COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3107 **Cir. Ct. No. 1999CF6006**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTAE L. DOYLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Dontae L. Doyle, *pro se*, appeals an order denying his WIS. STAT. § 974.06 motion, which sought a new trial on the basis of newly discovered evidence. Doyle, who was convicted of a dozen crimes and sentenced to eighty-seven years' imprisonment, offered affidavits and testimony of five other

inmates, two of whom claimed responsibility for Doyle's crimes. We agree with the circuit court's conclusion that there is no probability of a different result at trial and, therefore, we affirm the order.

BACKGROUND

¶2 Doyle was charged with fourteen different counts arising from armed robberies occurring between August and November 1999. These were robberies of area grocery stores and "carjackings" of two vehicles from their owners' homes. Doyle was charged with seven counts of armed robbery while concealing his identity, one count of attempted armed robbery while concealing his identity, one count of armed robbery, two counts of second-degree reckless endangerment, one count of robbery with a threat of force, one count of theft of a firearm while using a dangerous weapon, all as party to a crime, and one count of fleeing or eluding a traffic officer.

¶3 Doyle was arrested after officers spotted him driving one of the stolen vehicles. He fled at a high rate of speed in the vehicle, then on foot, before he was apprehended. At the time of his arrest, Doyle had in his possession a gun that had been taken from a security guard during one of the robberies. As part of its case, the State introduced evidence that Doyle had confessed his involvement in the various robberies to detectives and evidence that Doyle's fingerprints were found on one of the stolen vehicles. A jury convicted Doyle on twelve counts.[1]

¶4 Doyle moved for a new trial based on ineffective assistance of counsel. He alleged that counsel was ineffective for: failing to move to sever the

[1] Two of the charges had been dismissed as duplicative.

charges; advising Doyle not to testify; failing to subpoena a particular witness who recalled suspects of a different height than Doyle; failing to hire an investigator to seek out two individuals; failing to seek electronic monitoring records; and failing to call two witnesses to identify Doyle's co-defendant. The circuit court denied the motion. This court affirmed. *See* ***State v. Doyle***, No. 2002AP250-CR, unpublished slip op. (WI App Sept. 24, 2002).

¶5 In January 2004, Doyle filed a *pro se* motion for relief under WIS. STAT. § 974.06. He alleged newly discovered evidence, submitting affidavits from Terrance Prude and Calvin Williams in support of his claim. Prude asserted he was responsible for at least two of the robberies; Williams averred he had heard Prude talking about committing the crimes. The circuit court ultimately denied the motion, concluding that Prude's affidavit was immaterial because it did not exonerate Doyle[2] and that Williams's affidavit lacked sufficient detail to permit the court to determine he was referring to the same robberies for which Doyle was convicted. We affirmed. *See* ***State v. Doyle***, No. 2004AP1578, unpublished slip op. (WI App Jan. 24, 2006).

¶6 In June 2006, Doyle filed another *pro se* WIS. STAT. § 974.06 motion, seeking relief on the basis of newly discovered evidence. Doyle submitted affidavits from five individuals, including Prude and Williams, who either claimed responsibility for the robberies or claimed to know others who were claiming such responsibility. The circuit court denied the motion for essentially the same reason that the prior § 974.06 motion had been denied.

[2] The evidence demonstrated that, at the two robberies Prude "confessed" to, there were two robbers each time. Prude's admission to being one of those robbers did not eliminate Doyle as the second suspect.

¶7 This time, we reversed and remanded for an evidentiary hearing. *See* ***State v. Doyle***, No. 2006AP1781, unpublished slip op. (WI App Sept. 26, 2007). We noted that Doyle had alleged facts which, *if true*, would entitle him to relief. We further noted, however, that credibility determinations should be resolved through live testimony, not on the basis of the affidavits alone. Following an evidentiary hearing on remand, the circuit court again denied the motion. Doyle appeals.

