

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2074

Cir. Ct. No. 2008CV352

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. JOHN M. CAMPBELL,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Adams County:
PATRICK J. TAGGART, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. John Campbell appeals a certiorari decision affirming the administrative denial of his motion to reopen a probation revocation hearing based upon newly discovered evidence. For the reasons discussed below, we conclude that Campbell was entitled to have his revocation hearing reopened.

Accordingly, we reverse the trial court's order and remand with directions that it grant the writ of certiorari.

BACKGROUND

¶2 Campbell was convicted of three drug-related felony charges in Adams County Case No. 2001CF89, for which he was sentenced to one bifurcated prison term and two concurrent terms of probation.¹ He was released to extended supervision in 2003. The Department of Corrections Division of Probation and Parole notified Campbell early in 2007 that it would seek to revoke his extended supervision and probation based upon an altercation that had occurred in Iowa, during which Campbell's girlfriend was stabbed.

¶3 The only witness at the revocation hearing was a probation agent who introduced a packet of revocation materials that included an Iowa police report of the incident, a summary of the testimony Iowa prosecutors intended to introduce at Campbell's trial, and Campbell's written statement.

¶4 The Iowa police report related that the victim, Stacy Russell, said she went into Campbell's house and found him in bed with another woman, Elisha Koppman. Russell got very upset and started a verbal fight with Campbell. She then tried to leave the house, but Campbell followed her outside, came up behind her and stabbed her in the back. Koppman told the police that Russell "went crazy" upon finding her in bed with Campbell, so she got up and left. Koppman also said Campbell told her the following day that he had stabbed Russell either by

¹ There was also a misdemeanor count on which he was sentenced to time served, and which is not at issue on this appeal.

accident or to protect himself. Campbell's stepmother, Marie Grems, informed police that Campbell called and told her that he had stabbed Russell after she found him in bed with Koppman and he asked for her help. When Grems arrived, Russell refused to go to the hospital, so Grems stitched her up herself. The summary of anticipated testimony appears to have been based nearly verbatim upon the statements contained in the police reports.

¶5 Campbell's statement in the revocation materials asserted that the verbal argument that followed Russell's discovery of him in bed with Koppman

escalated into [Russell] coming after me. I saw [Russell] come at me w/ the knife. I rolled her off me. I then got up and went to the kitchen. [Russell] put the knife down and grabbed another knife. She got a buck knife & fell into a chair. She started swinging at me w/ the other hand. She then went at me with the hand. She then got stabbed in the back.

Campbell went on to state that he denied stabbing Russell. Counsel picked up on that last portion of Campbell's statement, and argued:

He indicates that she was coming at him when she was stabbed. (inaudible) someone else may have done the actual injury to this victim. There was another person in the room who may have had incentive to act in the matter and that is Mr. Campbell's position is that, that [Russell] was injured by the other individual in the room, that he had backed up and was, was facing her at the time but did not have access to her back while this occurred. The other person did.

¶6 The administrative law judge noted that Campbell "did not enter any evidence to refute the Department's hearsay, but argued that a third person caused the stab wound. This version of events is inconsistent with the statements of Russell, Koppman, and the client's own written explanation." The ALJ then made a factual finding that "Campbell was out of control and used a knife to attack his girlfriend." Based on that conduct, he concluded that Campbell had violated his

rules of supervision, and that single proven allegation was sufficiently serious to warrant revocation.

¶7 Two months after Campbell's supervision and probation were revoked, an Iowa jury found him not guilty of stabbing Russell based upon a claim of self-defense. According to Russell's deposition and trial testimony, neither of which were available at the time of the revocation, Russell said she "went nuts" or "went into a rage" and "started breaking things" when she found them in bed. She said "I continued to break things and throw shit at John, and I grabbed the knife and I started cutting up our bed and our pillows." Next, "I remember we started wrestling in our house, but when we finished we were out on the road somewhere." The reason they were wrestling was that "he was trying to stop me from breaking things and cutting things up." She thought he must have disarmed her at some point, because she didn't have the knife anymore, but she was not sure when that was. She also did not know exactly at what point during the encounter she was actually stabbed, and admitted that it could have been at a point when the knife was in her own hand or being wrestled away from her. She could not even say with certainty that Campbell had stabbed her, but "assumed" he did.

