COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1844 **Cir. Ct. No. 1983CR1579**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JODY MAYO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: R. ALAN BATES, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 LUNDSTEN, J. Jody Mayo appeals the circuit court's order denying a second motion for a new trial based on newly discovered evidence. Her motion is based on the same evidence as her previous motion. Mayo argues, however, that she is entitled to a new trial because our prior decision affirming the

denial of her previous motion was based on errors of law or has been superseded by intervening changes in the law. We disagree and affirm the circuit court's order.

Background

¶2 This case is before us for the fifth time. We limit our summary of the facts and procedural history to what is necessary to provide the reader with sufficient context for the limited issues before us.

¶3 Mayo and Michelle Lambert were convicted in separate trials for the 1981 murder of Randall Bleiler. Lambert, who was tried first, testified at Mayo's trial and denied that either she or Mayo was involved in the murder.

¶4 The State's case against Mayo relied heavily on various witnesses who testified that Lambert admitted to killing Bleiler, sometimes implicating Mayo as well, and one or two witnesses who testified that Mayo said she had participated in the murder. Mayo did not testify at her trial. We affirmed Mayo's conviction on direct appeal in an unpublished decision in 1986.

¶5 In 1993, Mayo moved for a new trial under WIS. STAT. § 974.06 (2005-06)[1] based on newly discovered evidence. The evidence consisted largely of Lambert's statements in December 1990 to various employees of Taycheedah Correctional Institution. The thrust of those statements was that Lambert claimed that she had killed Bleiler and that Mayo played no part in the murder.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted. The relevant portion of WIS. STAT. § 974.06 has not changed since the time of Mayo's 1993 motion.

¶6 Lambert refused to testify at Mayo's postconviction hearing, asserting her Fifth Amendment privilege against self-incrimination, and persisting in her refusal after the circuit court rejected her claim of privilege. Mayo took the stand and testified that, although she was with Lambert earlier on the night of the murder, she did not participate in it.

¶7 The circuit court denied Mayo's motion for a new trial. In a published decision, we reversed and remanded to the circuit court so that court could determine whether Lambert's recantation of the testimony she gave at Mayo's trial was sufficiently corroborated and, if so, whether there was a reasonable probability that a jury would have a reasonable doubt as to Mayo's guilt after considering both Lambert's trial testimony and Lambert's recantation statements. ***State v. Mayo***, 217 Wis. 2d 217, 229-30, 579 N.W.2d 768 (Ct. App. 1998).

¶8 On remand, the circuit court again denied Mayo's motion. The court concluded that Lambert's recantation statements were not sufficiently corroborated and that there was no reasonable probability that a jury would have a reasonable doubt as to Mayo's guilt. We affirmed the circuit court in an unpublished per curiam decision dated February 10, 2000. Our reasoning, in a nutshell, was that Lambert's recantation statements were insufficiently corroborated and were lacking in circumstantial guarantees of trustworthiness. We considered, among other things, Lambert's unwillingness to testify to her statements, evidence contradicting Lambert's statements, and evidence that Lambert was diagnosed with "schizo-affective schizophrenia" and apparently stopped taking her medication one week to ten days before she made several of her statements.

¶9 Seven years later, in 2007, Mayo filed a second postconviction motion for a new trial based on newly discovered evidence. In this motion, Mayo did not present any additional new evidence. Rather, she argued that WIS. STAT. § 974.06 must be construed to permit a successive motion raising a previously raised and finally adjudicated issue if the court's decision on the issue was "founded upon errors of law or superseded by intervening changes in the law." Mayo argued that such errors of law or changes in the law provide "sufficient reason" under the statute for a successive motion raising the same claims that were previously raised and finally adjudicated.[2] In addition, Mayo sought reversal in the interest of justice.

¶10 The circuit court denied Mayo's motion, and Mayo appeals the resulting order. We reference additional facts as needed below.

