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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

February 5, 2025

To:

Hon. Natasha L. Torry
Circuit Court Judge
Electronic Notice

Chris Koenig
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

Michael M. Moffett #384291
Fox Lake Correctional Institution
P.O. Box 147
Fox Lake, WI 53933

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

2023AP2104 State of Wisconsin v. Michael M. Moffett (L.C. #2009CF143)

Before Gundrum, P.J., Neubauer and Lazar, 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).

Moffett appeals from an order denying his motion for reconsideration of an order denying his most recent WIS. STAT. § 974.06 (2021-22)[1] motion. On appeal, Moffett argues he is entitled to reconsideration because the circuit court applied the wrong legal standard to issues he raised in his § 974.06 motion. 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. We affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Moffett was convicted, following a jury trial, of first-degree intentional homicide. He has had a direct appeal and three subsequent pro se appeals. *See* ***State v. Moffett***, No. 2011AP1290, unpublished op. and order (WI App Feb. 15, 2012); ***State v. Moffett***, No 2012AP2564, unpublished op. and order (WI App June 5, 2013); ***State v. Moffett***, No. 2013AP2187, unpublished slip. op. (WI App Sept. 10, 2014); ***State v. Moffett***, No. 2019AP1973, unpublished op. and order (WI App Oct. 6, 2021).

In June 2023, Moffett filed the postconviction motion underlying the present appeal. In his motion, he argued he was entitled to an evidentiary hearing on his claim that "newly discovered [evidence] warrants a new trial." He attached to his motion, an affidavit from trial witness Kerry Bohannon who averred that, contrary to his trial testimony, the victim did possess a gun during the shooting; after the shooting Bohannon took the gun from the victim and sold it for drugs, and Bohannon testified at trial the victim *did not* possess a gun during the shooting because a detective had the witness "do it as he wanted." Moffett also attached an affidavit from defense trial witness Christylee Broehm[2] who averred that she "d[id]n't remember everything" but, contrary to her trial testimony, the victim "never pulled a gun out on me" and she only testified he did because Moffett's trial counsel wanted her to do so. The second half of Moffett's postconviction motion included a section titled, "Below the second portion of this postconviction motion contains issues that were previously raised in prior motion." (Capitalization omitted.) In that section, Moffett acknowledged that he previously raised these issues in an earlier postconviction motion.

[2] At the time of trial, Broehm's name was Christylee Nohelty.

The circuit court denied Moffett's motion. With respect to the newly-discovered evidence issue, the court determined the recanting witnesses' statements had "no indicia of reliability." The court found Bohannon "changed his statements regarding the facts of this case numerous times since the investigation into this criminal incident began" and Broehm admitted "her memory of that time is not clear." The court observed that Moffett was relying on Bohannon's recantation to support his claim of self-defense and his assertion that a gun was present in the victim's car during this crime; however, the court determined Moffett "offer[ed] no other evidence of record to support such a claim" and the "unsupported statement of a recanting witness … [was] insufficient to support the defendant's claims for relief." The court also found that Moffett offered no sufficient reason as to why the witnesses' late recantations were not argued in previous postconviction motions. As a result, the court determined "these issues are precluded by … the ruling in [***State v.***] ***Escalona-Naranjo***, [185 Wis. 2d 168, 517 N.W.2d 157 (1994)]."

As to Moffett's second argument—that the circuit court should revisit issues he previously raised, the postconviction court determined, "[b]y the very title, [Moffett] admits that these issues were previously considered and denied by the circuit and appellate courts." The court relied on a quotation from our last decision involving Moffett where we stated: "[A] defendant may not relitigate a matter previously litigated, 'no matter how artfully the defendant may rephrase the issue.'" ***Moffett***, No. 2019AP1973, unpublished op. and order at 2 (quoting ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Relying on ***Witkowski***, the court did not consider the arguments in that section of Moffett's postconviction motion.

Moffett moved for reconsideration. He argued that the postconviction court applied an "incorrect standard of law" when it denied his motion. He also admitted that, with respect to the second portion of his postconviction motion, he was attempting to relitigate prior issues because they had been inadequately raised earlier. The circuit court denied his motion for reconsideration, concluding that Moffett did not raise "any new information that has not already been considered and addressed by the [c]ourt." Moffett then appealed both orders.