¶8 Koppman testified that Russell was "really pissed off and kind of irate, and she was yelling and stuff" when she discovered them in bed together. As Koppman was getting dressed and leaving, Russell was trying to pull Campbell out of the bed. When Koppman went over to Campbell's place the next day, she saw the slashed bed, the bloody chair, and the mess from the fight. Campbell told Koppman that Russell had come at him with a knife and he thought he had stabbed her while he was grabbing her hand with the knife. Koppman went back later after Campbell had been arrested and took pictures of the bed and chair, which were introduced into evidence.

¶9 Grems testified that Campbell called her to say that he had stabbed Russell, that she was bleeding, and that he needed help. When Grems arrived, she heard Russell saying that Campbell had stabbed her. Grems tried to get Russell to go to the hospital, but Russell refused because she was afraid she would be arrested and she also did not want to get Campbell in trouble. Campbell was crying the whole time Grems was stitching Russell up, and Russell kept telling him it was not his fault. Russell told Grems that she had thrown glasses and a deep-fat fryer at Campbell and had taken a knife from the kitchen and cut up the bed. Later than night, Grems herself observed the slashed bed with blood on it, a chair with blood on it, and glass all over the place.

¶10 Campbell testified that Russell was “drunk and yelling and screaming and getting all crazy” when she found them in bed together. He said Russell chased Koppman out the door, throwing stuff at her, then he heard her breaking glasses in the kitchen. Russell came back into the bedroom with a fillet knife and tried to stab Campbell while he was still in the bed. She slashed the bed several times as Campbell scooted away. Russell then ran back into the kitchen, and Campbell followed her. Russell set the fillet knife down, threw a fryer at him, and then grabbed a foldable pocketknife and came at him again. He pushed her down in a chair while she was still trying to stab him, and was finally able to control her arms. At that point Russell told Campbell that he had stabbed her. He said he did not intentionally stab her, and did not even know when she got hurt.

¶11 While considering an evidentiary issue during the trial, the Iowa trial court commented that, “when I look at the facts of this case, it’s clear that [Campbell] was not the initiator or the aggressor here. She came into the -- the facts are undisputed that she entered the house, unbeknownst to anybody, possibly

without permission, and she immediately started into a rage” The jury acquitted.

¶12 Campbell moved to reopen the revocation proceeding based upon “both the acquittal and the evidence adduced at [his] Iowa trial regarding the stabbing incident.” Campbell’s motion highlighted portions of the testimony of Russell, Koppman and Grems—as well as his own testimony—that he argued undermined or contradicted the statements contained in the police report and witness summaries presented at the revocation hearing.

¶13 David Schwartz, the Administrator of the Division of Hearings and Appeals, denied the motion to reopen. He first cited WIS. ADMIN. CODE § DOC 331.08 for the proposition that an acquittal on criminal charges for the conduct underlying an alleged violation “shall not preclude” revocation for that same conduct. From that he reasoned that “the [Iowa] not guilty verdict is not relevant and has no bearing on the outcome of these proceedings.” The administrator then stated that the idea “that the argument of self-defense was not known to Mr. Campbell and therefore, he was not able to argue this defense at his revocation hearing” made no sense because “Campbell would have known if he had acted in self-defense no matter what had happened at the criminal trial.” The administrator concluded that there was no legally compelling basis in the record to reopen the hearing, without directly addressing why the trial testimony of Russell, Koppman or Grems would not satisfy the criteria of newly discovered evidence.

¶14 Campbell sought certiorari review. The circuit court denied his petition, and he appeals.