Discussion

¶11 It is important at the outset to recognize that Mayo's appeal is, in effect, a challenge to our February 10, 2000 decision (our "prior decision"). Mayo argues, as she did in the circuit court, that she may pursue her second WIS. STAT. § 974.06 motion for a new trial based on newly discovered evidence because our

[2] WISCONSIN STAT. § 974.06(4) provides, in relevant part:

> **(4)** All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated … in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

prior decision was based on errors of law or has been superseded by intervening changes in the law. In particular, Mayo argues that we used the wrong standard for corroboration of newly discovered recantation evidence, held her to a burden of proof that was incorrect in light of intervening legal changes, and applied the wrong standard of review. She also renews her argument for reversal in the interest of justice.

¶12 The State argues that Mayo's second motion is procedurally barred. The State relies on the plain language of WIS. STAT. § 974.06, law of the case doctrine, and other principles and authorities.

¶13 For reasons we discuss below, we disagree with Mayo that our prior decision was based on errors of law or has been superseded by intervening changes in the law. We also disagree that Mayo should receive a new trial in the interest of justice. Accordingly, we need not and do not decide whether the entire motion is procedurally barred.

A. Whether Our Prior Decision Used The Wrong Standard For Corroboration Of Newly Discovered Recantation Evidence

¶14 A defendant's right to a new trial based on newly discovered recantation evidence depends on a six-prong inquiry:

> First, 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 evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. [5] If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial. [6] Finally, when the newly discovered evidence is a witness's recantation, we have stated that the recantation must be corroborated by other newly discovered evidence.

State v. McCallum, 208 Wis. 2d 463, 473-74, 561 N.W.2d 707 (1997); *see also* ***State v. Terrance J.W.***, 202 Wis. 2d 496, 500-01, 550 N.W.2d 445 (Ct. App. 1996). If a defendant fails to satisfy any one of these prongs, the defendant's claim for a new trial based on newly discovered recantation evidence will not succeed. *See* ***Terrance J.W.***, 202 Wis. 2d at 500-01.

¶15 The final prong, corroboration of newly discovered recantation evidence, is required because recantation evidence is inherently unreliable. *See, e.g.*, ***McCallum***, 208 Wis. 2d at 476; ***Mayo***, 217 Wis. 2d at 226; *see also* ***McCallum***, 208 Wis. 2d at 479 ("Recantation, by its very nature, calls into question the credibility of the witness ….").

¶16 Mayo argues that our prior decision was based on an error of law because we set the bar too high by using the wrong corroboration standard. In our prior decision, we stated the standard as follows:

> Where, as here, there is no physical evidence to corroborate the original testimony, the corroboration requirement may be satisfied either by: (1) "significant independent corroboration" of the falsity of the earlier testimony; or (2) "the existence of a feasible motive for the false testimony together with circumstantial guarantees of the trustworthiness of the recantation." ***McCallum***, 208 Wis. 2d at 477.

¶17 Mayo argues that, in our prior decision, we incorrectly declared that there must be "independent" corroboration in the sense that the corroboration must be evidence of a different character from the recantation itself. Mayo argues that the correct test in a recantation case is the second test and that we erroneously "discounted" the circumstance that Lambert recanted to numerous different witnesses over a substantial period of time. According to Mayo, each of

Lambert's recantations corroborates her other recantations. We reject Mayo's arguments.

¶18 The key to understanding why we reject Mayo's arguments is that we stated the two tests for corroboration in the disjunctive—"(1) 'significant independent corroboration' of the falsity of the earlier testimony; *or* (2) 'the existence of a feasible motive for the false testimony together with circumstantial guarantees of the trustworthiness of the recantation'" (emphasis added)—and separately applied each of them. We assumed, correctly, that meeting either test would be sufficient. Mayo contends that it was wrong to apply the first test and that we should have applied only the second test. This argument is a non-starter. By separately applying both tests, and concluding that Mayo failed to satisfy each, our application of the first test was, at worst, superfluous.

¶19 Moreover, Mayo does not persuade us that it was incorrect to use both tests. We recognize that, in ***McCallum***, the supreme court determined that requiring "significant independent corroboration" is too burdensome in at least some recantation cases. ***McCallum***, 208 Wis. 2d at 477. The supreme court held that it would be sufficient in such cases for a defendant to show a feasible motive for the initial false statement along with circumstantial guarantees of the trustworthiness of the recantation. ***Id.*** at 477-78. Still, nothing in ***McCallum*** suggests that the "significant independent corroboration" test does not remain a valid alternative means for a defendant to meet the corroboration requirement.

