COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2480 **Cir. Ct. No. 2009CF2518**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY ALEXANDER LEAVY-CARTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Jeremy Leavy-Carter, pro se, appeals an order denying his WIS. STAT. § 974.06 (2011-12)[1] postconviction motion seeking to withdraw his guilty plea to second-degree intentional homicide. Leavy-Carter contends that: (1) incriminating statements Leavy-Carter made to police were obtained in violation of Leavy-Carter's constitutional rights; and (2) the plea colloquy was deficient. We reject these contentions, and affirm.

¶2 In June 2010, Leavy-Carter pled guilty to second-degree intentional homicide. Leavy-Carter did not pursue a postconviction motion or direct appeal.

¶3 In August 2012, Leavy-Carter filed this pro se WIS. STAT. § 974.06 motion to withdraw his plea, arguing that incriminating statements he made to police were obtained in violation of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966); that the statements were involuntary and coerced; and that Leavy-Carter's public defender-appointed postconviction counsel was ineffective by failing to raise that issue in postconviction proceedings. The circuit court denied the motion without a hearing. Leavy-Carter appeals.

¶4 A defendant is only entitled to an evidentiary hearing on a postconviction motion if the motion alleges facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). A circuit court may, in its discretion, deny a postconviction motion without a hearing if the motion does not raise a question of fact or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not

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

entitled to relief. *See* ***Bentley***, 201 Wis. 2d at 309-11; ***Nelson***, 54 Wis. 2d at 497-98. Thus, a defendant must demonstrate in a postconviction motion that there is a sufficient reason to conduct an evidentiary hearing. *See* ***State v. Washington***, 176 Wis. 2d 205, 216, 500 N.W.2d 331 (Ct. App. 1993) ("[T]he motion must contain at least enough facts to lead the trial court to conclude that an evidentiary hearing is necessary."). Whether a postconviction motion sufficiently alleges facts to entitle a defendant to a hearing is a question of law, which we review independently. *See* ***Bentley***, 201 Wis. 2d at 310.

¶5 Because Leavy-Carter did not move to suppress his statements before entering his plea, we review Leavy-Carter's suppression argument as a claim that his trial counsel was ineffective by failing to move to suppress those statements. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31 (we address claims of error that were not raised in the circuit court within the rubric of ineffective assistance of counsel). We conclude that Leavy-Carter did not allege sufficient facts to warrant an evidentiary hearing.

¶6 A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694. We liberally construe Leavy-Carter's pro se motion as asserting that his trial counsel was deficient by failing to file a suppression motion. However, Leavy-Carter did not assert that he would not have pled guilty if the statements had been suppressed, nor did he explain why he would have pled differently. *See* ***Bentley***, 201 Wis. 2d at 312 (explaining that a "defendant seeking to withdraw his or her plea must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on

going to trial'" (citation omitted)). Accordingly, the circuit court properly denied the motion without a hearing.

¶7 Finally, Leavy-Carter claims a deficiency in the plea colloquy for the first time on appeal. By failing to raise that issue in his postconviction motion, Leavy-Carter has waived his right to pursue it on appeal because the circuit court never had the opportunity to rule on that claim in the first instance. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52. Consequently, we will not address it on appeal.[2]

By the Court.—Order affirmed.

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

[2] Leavy-Carter's motion sets forth the law that a plea is involuntary if it is entered without knowledge of the charge or the potential punishment. However, it does not assert any defect in Leavy-Carter's plea colloquy in this case. Accordingly, we do not address that argument on appeal.

Similarly, to the extent Leavy-Carter raises other arguments on appeal that he did not raise in his postconviction motion, we do not reach those arguments.