

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-2335

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES F. WEIHER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. James Weiher appeals an order denying his motion under § 974.06, STATS., to vacate his guilty plea or, in the alternative, to modify his sentence. We conclude that the trial court properly denied relief and therefore affirm.

Weiher pleaded guilty to misdemeanor battery and second-degree sexual assault, and was placed on probation. He subsequently committed another felony, and his probation was revoked. On sentencing after revocation, the trial court imposed an eight-year prison term. On Weiher's no merit appeal from that sentence, we independently concluded that the trial court properly exercised its sentencing discretion. *State v. Weiher*, No. 93-3396-CR-NM (Wis. Ct. App. July 28, 1994).

In support of his § 974.06, STATS., motion, Weiher submitted an affidavit from a fellow inmate, Robert Ciarpaglini, averring that he had recently spoken with Weiher's victim. According to Ciarpaglini, the victim admitted that she had fabricated her story and that Weiher was, in fact, innocent. The motion itself identified several ways in which the trial court allegedly exceeded its sentencing discretion at the sentencing after revocation.

The trial court denied the motion without a hearing. The court pointed out that Weiher pleaded guilty and had admitted details of the sexual assault at the plea hearing. The court also noted that Weiher's hearsay evidence did not cast sufficient doubt on the victim's previous statements to justify a hearing, much less an order vacating his conviction. The court concluded that "even an affidavit from the victim or her sworn testimony—now, nearly five years after the fact—is not likely to meet the burden under all the circumstances." On Weiher's request for a sentence modification, the trial court found no reason to relitigate an issue already decided on appeal.

The trial court properly refused to vacate Weiher's plea. A defendant seeking to withdraw a guilty plea after sentencing must show by clear and convincing evidence that withdrawal of the plea is necessary to prevent a

manifest injustice. *State v. Bentley*, 201 Wis.2d 303, 311, 548 N.W.2d 50, 54 (1996). A defendant may satisfy this standard with newly discovered evidence. *State v. Krieger*, 163 Wis.2d 241, 255, 471 N.W.2d 599, 604 (Ct. App. 1991).

The Wisconsin Supreme Court has recently determined that for newly discovered evidence to constitute a manifest injustice, the following criteria must be met:

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.

State v. McCallum, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710-11 (1997). If the four criteria are proven by clear and convincing evidence, the trial court must determine “whether a reasonable probability exists that a different result would be reached in a trial.” *Id.* at 473, 561 N.W.2d at 711. If the newly discovered evidence is a witness’s recantation, corroboration by other newly discovered evidence is required. *Id.* at 473-74, 561 N.W.2d at 711. The corroboration requirement is satisfied if: “(1) there is a feasible motive for the initial false statement; and (2) there are circumstantial guarantees of the trustworthiness of the recantation.” *Id.* at 477-78, 561 N.W.2d at 712.

Weiher’s proffered evidence of a recantation fails the corroboration requirement. The only evidence presented in support of the recantation is the affidavit of Weiher’s prison paralegal claiming he spoke to the victim on the phone and that the victim stated Weiher was innocent. This report is hearsay and therefore provides no “circumstantial guarantees of the trustworthiness of the recantation.”

The trial court properly declined to address the merits of Weiher's challenge to his sentence. That sentence was reviewed and affirmed on Weiher's appeal. Further litigation on the same matter is therefore barred. *State v. Escalona-Naranjo*, 185 Wis.2d 168, 181-86, 517 N.W.2d 157, 162-64 (1994) (if a defendant's claims have been finally adjudicated or not raised in a prior postconviction motion, they may not be raised in a § 974.06, STATS., motion unless "sufficient reason" exists for the failure to allege or adequately raise the issue in a prior motion). Because Weiher's "new" challenges to his sentence all relate to matters that existed at the time of his sentencing and prior to his earlier appeal, they will not be addressed by this court. *Id.*

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