STANDARD OF REVIEW

¶15 Our certiorari review of a revocation determination is limited to considering: (1) whether the Division of Hearings and Appeal kept within its jurisdiction; (2) whether it acted according to law; (3) whether its actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; (4) and whether the evidence was such that the division might reasonably make the decision in question. *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527.

DISCUSSION

¶16 The parties agree that a probationer seeking to reopen a revocation hearing based upon newly discovered evidence must make a showing analogous to that required to obtain a new trial in a criminal case. *State ex rel. Booker v. Schwarz*, 2004 WI App 50, ¶14, 270 Wis. 2d 745, 678 N.W.2d 361. Specifically:

(1) [t]he evidence must have come to the moving party's knowledge after [the revocation hearing]; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at [the hearing]; and (5) it must be reasonably probable that a different result would be reached [at a new revocation hearing].

Id., ¶¶12, 15.

¶17 Campbell asserts that it was not reasonable for the division to deny his motion to reopen the revocation hearing in light of the sworn testimony produced at his subsequent trial on the charge underlying the revocation, which resulted in acquittal. We will therefore examine the application of the newly discovered evidence test to the acquittal itself, to the defendant's testimony at trial,

and to the trial testimony of the prosecution's witnesses, Russell, Koppman and Grems.

¶18 It is beyond question that the acquittal itself came to Campbell's attention after the revocation hearing; that he was not negligent in failing to obtain it sooner; and that it was noncumulative. The division determined that the acquittal was not relevant (and thus, we infer, not material and/or reasonably probable to lead to a different result in the division's view) because an administrative rule specifies that it would not preclude revocation. *See* WIS. ADMIN. CODE § DOC 331.08. The fact that an acquittal would not, in and of itself, *preclude* revocation, however, does not mean that it would not be *relevant* to the question whether revocation was warranted. *See, e.g., State v. Verstoppen*, 185 Wis. 2d 728, 739, 519 N.W.2d 653 (Ct. App. 1993) (noting that an acquittal on criminal charges following the revocation of probation "implicates the propriety of [the] probation revocation"). Therefore, the division was not acting according to law when it refused to take the acquittal into consideration and examine whether it undermined confidence in the strength of the evidence at the revocation proceeding.

¶19 Neither party presented testimonial evidence at the revocation hearing, so the division had no opportunity to independently examine the credibility of Campbell or the prosecution witnesses and make its own judgment as to the weight of the evidence in relation to the applicable burdens of proof in the two proceedings. Rather, the revocation decision was based entirely on documentary evidence about what the state of Iowa *intended* to prove at trial. The fact that the state of Iowa subsequently *failed* to prove the crime charged is therefore plainly material to the question whether Campbell did or did not commit the alleged probation violation leading to his revocation. We will consider

whether the acquittal was reasonably probable to lead to a different result at a reopened revocation hearing in conjunction with the other evidence Campbell sought to introduce as newly discovered.

¶20 The second piece of evidence Campbell sought to introduce at a reopened revocation hearing was his own trial testimony that he either inadvertently stabbed Russell or caused her to stab herself while he was attempting to protect himself from her knife attack. We conclude the division reasonably determined that Campbell's trial testimony did not satisfy the test for newly discovered evidence. As the division observed, Campbell obviously would have known already at the time of the revocation hearing whether he had acted in self-defense. Indeed, his written statement in the revocation proceeding asserted that Russell had come at him with a knife and that he denied stabbing her. Therefore, Campbell's own trial testimony could not satisfy even the first element of the newly discovered evidence test.

¶21 The third piece of evidence Campbell sought to introduce at a reopened revocation hearing was the trial testimony of the prosecution's witnesses. The division's decision failed to address the significance of the testimony of Russell, Koppman and Grems, even though that evidence was the crux of Campbell's motion. On appeal, the division concedes that Campbell learned of these witnesses' trial testimony after the revocation proceeding; that he could not have discovered it earlier because it did not yet exist; and that it was not cumulative since no one testified at the revocation hearing. The division maintains, however, that the trial testimony of the prosecution witnesses was neither material nor reasonably probable to produce a different outcome.