¶20 Mayo also seems to be arguing that we erred as a matter of law because we implicitly concluded, even in our application of the more relaxed test, that the corroboration requirement must be met by evidence of a different character from the recantation itself. According to Mayo, each of Lambert's

recantations corroborates her other recantations and, consequently, Mayo showed sufficient circumstantial guarantees of trustworthiness. This argument lacks merit because, in applying the more relaxed test, we *did* consider Lambert's multiple recantation statements as a relevant circumstance that weighed in Mayo's favor. We concluded, however, that other factors were more important. We explained as follows:

> Mayo argues that Lambert's statements were trustworthy because they were self-incriminatory, spontaneously made, and *consistently repeated on a number of different occasions*. *While these circumstances do tend to weigh in Mayo's favor*, there are other factors present here which undermine the inherent reliability of Lambert's statements.

(Emphasis added.)[3]

¶21 Mayo also contends that we erred in our reasoning in several other respects in concluding that Lambert's recantation statements lacked sufficient circumstantial guarantees of trustworthiness. This part of Mayo's argument is, in substance, a disagreement with our application of the test; it is not an argument that we applied a wrong test. Thus, there can be no serious dispute that this part of Mayo's argument is procedurally barred by WIS. STAT. § 974.06 or by law of the case.

¶22 Furthermore, we find Mayo's re-argument unpersuasive. For example, Mayo points out that, as part of our reasoning, we considered that Lambert suffers from mental illness and that the circuit court was in the best position to resolve any conflict among the witnesses as to whether Lambert was

[3] There is no dispute that Mayo provided a "feasible motive" for Lambert's recantations. The focus here is on whether there were sufficient circumstantial guarantees of trustworthiness.

delusional at the time of her recantation statements. Mayo asserts that Lambert's mental illness does not render Lambert's statements "incredible *per se*." We agree, but our prior decision did not rely on the proposition that Lambert's mental illness, by itself, rendered Lambert's statements incredible. Indeed, we did not determine Lambert's credibility. Rather, we applied the legal test that Mayo asserts is the proper one—whether Lambert's recantation statements had sufficient circumstantial guarantees of trustworthiness to meet the corroboration requirement.

B. Whether We Held Mayo To The Wrong Burden Of Proof

¶23 Mayo argues that, in our prior decision, we incorrectly required her to show a reasonable probability of a different outcome by clear and convincing evidence. She argues that intervening legal changes have clarified that the clear and convincing burden of proof does not apply to the reasonable probability prong of the newly discovered evidence inquiry.

¶24 Mayo points in particular to ***State v. Armstrong***, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98. There, the supreme court held that the concept of "reasonable probability" is itself a burden of proof. ***Id.***, ¶160. "There are no gradations of a reasonable probability; either there is one, or there is not." ***Id.***, ¶162. The ***Armstrong*** court withdrew language from a prior case, ***State v. Avery***, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997), which stated that the reasonable probability showing must be by clear and convincing evidence. ***Armstrong***, 283 Wis. 2d 639, ¶162.

¶25 It is true that, in our prior decision, we initially stated that Mayo had to prove by clear and convincing evidence that Lambert's statements created a reasonable probability of a different result at a new trial. There are at least two

reasons, however, why we are not convinced that this statement produced an erroneous result in Mayo's case.

¶26 First, we did not in any meaningful sense apply the reasonable probability prong in our prior decision. Rather, our analysis focused on the corroboration prong. Although we framed our discussion in terms of the reasonable probability prong, we proceeded, in effect, to analyze the case based on the corroboration prong.[4]

¶27 Second, nothing else in our prior decision suggests that our conclusions depended on application of the clear and convincing burden of proof. Although we initially stated that this was the standard of proof, our analysis made no additional reference to it and contains nothing suggesting that Mayo's claim failed because of this heightened burden.

