COURT OF APPEALS DECISION DATED AND FILED

September 22, 2015

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. 2014AP2686 **Cir. Ct. No. 2001CF1567**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS G. MISTRIOTY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Nicholas G. Mistrioty, *pro se*, appeals from an order of the circuit court that denied without a hearing his motion to withdraw his plea. Mistrioty contends the circuit court failed to apply the appropriate legal standard when evaluating his motion. Because the result is correct, we affirm.

BACKGROUND

¶2 In March 2001, Mistrioty was charged with the second-degree sexual assault and child enticement of A.S. Mistrioty pled no contest to the charges and was given concurrent, indeterminate, ten-year sentences, imposed and stayed in favor of eight years' probation. Mistrioty's probation was revoked in 2002, and he began serving the stayed sentences. He was paroled in 2009 but revoked in November 2011, and he was returned to prison for two years, ten months, and twenty days. After serving that time, Mistrioty was paroled again.

¶3 On December 9, 2013, Mistrioty filed a postconviction motion seeking plea withdrawal based on newly discovered evidence. Specifically, Mistrioty "became aware that [A.S.] was recanting his statements that Mistrioty had sexually assaulted him." Mistrioty obtained an affidavit from A.S. The circuit court denied the motion without a hearing, noting there was no other evidence to corroborate the recantation. Thus, Mistrioty had failed to establish there was newly discovered evidence warranting plea withdrawal.

DISCUSSION

¶4 "After sentencing, a defendant who seeks to withdraw a guilty or no contest plea 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). "Newly discovered evidence may be sufficient to establish that a manifest justice has occurred." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

¶5 In order for newly discovered evidence to warrant plea withdrawal, "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." *See* ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted). "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." ***Id.*** Further, "when the newly discovered evidence is a witness's recantation … the recantation must be corroborated by other newly discovered evidence." ***McCallum***, 208 Wis. 2d at 473-74.

¶6 "[A] recantation will generally meet the first four criteria [of the newly discovered evidence test]…. The determinative factors to be considered are whether it is reasonably probable that a different result would be reached at a new trial and whether the recantation is sufficiently corroborated by other newly discovered evidence." ***State v. Terrance J.W.***, 202 Wis. 2d 496, 501, 550 N.W.2d 445 (Ct. App. 1996). There will be sufficient corroboration if "there is a feasible motive for the initial false statement … [and] there are circumstantial guarantees of the trustworthiness of the recantation." ***McCallum***, 208 Wis. 2d at 478.

¶7 According to the criminal complaint, A.S. originally told police that Mistrioty took him to a movie when he was twelve years old and, on the way home, pulled the car into a parking lot, pushed A.S.'s head into his lap, pulled down A.S.'s pants, and reached into A.S.'s underwear to grab his penis. A.S. also reported an incident where Mistrioty took A.S. to a restaurant and, while A.S. was

in the bathroom at the urinal, came up behind A.S., wrapped both arms around him, and grabbed A.S.'s penis with both hands. According to the recantation affidavit that Mistrioty obtained from A.S., A.S. "felt pressure from the police and my dad about them believing that [Mistrioty] was doing stuff sexually with me." Thus, A.S. told police "basically what they wanted to hear" in order to "get the cops and my dad (a little bit) off my back. None of this ever happened."

¶8 Mistrioty contends that the circuit court erred in denying his motion without a hearing because the circuit court merely concluded he had failed to provide any corroborating evidence for the recantation, without applying the two-step test for corroboration set forth in ***McCallum***. Thus, Mistrioty argues, the circuit court committed an error of law, so its discretionary decision to deny his postconviction motion should be reversed. *See* ***State v. Martinez***, 150 Wis. 2d 62, 71, 440 N.W.2d 783 (1989) (exercise of discretion based on erroneous application of law is erroneous exercise of discretion).

¶9 We are not so persuaded. Before the circuit court was required to grant a hearing, the motion had to allege sufficient materials facts which, if true, would entitle him to relief. *See* ***State v. Love***, 2005 WI 116, ¶26, 47, 284 Wis. 2d 111, 700 N.W.2d 62. The circuit court's conclusion that Mistrioty offered no corroboration is simply its ultimate determination that the postconviction motion failed to allege sufficient material facts warranting relief. That conclusion is not erroneous: even expressly applying the ***McCallum*** corroboration standards to the motion, Mistrioty has not alleged sufficient material facts to entitle him to relief.

¶10 As noted, the ***McCallum*** corroboration test has two parts: a feasible motive for the original false statement and circumstantial guarantees of trustworthiness of the recantation. Here, the State assumed for the sake of

argument that Mistrioty satisfied the feasible-motive requirement by attaching A.S.'s affidavit, in which A.S. explained that he made his original false statement so that his father and police "would quit pestering" him. We will also assume without deciding that the affidavit satisfies the feasible-motive requirements, because Mistrioty's motion fails on the second prong.

¶11 A recantation must have circumstantial guarantees of trustworthiness, and there are three factors to consider in evaluating the trustworthiness of a recantation: whether the recantation is internally consistent, whether the recantation is consistent with circumstances as they existed at the time of the original statement, and whether the recanting witness knows there could be criminal consequences from the earlier false statement. *See* ***McCallum***, 208 Wis. 2d at 478. While A.S.'s recantation is internally consistent, there are no other circumstantial guarantees of trustworthiness.

¶12 A.S.'s recantation claims he made up his original allegations to get his father and police to stop "pestering" him. However, there is no indication that, at the time of the original statement, A.S. was concerned about his father's treatment of him—there is no mention of the father in any of the pretrial record. For example, when the State made an offer of proof on a motion to admit other-acts evidence, it referred to Mistrioty's menacing and harassing behavior toward A.S. and his mother only. The State further points out that in the affidavit, A.S. frequently speaks in the plural, noting that his father "asked us if [Mistrioty] ever tried anything sexual with us and we told him no." The affidavit does not indicate who, beside A.S., the father was questioning. Additionally, while A.S.'s affidavit claims a police detective interviewed him three to four times, the record reflects only a single interview by that detective. The affidavit also is not consistent with reports from a witness who, at the time of the original accusations, reported seeing

Mistrioty, riding with A.S. in his car, putting his hand on A.S.'s thigh and squeezing. Mistrioty's motion alleges no facts that harmonize the recantation with the facts existing at the time of A.S.'s original accusations against Mistrioty.[1]

¶13 Nor is there any possibility of criminal sanctions for A.S. and an original "false" accusation. His statement to police was not under oath, so he cannot be charged with perjury. *See* WIS. STAT. § 946.31(1) (2013-14)[2] (Perjury, a Class H felony, is committed by someone who "under oath or affirmation orally makes a false material statement which the person does not believe to be true."). In any event, any applicable statute of limitations has long since expired. *See* WIS. STAT. § 939.74(1) (six-year statute of limitations for most felonies).

¶14 Applying the ***McCallum*** test, then, Mistrioty's motion fails to allege sufficient material facts entitling him to relief, because it inadequately demonstrates the circumstantial guarantees of trustworthiness necessary to find a "newly discovered" recantation is sufficiently corroborated. Thus, even if the circuit court erred by not expressly applying ***McCallum*** in its denial, the circuit court still correctly concluded there was insufficient corroboration, *see* ***Milton v. Washburn Cnty.***, 2011 WI App 48, ¶8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924 (this court will affirm a circuit court if the circuit court reached the right result, even if it had the wrong reason), so the circuit court could properly deny the plea withdrawal motion without a hearing.

[1] The State pointed out these deficiencies in its brief, but Mistrioty did not file a reply brief to refute them.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

By the Court.—Order affirmed.

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