¶22 The division characterizes the prosecution witness statements contained in the police reports and the testimony given at trial as “remarkably consistent,” and argues they “did not vary in any material way.” We disagree. According to the statement the victim gave to police, the victim provided only *verbal* provocation and was attempting to leave when the defendant followed her *outside* and stabbed her there with a knife he presumably *produced on his own*. According to the victim’s trial testimony, *she herself grabbed a knife* at two different points during the incident, slashed the bed and *physically* attacked Campbell, and was then stabbed *inside* the house, when Campbell tried to disarm her. The victim’s trial testimony that she had slashed the bed with a knife and physically attacked Campbell before he stabbed her inside the house was further bolstered by Koppman’s testimony that she saw Russell physically trying to pull Campbell from the bed before she left and saw the slashed bed and bloody chair the following day, and by Grems’ testimony that Russell said she was afraid she herself would be arrested if she reported the incident and that Grems also saw the slashed bed, broken glass and oil from the fryer.

¶23 The division specifically noted in its original decision that there was no evidence at the revocation proceeding to refute the version of events related in the statements to police. The victim’s subsequent admission that she was the one who instigated the fight and introduced a knife into it, and additional statements from other witnesses that supported that version of events but were not included in the police report, directly contradict the division’s finding that Campbell stabbed Russell while he was “out of control.” We therefore conclude that the trial testimony of the prosecution witnesses was material to the question whether Campbell violated the conditions of his supervision and parole.

¶24 Taking into account both the material evidence that the victim testified she went into a rage and grabbed a knife and Campbell wrestled with her to disarm her, and the material fact that a jury found the testimony of the victim and other witnesses at trial sufficiently credible to acquit Campbell, there is at least a reasonable probability that a decision maker looking at both the information available during the revocation proceeding and the subsequent information would conclude that Campbell had not violated the rules of his supervision by stabbing Russell without justification. We therefore conclude the evidence does not reasonably support the division's determination that Campbell failed to satisfy all five elements of the newly discovered evidence test.

¶25 Finally, the division argues that its refusal to reopen the hearing was justified, even if all five factors of the newly discovered evidence test were satisfied, because Campbell presented an alternate theory at the revocation hearing that someone else may have stabbed Russell. Campbell characterizes the division's argument as attempting to add a sixth element to the newly discovered evidence test. We view it as more akin to a judicial estoppel argument—*i.e.*, that Campbell should be precluded from obtaining a new hearing at which he could present testimony from the victim that would support his self-defense claim because he previously argued an inconsistent theory that someone else stabbed her.

¶26 The doctrine of judicial estoppel precludes a party from asserting one position during the course of litigation, only to later argue the opposite. *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). A party asserting judicial estoppel must show: “(1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped convinced the first court to adopt its position.” *Mrozek v. Intra*

Financial Corp., 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54 (citation omitted). We are not persuaded that these elements have been established here.

¶27 First, it is not clear that Campbell's revocation statement and trial testimony are entirely inconsistent. It has been his position all along that he was not even aware of when the victim was stabbed, much less that he himself had stabbed her. The victim herself could not say when she was stabbed or whether the knife might actually have been in her hand at the time. If Campbell did not know when exactly the victim was stabbed, he might also not have been aware whether Koppman was still present at that time, since she had to get dressed before she left. Even assuming that a suggestion that a third party might have actually stabbed the victim was clearly inconsistent with a claim of self-defense, and that the basic facts were still the same, Campbell certainly never persuaded the revocation official to adopt his position that a third party had stabbed Russell.

¶28 We conclude that Campbell was entitled to have his revocation hearing reopened based upon newly discovered evidence. We therefore reverse the order of the circuit court and remand with directions that it enter a writ of certiorari to that effect.

By the Court.—Order reversed and cause remanded with directions.

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