On appeal, and by order dated December 11, 2023, we determined we lacked jurisdiction over an appeal from the circuit court order denying Moffett's WIS. STAT. § 974.06 motion because Moffett's notice of appeal was not timely filed. As for the order denying Moffett's motion for reconsideration, we determined the notice of appeal was timely filed. However, we noted

> an appeal cannot be taken from an order denying a motion for reconsideration that presents the same issues as those determined in the order sought to be reconsidered. *See* ***Silverton Enters., Inc. v. General Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). The concern is that a motion for reconsideration not be used to extend the time to appeal from a judgment or order when that time has expired. ***Id.***; *see also* ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 197 N.W.2d 752 (1972).

Because we could not determine from the record whether the order denying the motion for reconsideration presented issues that could have been raised in an appeal from the postconviction order, we directed the parties to address the threshold jurisdictional issue as the "first issue in their appellate briefs." Neither party has directly addressed this jurisdictional question. We will therefore assume without deciding that we have jurisdiction over the order denying the motion for reconsideration.

"To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact." ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. We review a circuit court's decision on a motion for reconsideration under the erroneous exercise of discretion standard. ***Id.***, ¶6. We can also affirm on different grounds than those relied on by the circuit court. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987) (where the circuit court's decision is correct, we may affirm on grounds not utilized by that court).

On appeal, Moffett first argues the circuit court erroneously exercised its discretion when denying his reconsideration motion because the court applied the "wrong standard of law." We disagree. To overcome ***Escalona-Naranjo***'s procedural bar and receive a new trial based on allegations of newly-discovered evidence, "a defendant must establish 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.'" ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590 (citation omitted). "Once those four criteria have been established, the court looks to 'whether a reasonable probability exists that a different result would be reached in a [new] trial.'" ***Id.*** (citation omitted). Further, "[a] claim of newly discovered evidence that is based on recantation also requires corroboration of the recantation with additional newly discovered evidence." ***State v. McAlister***, 2018 WI 34, ¶33, 380 Wis. 2d 684, 911 N.W.2d 77. "[C]orroboration requires newly discovered evidence that '(1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation.'" ***Id.*** (citation omitted).

Here, among other reasons, the circuit court determined Moffett did not provide additional newly-discovered evidence to corroborate the two recantations he offered. *See* ***McAlister***, 380 Wis. 2d 684, ¶33. It denied Moffett's postconviction motion as to the newly-discovered evidence. When Moffett moved for reconsideration of that order on the basis that the circuit court applied an "incorrect standard of law," the court appropriately denied Moffett's motion. We agree he failed to establish the circuit court committed a "manifest error of law." *See* ***Koepsell's***, 275 Wis. 2d 397, ¶44.

As for Moffett's assertions regarding the issues he raised in previous postconviction motions, Moffett argued in his reconsideration motion that the circuit court's application of ***Witkowski*** was "the incorrect standard of law" because he was entitled to have issues revisited that were initially "inadequately raised." We disagree. ***Witkowski*** explicitly prohibits Moffett from renewing claims he previously made. The circuit court appropriately denied Moffett's motion for reconsideration because he again failed to establish the court committed a "manifest error of law." *See* ***Koepsell's***, 275 Wis. 2d 397, ¶44.

Finally, Moffett argues we should, in our discretion, reverse his conviction and order a new trial in the interest of justice. *See* ***State v. Avery***, 2013 WI 13, ¶23, 345 Wis. 2d 407, 826 N.W.2d 60 (We have "the discretionary power to reverse a conviction in the interest of justice."). Moffett raises many reasons why he believes we should grant him a new trial in the interests of justice. However, Moffett's claims are simply a rehash of prior grounds seeking a new trial that we have already rejected. *See* ***State v. Arredondo***, 2004 WI App 7, ¶56, 269 Wis. 2d 369, 674 N.W.2d 647. We conclude Moffett has not demonstrated that this is an exceptional case that warrants discretionary reversal.

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. § 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals