COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1315-CR **Cir. Ct. No. 2003CF6154**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY DONALD LEISER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jeffrey Donald Leiser, *pro se*, appeals an order denying his motion for: (1) an *in camera* review of reports that he believes were generated by Washington County social services; (2) postconviction discovery of

those reports pursuant to ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999); and (3) a hearing to explore his allegation that the State's failure to produce the reports before trial violated the State's obligations to disclose exculpatory evidence, under ***Brady v. Maryland***, 373 U.S. 83 (1963). Because Leiser offers only speculation about the content of the alleged reports that he seeks, we affirm.

BACKGROUND

¶2 In 2003, the State charged Leiser with sexually assaulting M.S. and T.S., the granddaughters of Leiser's wife, Heidi L. The State alleged that Leiser had sexual contact with M.S. when she was eight years old, and that he had sexual contact with T.S. when she was nine years old. On April 15, 2004, a jury found Leiser guilty of first-degree sexual assault of M.S. and acquitted him of the charge involving T.S.

¶3 Leiser pursued a direct appeal. He claimed that his trial counsel was ineffective for failing to object to evidence of his status as a registered sex offender. ***State v. Leiser***, No. 2004AP3364-CR, unpublished slip op., ¶1 (WI App Nov. 23, 2005) (***Leiser I***). We disagreed, concluding that the circuit court properly admitted the evidence. ***Id.*** Leiser next pursued a *pro se* postconviction motion alleging that his trial counsel was ineffective for failing to challenge a procedural error during trial, for failing to object to the State's closing argument, and for failing to call Matthew S., the father of M.S. and T.S., as a trial witness. *See* ***State v. Leiser***, No. 2006AP2149, unpublished slip op., ¶¶1, 24 (WI App May 22, 2007) (***Leiser II***). We concluded that the procedural error was harmless, the

State gave an unobjectionable closing argument, and Leiser showed no prejudice from the failure to call Matthew S. as a witness because Leiser offered "nothing but his own conclusory statements in support of what Matthew [S.]'s testimony might be." *See* ***id.*** ¶¶2, 26. In 2010, Leiser sought writs of *mandamus* from the Milwaukee County circuit court to compel the disclosure of any Milwaukee Police Department records relating to him. The circuit court denied his petitions and we affirmed, concluding that he did not have a clear legal right to the records he wanted. ***State ex rel. Leiser v. State***, No. 2011AP61, unpublished slip op., ¶15 (WI App Apr. 17, 2012) (***Leiser III***).[1]

¶4 In 2013, Leiser filed the motion underlying this appeal. He sought an *in camera* review of Washington County social services records, postconviction discovery of those records, and a hearing on his claim that the State withheld the records before trial, knowing that they were relevant and exculpatory. Leiser purported to support his motion with a handful of documents: (1) a short police report reflecting that a police officer "notified [the] bureau of Washington County Child Welfare" after speaking to M.S. and her mother, Nicole S.; (2) a half-page Assessment Form stamped "Washington County Human Services Department Confidential," which identifies M.S. as an alleged sexual abuse victim of Jeffrey Leiser; (3) a City of West Allis police report prepared in August 2000

[1] The record indicates that Leiser filed an additional petition for a writ of *mandamus* in Washington County circuit court to compel release of Washington County Human Services Department records. Leiser did not appeal the order denying that petition.

documenting a disclosure by Nicole S. that she was sexually assaulted in 1976 by a female family member; and (4) an excerpt from the appellate brief filed by the respondents in ***Leiser III***, arguing that Leiser's access to Milwaukee Police Department records is barred by statute.

¶5 Based on these documents, Leiser contended that the Washington County Human Services Department conducted an investigation into the allegations that he abused M.S. and T.S. and that the reports generated pursuant to this investigation contain: (1) statements by Matthew S. that he "did not believe that Leiser sexually assaulted M.S."; (2) information that Nicole S. told her children that she was sexually abused, and this led the children to "fabricate the story that Leiser sexually assaulted them"; and (3) statements from M.S. and T.S. that Leiser "never touched them."

¶6 The circuit court denied relief, explaining that "it is unknown whether such Washington County reports exist." The circuit court further concluded that the alleged statements from Matthew S. would not have been admissible at trial or affected its outcome, that nothing in the West Allis Police Department report from August 2000 substantiates Leiser's allegation that Nicole S. told her children about her own sexual victimization, and that any such evidence about Nicole S.'s statements to her children is not exculpatory. Leiser launched the instant appeal.

¶7 Before appellate briefing began, Leiser moved to stay the appeal and remand the matter to the circuit court. He sought a fact-finding hearing in regard

to a document that he claimed he had just received from the lawyer who represented him in the proceedings underlying ***Leiser I***. The letter, dated July 15, 2004, is on Washington County Social Services letterhead, is addressed to Leiser personally, and states, in pertinent part:

> [w]e have completed our investigation into the report of alleged maltreatment of a child who is not part of your family. Wisconsin Statutes require that we determine whether abuse or neglect has occurred. We have concluded that the child was sexually abused and that you are responsible for the abuse experienced by the child.... The agency records containing this information are confidential.... You may appeal the substantiation decision. If you wish to do so, submit a written request to [the] Appeals Coordinator.... However, since you have already been convicted for this offense, you no longer have the right to request an appeal.

