

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 9, 2014

Diane M. Fremgen
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. 2013AP1570

Cir. Ct. No. 2003CF301

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS T. LAMB,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
DANIEL J. BISSETT, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. In 2005, Travis T. Lamb pled no contest to attempted first-degree intentional homicide and possession of THC. Lamb and

others were involved in a July 2003 altercation in which Vincent Howard got stabbed. Howard testified at Lamb's preliminary hearing that it was Lamb who stabbed him. Lamb was convicted in March 2005.

¶2 In 2013, Lamb sought to withdraw his pleas. He claimed it was not he who stabbed Howard and cited newly discovered evidence, to wit, three unsolicited letters Howard sent to the court in October and November 2005 recanting his testimony and a March 2010 letter, also unsolicited, from Jonathon Glass, an associate of Howard's, corroborating Howard's recantation. Glass explained that Howard lied so that he could exact "street justice" against the real perpetrator. The court summarily denied the motion. We affirm the order.

¶3 Whether the trial court erroneously denied his postconviction motion without a hearing implicates a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first determine whether, on its face, Lamb's motion alleges sufficient material facts that, if true, would entitle him to relief. *See id.* We review this question of law de novo. *Id.* If the motion raises sufficient material facts, the trial court must hold an evidentiary hearing. *Id.* If it does not, or if it presents only conclusory allegations, or if the record conclusively demonstrates that Lamb is not entitled to relief, it was within the trial court's discretion to grant or deny a hearing. *See id.* We review discretionary decisions under the deferential erroneous-exercise-of-discretion standard. *Id.*

¶4 A defendant who seeks to withdraw a guilty or no-contest plea after sentencing "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" *State v. Krieger*, 163 Wis. 2d 241, 249, 471 N.W.2d 599 (Ct. App. 1991) (citation omitted). The motion is addressed to the

trial court's sound discretion; we will reverse only for an improper exercise of discretion. *Id.* at 250.

¶5 For newly discovered evidence to constitute a manifest injustice and warrant plea withdrawal, a 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 (1997). If he or she sufficiently proves these four criteria, the trial court must determine whether “a reasonable probability exists that a different result would be reached in a trial.” *Id.* When the newly discovered evidence is a witness's recantation, the recantation itself must be corroborated by other newly discovered evidence. *Id.* at 473-74.

¶6 The State concedes, and we agree, that Lamb could not have discovered the letters until after conviction, the evidence is material to the central issue, and is not cumulative to other evidence. Howard's recantation thus satisfies the first, third, and fourth criteria. As to the second criterion, however, Lamb is unable to show that he was not negligent in seeking the evidence.

¶7 Lamb knew since the 2003 preliminary hearing that Howard said someone named “Danny” was involved in the assault and since the 2005 letters that Howard said the stabber had a particular tattoo on his arm. There were three assailants; Lamb could have attempted to learn the identity of “Danny” and of the person with the tattoo. When Lamb learned about Howard's letters in November 2005 he wrote to the court asking “what [he] could or should do” about them.

What he did was wait until 2013 to file this WIS. STAT. § 974.06 (2011-12)¹ motion.

¶8 The evidence also fails the corroboration test. Lamb’s motion pointed to a police report prepared after the incident. The report indicated that Howard was uncooperative with the investigation and shouted, “[D]on’t tell who did it, that is street justice.” Lamb does not claim that the State failed to comply with his July 2003 discovery demand that included a demand for “copies of all police reports.” A belated appreciation of the significance of previously known information is not newly discovered evidence. *Vara v. State*, 56 Wis. 2d 390, 394, 202 N.W.2d 10 (1972).

¶9 While the police report may corroborate Glass’s written statement, it does not necessarily corroborate Howard’s recantation. The report indicates that Howard’s clamoring for “street justice” occurred in the context of other witnesses identifying Lamb as the perpetrator. Glass acknowledged that he did not see the stabbing but arrived only after Howard called him to say he needed help because he had been “jumped by three guys.” The police report thus validates Glass’s assertion that Howard used the term “street justice,” but not that Howard intended it to refer to someone other than Lamb. In any event, Glass’s statement leaves untouched Lamb’s stipulation at the plea hearing that the allegations in the complaint that he stabbed Howard formed a factual basis for the plea.

¶10 Lamb entered his no-contest plea a year and a half after Howard’s incriminating testimony at the preliminary hearing. He could have explored the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

identity of the tattooed person and of “Danny” and Howard’s claim that he framed Lamb so he could pursue “street justice.” He could have advised the court that his counsel did not conduct a proper investigation. Instead, he admitted the charges by pleading no contest then waited eight years after discovering Howard’s recantation to file for postconviction relief. The court did not erroneously exercise its discretion in denying his postconviction motion without a hearing.

By the Court.—Order affirmed.

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