DISCUSSION

¶8 "'"Motions for a new trial based on newly discovered evidence are entertained with great caution.'" ***State v. Morse***, 2005 WI App 223, ¶14, 284 Wis. 2d 369, 377, 706 N.W.2d 152, 156 (citation omitted). A defendant seeking a new trial on the basis of newly discovered evidence must establish, 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. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 385, 746 N.W.2d 590, 595 (quoting ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 704, 700 N.W.2d 98, 130). If these four criteria are met, the court must determine whether, in comparing the new evidence to previously presented evidence, a reasonable probability exists that a different result would be reached in a new trial. ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 134, 700 N.W.2d 62, 74.

¶9 We review the circuit court's decision on whether to grant a new trial based on newly discovered evidence for an erroneous exercise of discretion. ***Edmunds***, 2008 WI App 33, ¶14, 308 Wis. 2d at 385, 746 N.W.2d at 595. A court properly exercises its discretion if the determination has "a reasonable basis and is

made in accordance with accepted legal standards and facts of record." ***Morse***, 2005 WI App 223, ¶14, 287 Wis. 2d at 377, 706 Wis. 2d at 156.

¶10 Contrary to Doyle's claim, the circuit court did not concede he had met the first four prongs of the newly discovered evidence test. Instead, it noted that because Doyle did not testify on remand, it was unclear to what extent the new evidence came to light after trial, and it was unclear whether Doyle was negligent in failing to seek it before trial. The court actually concluded that it need not address the first four prongs of the test because Doyle had not shown a reasonable probability of a different result in a new trial.

¶11 The court stated that the reasonable probability prong had to be shown by "clear and convincing evidence." However, "[t]he reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof." ***Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d at 385, 746 N.W.2d at 595. Although the court applied a higher standard than necessary, we nevertheless conclude that it properly denied Doyle's motion for a new trial. *See* ***Burkes v. Hales***, 165 Wis. 2d 585, 591, 478 N.W.2d 37, 39 (Ct. App. 1991) (we generally search for reasons to sustain discretionary decisions); *see also* ***State v. Alles***, 106 Wis. 2d 368, 391, 316 N.W.2d 378, 388–389 (1982) (appellate court has power to determine whether order is supported by record and may affirm circuit court if it has reached the right result for the wrong reason).

¶12 As the circuit court noted, Doyle had already been convicted by a jury, convinced beyond a reasonable doubt of his guilt. The verdict was supported by testimony of police officers who stated Doyle was observed driving one of the stolen cars, fled from officers, and was armed with a gun taken from a security guard in one of the robberies. A trial exhibit showed his latent prints had been

obtained from one of the stolen vehicles. Further, Doyle had provided signed statements acknowledging his involvement in each of the crimes with which he was charged.

¶13 In contrast, Doyle's "newly discovered evidence" consisted of affidavits and testimony from five individuals. Three of them—Keith Glass, Sidney Bell, and Williams—had no personal knowledge of the crimes.[3] As the court observed, "they could not provide dates, addresses, exact locations, or details of crimes which clearly matched the particulars of the crimes for which" Doyle was convicted.

¶14 Glass, for instance, claimed he was at the home of Doyle's co-defendant, Demario Pokes, while Pokes and Darius Hopkins fought over one of the carjacked vehicles shortly after its theft. During the evidentiary hearing, the following exchange occurred between Glass and the State:

> [THE STATE]: You have no idea what address that [carjacking] crime happened at. Do you?
>
> A: No.
>
> Q: Somebody wrote that [affidavit] for you and you just put your name to it?
>
> A: Right. I mean I didn't know the exact address, but --

Glass also averred that during Doyle's trial, "Hopkins advised Pokes to testify against him." However, Glass could not recall any specific threats, testifying,

[3] It remains questionable how much of their testimony would have been admissible at a new trial.

"Yeah, well, they talked [about] their incident … he, you know, told dude to -- he told him to put that on Dontae."[4]

¶15 Bell averred that Prude told him about committing various robberies. Like Glass, though, Bell admitted that his affidavit had been prepared for him and that he had no personal knowledge of the crimes because he was not "personally there to witness who was involved" in any of the crimes.

