COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2187 **Cir. Ct. No. 2009CF143**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL M. MOFFETT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael M. Moffett appeals pro se from an order denying his WIS. STAT. § 974.06 (2011-12)[1] motion without an evidentiary

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

hearing. He contends that he was denied the effective assistance of counsel. He further contends that he was denied a fair trial because of certain security measures ordered by the circuit court. We reject Moffett's claims and affirm the order.

¶2 Moffett was convicted following a jury trial of first-degree intentional homicide. The charge stemmed from Moffett's actions in the shooting death of Luis DeLeon in Sheboygan.

¶3 By counsel, Moffett filed a direct appeal arguing that the evidence was insufficient to support the conviction. We rejected Moffett's argument and summarily affirmed the judgment of conviction. ***State v. Moffett***, No. 2011AP1290-CR, unpublished op. and order (WI App Feb. 15, 2012).

¶4 Approximately nineteen months later, Moffett filed a motion for postconviction relief under WIS. STAT. § 974.06, alleging that his postconviction counsel was ineffective for (1) failing to argue that his trial counsel was ineffective and (2) failing to challenge the circuit court's decision to order certain security measures at trial. The circuit court denied the motion without an evidentiary hearing. This appeal follows.

¶5 On appeal, Moffett contends that the circuit court erred when it denied his WIS. STAT. § 974.06 motion without an evidentiary hearing.

¶6 Whether a postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is subject to a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, we determine whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief. ***Id.*** This is a question of law that we review de

novo. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion raises such facts, the circuit court must hold an evidentiary hearing. ***Id.*** However, if the motion does not raise facts sufficient to entitle the defendant to relief, "or presents conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Allen***, 274 Wis. 2d 568, ¶9. We review the court's discretionary decision under the deferential erroneous exercise of discretion standard. ***Id.***

¶7 In his motion, Moffett argues that he was denied the effective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** at 687-88. To prove prejudice, a defendant must show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶8 Moffett first complains that his trial counsel was ineffective for failing to object to the contents of an autopsy report introduced at his preliminary hearing. Counsel was first given a copy of the report at the preliminary hearing. Moffett faults him for not objecting to its late introduction or requesting a continuance to investigate its contents.

¶9 We agree with the circuit court that Moffett's first allegation of ineffective assistance of counsel could be denied without an evidentiary hearing.

As noted by the State, a defendant is not entitled to discovery prior to the preliminary hearing, and counsel is under no obligation to obtain and investigate reports beforehand. *See* ***State v. Schaefer***, 2008 WI 25, ¶¶40, 89-94, 308 Wis. 2d 279, 746 N.W.2d 457. At any rate, Moffett does not explain what such an investigation would have revealed or why there is a reasonable probability that the result of the proceeding would have been different.

¶10 Moffett next complains that his trial counsel was ineffective for failing to investigate the jacket[2] worn by the victim, DeLeon. Moffett claims that the jacket "disappeared" and suggests that it could have aided his theory of self-defense by clarifying the nature of the bullet wounds on DeLeon's back (i.e., entrance wounds versus exit wounds).

¶11 We agree with the circuit court that Moffett's second allegation of ineffective assistance of counsel could be denied without an evidentiary hearing. Contrary to Moffett's assertion, DeLeon's jacket did not disappear. Rather, it was preserved by police and introduced into evidence at trial. As for the nature of the bullet wounds on DeLeon's back, the pathologist, Dr. Mark Witeck, testified that all seven bullet wounds were typical entrance wounds.[3] There is no reason to believe that an investigation of DeLeon's jacket would have undermined that conclusion or changed the result of the trial.

[2] Moffett describes the jacket as leather. However, the item was described at trial as a "black jacket with a red liner and a multicolored trim."

[3] Consistent with this opinion, Witeck also described the bullet wounds on DeLeon's front as exit wounds.

¶12 Moffett next complains that his trial counsel was ineffective for suborning perjury from two defense witnesses, Kristie Lee Nohelty and Randy Schultz. At trial, Nohelty testified that DeLeon had showed her a gun in his pants and had threatened her with it a couple of days before he was shot by Moffett. Meanwhile, Schultz testified that DeLeon had threatened to kill Moffett, and that when DeLeon made this threat he grabbed his crotch, which was "a little larger than it should have been," implying that there could have been a gun there.

¶13 We agree with the circuit court that Moffett's third allegation of ineffective assistance of counsel could be denied without an evidentiary hearing. To begin, any allegations against trial counsel for suborning perjury are conclusory at best. However, even assuming that the testimony of Nohelty and Schultz was false, Moffett has not shown how it prejudiced his defense. If anything, their testimony aided his theory of self-defense by portraying DeLeon as a potential threat and aggressor.

¶14 Moffett also argues that he was denied a fair trial because of certain security measures ordered by the circuit court. These measures included stationing plain clothes police officers in and out of the courtroom, using a metal detector at the courthouse, requiring Moffett to wear an electronic stun belt under his clothing, and instructing the jurors to park at a remote location from which they would be transported to the courthouse by the sheriff.

¶15 Again, we agree with the circuit court that Moffett's argument could be denied without an evidentiary hearing. There is nothing unusual about the presence of plain clothes police officers in and out of a courtroom or the use of a metal detector at a courthouse. Likewise, there is no reason to believe that the jury ever saw the belt that Moffett was wearing. As for the issue of parking at a remote

location, the jurors were told that the arrangement was because of parking problems at the courthouse. There is no evidence that any of the jurors believed that they were asked to park away from the courthouse for security reasons. In any event, Moffett fails to show how the court's security measures had any adverse effect on the fairness of his trial.

¶16 Given our determination that Moffett's challenges to trial counsel and the circuit court lack merit, we conclude that postconviction counsel was not ineffective for failing to raise them. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient if the challenge would have been rejected).

¶17 Similarly, we reject Moffett's suggestion that the combined effect of the above issues prejudiced his defense. As the State aptly points out, "[z]ero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

¶18 For the reasons stated, we affirm the order of the circuit court.[4]

By the Court.—Order affirmed.

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

[4] To the extent we have not addressed an argument raised by Moffett on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").