C. Whether We Applied The Wrong Standard Of Review

¶28 Mayo argues that we committed legal error in our prior decision because we reviewed the circuit court's decision only for an erroneous exercise of discretion.

[4] We initially framed Mayo's case as depending on the reasonable probability prong, and concluded our analysis with this statement:

> Because Lambert's statements were not independently corroborated, and were not sufficiently trustworthy to satisfy the relaxed corroboration requirement under ***McCallum***, it is not reasonably probable that they would have produced a different outcome at a new trial. Therefore, the trial court properly exercised its discretion when it denied Mayo's motion for a new trial on the basis of newly discovered evidence.

¶29 The case law commonly states both that a motion for a new trial based on newly discovered evidence is reviewed for an erroneous exercise of discretion, *see*, *e.g.*, ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999), and that whether due process requires a new trial is a constitutional question for our *de novo* review, *see*, *e.g.*, ***State v. Kimpel***, 153 Wis. 2d 697, 702, 451 N.W.2d 790 (Ct. App. 1989).

¶30 Mayo argues that the "essential question" in her case was whether due process requires a new trial. We disagree. As we have already indicated, the key issue in our prior decision, had it been stated clearly, was whether Mayo satisfied the corroboration requirement. Mayo cites no case law for the proposition that this issue is necessarily one of due process requiring *de novo* review. Indeed, Mayo does not point to any case law specifically addressing the proper standard of review for the circuit court's corroboration determination. Mayo has failed to demonstrate that it was legal error for this court to review the circuit court's corroboration determination for an erroneous exercise of discretion.[5]

[5] We recently observed that, despite any inconsistency in courts' application of the standard of review, we are bound by ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), to review circuit court decisions in newly discovered evidence cases for an erroneous exercise of discretion:

> Chief Justice Abrahamson's concurrence to ***State v. McCallum***, 208 Wis. 2d 463, 484-87, 561 N.W.2d 707 (1997), explains that although the courts have often repeated that the newly discovered evidence test is reviewed for an erroneous exercise of discretion, that standard has not been consistently applied. However, under ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), we are bound by the ***McCallum*** majority's mandate to review the circuit court's decision for an erroneous exercise of discretion.

(continued)

¶31 Moreover, even if the standard of review were *de novo*, we conclude that our analysis of the corroboration requirement in our prior decision effectively demonstrated not only that the circuit court reasonably exercised its discretion in determining that Mayo failed to meet the requirement but also that our independent analysis led us to agree with the circuit court.[6] Accordingly, Mayo's argument that we committed legal error in our prior decision by applying the wrong standard of review fails.

D. Reversal In The Interest Of Justice

¶32 Mayo argues that, "for the same reasons set forth" in her other arguments, we should reverse in the interest of justice so that she may receive a new trial. In addition, Mayo seems to be arguing that, in our prior decision, we erroneously concluded that we lacked the power to reverse in the interest of justice. Our power to reverse is now beside the point because we conclude that, for the reasons already explained, nothing in Mayo's arguments persuades us that the interest of justice requires reversal.

State v. Edmunds, 2008 WI App 33, ¶8 & n.3, __ Wis. 2d __, 746 N.W.2d 590, *review denied*, 2008 WI 40, __ Wis. 2d __, 749 N.W.2d 663 (No. 2007AP933). Turning directly to Chief Justice Abrahamson's concurrence, it seems apparent that not every issue in a newly discovered evidence case should be subject to the same standard of review. For example, the question of whether evidence was discovered after conviction is most often a question of fact. *See* ***McCallum***, 208 Wis. 2d at 486 (Abrahamson, C.J., concurring) (stating the view that this question is a factual determination). It is sufficient here to say that Mayo fails to demonstrate that the corroboration requirement must be reviewed *de novo*.

[6] Mayo also makes arguments regarding the reasonable probability prong of the six-prong inquiry for newly discovered recantation evidence. Even if we could properly reach that argument, we need not. Mayo's failure to satisfy the corroboration prong is dispositive because a defendant must satisfy all six prongs.

By the Court.—Order affirmed.

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