Leiser maintained that this letter warranted a hearing because "it shows that the [sic] Washington County did do an investigation." (Capitalization and some punctuation omitted.)

¶8 We denied the request for remand, concluding that fact-finding was unnecessary. We explained: "after the circuit court stated that it was unknown whether a report from Washington County existed, [the circuit court] went on to explain why the report would not have been exculpatory and would not have affected the outcome of the trial." We did, however, grant Leiser permission "to argue about the legal significance of this letter in his brief." Both parties have addressed the letter in their submissions, and we have considered it in reaching our decision.

DISCUSSION

¶9 Leiser seeks disclosure of Washington County social services reports.[2] In the circuit court, the State asserted that it lacked knowledge of whether any Washington County social services investigative reports exist. On appeal, the State agrees that the July 15, 2004 letter indicates that "some type of investigation occurred." Assuming that Washington County reports exist, however, we nonetheless conclude that the circuit court properly rejected Leiser's claims for an *in camera* review of any such reports and for postconviction access to them.

¶10 Leiser brought his postconviction motion for disclosure under the authority of ***O'Brien***. Pursuant to that case, a defendant may have postconviction discovery of physical evidence when the defendant shows that the evidence would be "relevant to an issue of consequence" and thus would create a reasonable probability of a different outcome at trial. *See* ***id.***, 223 Wis. 2d at 320-21.

[2] We note that, in the circuit court proceedings, Leiser claimed: "[i]t is Leiser's understanding that if a child reports a sexual assault that [sic] all interviews are recorded." Based on this assumption, he alleged that a Milwaukee policewoman had made recordings of statements by M.S. and T.S. that he had never received, and he demanded disclosure of the alleged recordings. The State's response to Leiser's motion explained that he misunderstood the statutes he cited, that no law mandates recording the statements of child sexual assault victims, and that no such recordings exist in this case. The circuit court found that Leiser's request for recorded statements lacked any factual basis and had no merit. On appeal, Leiser does not renew his argument that such recordings exist, although at several points in his brief-in-chief he suggests that he seeks "police records" in addition to Washington County social services records. We conclude that any claim Leiser may have for materials other than Washington County social services records is inadequately briefed, and we do not consider any such claim here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). We add that the State included with its response to Leiser's postconviction motion twenty-six pages of Milwaukee police reports along with an assistant district attorney's affidavit showing that they constituted all of the Milwaukee Police Department reports that the State received in this matter.

¶11 Here, however, Leiser seeks discovery not of physical evidence but of social services reports that are confidential under Wisconsin law. *See* WIS. STAT. § 48.981(7) (2011-12).[3] In ***State v. Robertson***, 2003 WI App 84, 263 Wis. 2d 349, 661 N.W.2d 105, we considered the mechanics of applying ***O'Brien*** when, as here, a convicted defendant seeks discovery of confidential records and requests an *in camera* review of those records to determine whether the defendant should receive them. *See* ***Robertson***, 263 Wis. 2d 349, ¶22. We held that a defendant requesting confidential records during postconviction proceedings must satisfy a preliminary burden. *See* ***id.*** We explained that such a "defendant must set forth a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information that is necessary to a determination of guilt or innocence and not merely cumulative to evidence already available to the defendant." ***Id.***, ¶26. We emphasized that "[m]ere speculation or conjecture as to what information is in the records is not sufficient." *See* ***id.*** Rather, the procedure "requires the court to look at the existing evidence in light of the request for an in camera review and to determine 'whether the records will likely contain evidence that is independently probative to the defense.'" ***Id.*** (citation omitted). Only if the defendant satisfies the preliminary burden imposed by ***Robertson*** and secures an *in camera* review must the circuit court determine whether, under ***O'Brien***, the evidence is consequential and should be disclosed to the defendant. ***Robertson***, 223 Wis. 2d 303, ¶22.

¶12 As both parties note, the circuit court did not make a separate determination of whether Leiser earned an *in camera* review of confidential

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

documents under ***Robertson*** before concluding that he failed to earn disclosure of those documents under ***O'Brien***. The circuit court's omission does not, however, affect our analysis. Whether a defendant made a preliminary showing sufficient to earn an *in camera* review is a question of law. ***Robertson***, 223 Wis. 2d 439, ¶24. We consider such questions independently. *See* ***State v. Ford***, 2007 WI 138, ¶29, 306 Wis. 2d 1, 742 N.W.2d 61. Accordingly, we turn to whether Leiser satisfied the preliminary burden imposed by ***Robertson***.

