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DISTRICT III

May 13, 2025

To:

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Circuit Court Judge
Electronic Notice

Caroline Brazeau
Clerk of Circuit Court
Marinette County Courthouse
Electronic Notice

Nicholas DeSantis
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Timothy A. Provis
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You are hereby notified that the Court has entered the following opinion and order:

2024AP101 State of Wisconsin v. Andrew T. Giguere (L. C. No. 2018CF210)

Before Stark, P.J., Hruz, and Gill, 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).

Andrew T. Giguere appeals from the circuit court's order denying his WIS. STAT. § 974.06 (2023-24)[1] motion for postconviction relief. He argues that (1) there is newly discovered evidence in the form of an affidavit from the victim recanting her allegations; (2) there is a "sufficient reason" to allow his current postconviction motion so as to escape the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994); (3) he received ineffective assistance of trial counsel; and (4) he was entitled to a hearing on his

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

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.

We provided a detailed factual and procedural history of this case in a prior decision, which we will not repeat here. *See* ***State v. Giguere***, No. 2021AP472-CR, unpublished op. and order (WI App June 14, 2022). Briefly, in 2018, the State charged Giguere, who was 36 years old, with four counts of second-degree sexual assault of a child under the age of 16. The complaint alleged that the victim, 15-year-old Grace,[2] disclosed having sexual intercourse with Giguere on multiple occasions. Pursuant to a plea agreement, Giguere pled no contest to one count of child enticement in exchange for dismissal of the other charges and a joint recommendation of five years of initial confinement followed by five years of extended supervision, to be served concurrently to a sentence Giguere was already serving. However, the circuit court did not follow the recommendation and sentenced Giguere to eight years of initial confinement followed by five years of extended supervision, to be served consecutive to the sentence he was already serving.

After sentencing, Giguere filed a motion to withdraw his plea, arguing that there was an insufficient factual basis for the plea. The circuit court conducted a hearing on the motion and then denied it. Giguere appealed, and we affirmed the conviction. ***Giguere***, No. 2021AP472-CR at 1. Giguere petitioned for review. The Wisconsin Supreme Court denied his petition. Giguere then filed the current WIS. STAT. § 974.06 postconviction motion. The circuit court denied the motion without a hearing. This appeal follows.

[2] This appeal involves the victim of a crime. Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

Giguere first argues that there is newly discovered evidence in the form of an affidavit from Grace in which she avers that she lied about having sexual intercourse with Giguere and states that she never "intended to engage" in sexual activity. Giguere contends that information about Grace's intent was not previously known, and thus the affidavit is newly discovered evidence.

A defendant claiming that newly discovered evidence exists must prove the following by clear and convincing evidence: (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. Kivioja***, 225 Wis. 2d 271, 286, 592 N.W.2d 220 (1999). In addition, where, as here, the newly discovered evidence is a recantation, it must be corroborated by other newly discovered evidence. *See* ***State v. Ferguson***, 2014 WI App 48, ¶24, 354 Wis. 2d 253, 847 N.W.2d 900.

The fatal problem with Giguere's newly discovered evidence claim is that Grace recanted her accusation that she had sexual intercourse with Giguere *prior to his conviction*. Grace sent an email to Giguere's trial counsel containing a detailed recantation in December 2018, three months before he entered his plea. Moreover, Grace's recantation was discussed at sentencing, where the prosecutor acknowledged that Grace had retracted her accusations and the circuit court noted that the charges were amended as a result. Giguere therefore cannot show that Grace's recantation "was discovered after conviction," which is a necessary component of a newly discovered evidence claim. *See* ***Kivioja***, 225 Wis. 2d 271 at 286.

Giguere attempts to overcome this flaw in his argument by contending that Grace's *intent* to avoid sexual activity was not previously known. However, Grace's intent to avoid sexual

activity is irrelevant to the charge to which Giguere pled no contest—child enticement. As relevant in this case, a person is guilty of child enticement if the person causes or attempts to cause a child to go into any vehicle, building, room or secluded place, with the intent to expose their genitals, pubic area, or intimate parts to the child or to cause the child to expose their genitals, pubic area, or intimate parts. *See* WIS. STAT. § 948.07(3). The intent of the victim is not a component of this crime.[3] Grace's intent "is [not] material to an issue in the case," *see* ***Kivioja***, 225 Wis. 2d 271 at 286, and therefore does not meet the criteria for newly discovered evidence.

Giguere next argues that the alleged newly discovered evidence provides a "sufficient reason" to allow his second postconviction motion to escape the procedural bar of ***Escalona-Naranjo***, which provides that issues that could have been raised in a previously filed direct appeal or postconviction motion cannot be the basis for a subsequent WIS. STAT. § 974.06 motion unless the defendant provides a sufficient reason for failing to raise the issue in the earlier proceeding. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Because we have rejected Giguere's argument that there is newly discovered evidence, we also reject Giguere's argument that the alleged newly discovered evidence constitutes a sufficient reason for failing to previously raise his claims and therefore escape the procedural bar of ***Escalona-Naranjo***.

Giguere next argues that he received ineffective assistance of trial counsel because his trial counsel did not interview Grace, prior to his plea and therefore counsel was not aware that

[3] To the extent that Giguere is attempting to argue that Grace's affidavit is probative of *his* intent, we reject this argument because an affidavit must be based on personal knowledge. *See, e.g.*, WIS. STAT. § 802.08(3). Giguere's intent is not within the scope of Grace's personal knowledge.

Grace had no intent to engage in sexual activity or to break the law. As discussed above, this information is not relevant to Giguere's conviction. Moreover, Giguere has not provided a sufficient reason for failing to previously raise the issue. Therefore, his argument that he received ineffective assistance of trial counsel is procedurally barred pursuant to ***Escalona-Naranjo***.

Finally, Giguere argues that he was entitled to a hearing on his motion. A circuit court must hold an evidentiary hearing on a postconviction motion only when the defendant alleges sufficient material facts that, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Giguere has not alleged facts that, if true, show that he is entitled to relief. As such, the circuit court properly denied his motion without a hearing.

Therefore,

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

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

Samuel A. Christensen
Clerk of Court of Appeals