¶16 Williams averred that Pokes had told him Doyle did not commit the crimes and that Hopkins "planned it this way." Williams was also scarce on details, testifying that Pokes did not "really go into no detail or nothing. He just really went into the whole ordeal of how Dontae didn't do nothing." Williams admitted his testimony was based solely on what others had told him.

¶17 As for the affidavits and testimony of Darius Hopkins and Terrance Prude, the court noted that the statute of limitations had run for the crimes to which they were now confessing and that neither man was "definitive or clear regarding particulars of crimes" they were confessing to. Hopkins, for instance, testified that one of the car thefts "was a typical car-jacking" in an alleyway. When asked what threats he made to secure Pokes's testimony, Hopkins answered that he was "just telling him that he was going to testify against whoever the person was they was accusing him of the crimes that I committed."

¶18 Hopkins further testified that he "maybe not can [sic] fill in all the minor detail -- I mean, the major or minor details, but it was one of those things to whereas, when I see it and I read it [in the affidavit], and replay it and it is like, I

[4] Hopkins testified that, in 1999, he was not acquainted with Doyle.

can remember that." The court stated that Hopkins's "general memory of a life of crime was not likely to defeat the strong evidence of defendant's involvement."

¶19 Prude likewise provided scant detail. When questioned about the locations of the crimes,[5] he eventually asked the State, "Can you show me the address?" The State responded, "Well, okay …. That's the point. You really don't remember which of these jobs you are claiming you did unless you look at an affidavit[.]" Prude also admitted his affidavits had been prepared for him.

¶20 The court further observed that Prude's affidavit directly contradicted witness testimony[6] and, while the witness had no apparent motive to lie or create facts, Prude might have an incentive to help a fellow prisoner reduce his time, since Prude ran no risk with an expired statute of limitations.

¶21 In short, the circuit court considered that the five witnesses' affidavits and testimony would be presented against the police officers' testimony and against Doyle's own confessions. Based on the vagueness of the witnesses' information against the concrete physical evidence, as well as the essentially

[5] Sentry stores on Appleton and Fond du Lac Avenues had been robbed, as well as an Aldi store on Fond du Lac Avenue. The State questioned Prude about the Sentry on Fond du Lac, but Prude maintained that the Aldi was the store on Fond du Lac.

[6] At least one witness to the robbery of an Aldi grocery store initially thought a customer she knew as "Shorty" might have been the robber. Prude's affidavit states that he goes by the nickname "Shorty" and that he had committed that robbery. However, the witness testified at trial that the only reason she named Shorty was because the robber had been short and was wearing green sweatpants. While she was testifying, she apparently realized that the defendant was displaying mannerisms consistent with those of the robber, and inconsistent with Shorty. She also testified that the robber did not have Shorty's voice.

unchallenged confessions, the court could appropriately conclude that there was no reasonable probability of a different result at a new trial.[7]

¶22 Doyle has asked us to consider his affidavit in reviewing the court's decision. We are not convinced this is appropriate: we remanded the case so that the circuit court could make determinations based not solely on affidavits but also on *live testimony*, which Doyle did not provide. Even if we did consider Doyle's current affidavit, we would note that Doyle avers, "I never spoke to any detectives and gave them any statements, I never signed any statement."[8] Doyle's signed statements are, however, in the record, and we agree with the circuit court's conclusion that Doyle has not shown that any new evidence creates a reasonable probability of a different result at trial. The WIS. STAT. § 974.06 motion was properly denied.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[7] Doyle complains the circuit court "never indicated whether the witnesses were inherently incredible and could not be believed by a jury." Doyle cites no authority requiring such an explicit finding. The lack of credibility is implicit in a determination that there is no reasonable probability that the witnesses' testimony would result in a different result.

[8] In the affidavit Doyle submitted in support of his motion for a new trial based on ineffective assistance of counsel, he complained that had he been allowed by counsel to testify, he could have told the jury that he had "signed the confessions because the police said I would be released if I signed the confessions." This means Doyle has one affidavit admitting to signing confessions after talking with police, and one affidavit claiming he never spoke with police and never signed any statements. One of these affidavits has been falsely sworn.