¶13 To demonstrate a right to an *in camera* review, Leiser repeats in his appellate briefs the arguments that he presented to the circuit court, and he adds some significant embellishments. He claims the Washington County reports will reveal that: (1) Nicole S. told M.S. and T.S. that Nicole S. was a sexual assault victim; (2) Matthew S. reported to the Washington County department of social services that M.S. and T.S. "were forced to fabricate this story because they were afraid of their mother"; (3) Matthew S. reported to the department of social services that Nicole S. "forced the girls to lie because Leiser married [their] grandmother"; and (4) "the alleged victim told [a social services worker] that Leiser never sexually assaulted her and that the mother was forcing her to fabricate the story." Leiser fails, however, to identify any specific factual basis in the record to support his conclusory allegations.

¶14 Leiser's unsupported claims are the epitome of "[m]ere speculation or conjecture." *See* ***id.***, 263 Wis. 2d 349, ¶26. Therefore, they cannot sustain the burden Leiser must carry to secure an *in camera* review. Indeed, the only factual information Leiser offers about the Washington County investigation is that it ended with the conclusion, reached after his conviction, that he sexually abused a child. Nothing in the appellate record and nothing in the briefs supports Leiser's unlikely assertion that this conclusion rests on reports containing

acknowledgements that the complaining witnesses lied and were coerced into making false accusations.

¶15 Leiser nonetheless suggests that the record supports his claim for an *in camera* review and disclosure because, when the State opposed his petitions for writs of *mandamus* in ***Leiser III***, the State argued: "[t]he M[ilwaukee] P[olice] D[epartment] properly denied access to the records requested due to a specific statutory exemption found within WIS. STAT. § 19.35(1)(am). The responsive records include personally identifying information that was collected in connection with investigations that could lead to an appeal." *See* Brief for Respondents at 11, ***Leiser III***, No. 2011AP61.[4] In Leiser's view, this argument shows that Washington County Department of Human Services records "would undermine a critical element of the prosecution[']s case." He is wrong.

¶16 First, nothing in the argument made by the State in ***Leiser III*** suggests that the Milwaukee Police Department records and any Washington County records are the same documents. Second, and more importantly, Leiser simply misreads the State's brief in ***Leiser III***. Contrary to his contention, the quoted excerpt from that brief does not imply—let alone show—that any records exist containing information that would undermine confidence in the outcome of his criminal trial. Rather, the excerpt explains why, in the State's view, the records fit within a statutory exception to the rule that an individual has a right to inspect any record containing personally identifiable information pertaining to that individual. *See* WIS. STAT. § 19.35(1)(am). Pursuant to § 19.35(1)(am)1., such an

[4] The State and two additional respondents jointly opposed Leiser's position in ***Leiser v. State***, No. 2011AP61, unpublished slip op. (WI App Apr. 17, 2012) (***Leiser III***). For ease of reference, we refer to the respondents in ***Leiser III*** collectively as the State.

exception exists for "[a]ny record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to a[]... court proceeding." No one disputed in ***Leiser III*** that Leiser sought records containing information collected in connection with an investigation into claims that he sexually assaulted two children. *See* ***id.***, No. 2011AP61, ¶13. The quoted excerpt from the State's brief in that case merely highlighted that the investigation could (and in fact did) lead to court proceedings, including an appeal.

¶17 Because Leiser does not provide a factual basis demonstrating a reasonable likelihood that the content of any alleged Washington County Human Services reports contain relevant information necessary to determining his guilt or innocence, he is not entitled to an *in camera* inspection of any such reports. *See* ***Robertson***, 263 Wis. 2d 349, ¶26. Therefore, his quest for postconviction discovery of confidential material is at an end. *See* ***id.***, ¶22.

¶18 We turn to Leiser's contention that the State breached its duty to disclose exculpatory information under ***Brady***. Pursuant to ***Brady*** and its progeny, the State must disclose evidence that is favorable to an accused, and failure to do so violates due process. *See* ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. "Evidence is favorable to an accused, when, 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" ***Id.*** (citation omitted). A defendant has the burden to establish a violation of the State's obligations under ***Brady***. *See* ***Harris***, 272 Wis. 2d 80, ¶13.

¶19 To establish a ***Brady*** violation, a defendant must show that the State withheld evidence that is not only favorable to the accused, but also material to the case. *See* ***Harris***, 272 Wis. 2d 80, ¶13. "'The evidence is material only if there is

a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" ***Id***, ¶14 (citation omitted).

¶20 On appeal, Leiser argues that he is entitled to a postconviction hearing to explore his allegation that the State violated its obligations under ***Brady*** by not giving him reports allegedly generated as a result of an investigation by the Washington County Human Services Department. To earn an evidentiary hearing, however, a convicted defendant must support his or her postconviction motion with allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This presents a question of law for our independent review. ***Id.*** If, however, the convicted defendant does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. ***Id.*** We review a circuit court's discretionary decisions with deference. ***Id.***

¶21 As we have already discussed, Leiser speculates and fantasizes about the content of the reports that he believes Washington County created and collected. He fails to show, however, that any reports from Washington County are favorable to him or that any Washington County reports would have put his case "in such a different light as to undermine confidence in the verdict." *See* ***Harris***, 272 Wis. 2d 80, ¶15. Because he offers nothing beyond unfounded and conclusory allegations to support his claim of a ***Brady*** violation, he is not entitled to a postconviction hearing as a matter of law.

By the Court.—Order affirmed.

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