, too, nothing Wolfe has presented persuades us that a new trial is warranted in the interest of justice.

Wolfe also filed a WIS. STAT. § 974.07 motion asking the circuit court to order DNA testing of an ice pick seized by police from an unknown location early in the investigation. In an attempt to imbue this old inventory with potential relevance, Wolfe's motion relies on the unsworn statements in the anonymous letter suggesting that a "black guy" stabbed Carter with an ice pick.

On appeal, Wolfe argues that the circuit court erroneously exercised its discretion in denying his motion. We disagree. The circuit court explained at length why Wolfe's one-page motion failed to establish the statutory criteria set forth in WIS. STAT. § 974.07(7)(a) or (b). Wolfe's appellate argument on this point cites no legal authority and is patently inadequate. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Finally, the State asks this court to warn Wolfe that continued litigation on claims previously litigated may subject him to sanctions under ***State v. Casteel***, 2001 WI App 188, ¶¶25-26, 247 Wis. 2d 451, 634 N.W.2d 338 (where appellant filed a frivolous appeal after being warned that further frivolous litigation would result in sanctions, it was proper for this court to require that future filings be accompanied by an affidavit explaining why the appeal was not frivolous, and to refuse to accept any filing deemed to be frivolous). Given that this is Wolfe's third round of postconviction collateral attacks, we warn him that future frivolous litigation may result in sanctions, such as those imposed in ***Casteel***.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals