COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2464 **Cir. Ct. No. 2007CF821**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHELDON R. SCHEEL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Sheldon Scheel, *pro se*, appeals an order denying his postconviction motion filed pursuant to WIS. STAT. § 974.06 (2011-12).[1] On appeal, Scheel argues that his due process rights were violated when the State failed to disclose certain evidence to him prior to trial. For the reasons set forth below, we affirm the order of the circuit court.

¶2 Scheel was convicted of a number of crimes, including possession of a firearm by a felon and pointing a firearm at another person. Scheel filed a postconviction motion arguing, in relevant part, that his trial counsel was ineffective for failing to present favorable DNA evidence at trial. The evidence took the form of a crime laboratory report concluding that: (1) an insufficient amount of DNA was detected from the trigger of the gun that Scheel was accused of pointing; (2) no DNA profile could be obtained from the front grip of the gun; and (3) Scheel was not a contributor to the DNA mixture detected from the left grip.

¶3 In an order dated November 28, 2011, the circuit court denied Scheel's motion without an evidentiary hearing, and Scheel appealed. In an order dated January 30, 2013, we concluded that Scheel was entitled to an evidentiary hearing on his claim that his counsel was ineffective for failing to present the DNA evidence. We remanded the record to the circuit court, which denied Scheel's postconviction motion after a ***Machner***[2] hearing.

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

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶4 Attorney Daniel Muza, who was Scheel's trial counsel, testified at the ***Machner*** hearing that, although he received a report regarding fingerprint evidence prepared by the state crime lab prior to trial, he never received any report regarding DNA evidence. Muza testified that he had made several requests to the State prior to trial for any other crime lab evidence. The State stipulated, for purposes of the hearing, that Muza was not made aware of the DNA evidence.

¶5 At the conclusion of the hearing, the circuit court denied Scheel's motion for a new trial. The circuit court applied the correct legal standard, stating that in order to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that said performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The court correctly stated that, to prove prejudice, the 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.

¶6 The circuit court then noted that the inquiry was not so much whether Muza was ineffective for failing to present the DNA evidence, but whether the prosecutor had had the evidence but failed to disclose it. The court correctly noted that, under either inquiry, the key issue was whether Scheel was prejudiced. The court then found that, considering all of the "overwhelming" evidence, even if the DNA evidence had been presented at trial, it would not have changed the results of the jury trial. After the hearing, the court entered a written order on August 7, 2013, denying Scheel's motion for a new trial.

¶7 Scheel did not appeal the August 7, 2013 order. Rather, he filed a new postconviction motion on October 8, 2013, alleging that the State's failure to provide the DNA evidence was a violation of his due process rights. *See* ***Brady v.***

Maryland, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"). *See also* WIS. STAT. § 971.23(1)(h) (State is required to disclose "any exculpatory evidence" to the defense). The circuit court summarily dismissed Scheel's motion in an order dated October 29, 2013, for the reasons set forth in its previous decision dated November 28, 2011 and the reasons stated on the record at the August 7, 2013 hearing. This appeal follows.

¶8 Our supreme court has recognized that the materiality test under ***Brady*** "is the same test for ineffective assistance of counsel under ***Strickland***." ***State v. Harris***, 2004 WI 64, ¶14, 272 Wis. 2d 80, 680 N.W.2d 737. That is, undisclosed 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.'" ***Id.*** (quoted source omitted).

¶9 In its oral decision on August 7, 2013, the circuit court explicitly found that even if the State had given the DNA test results to the defense prior to trial, it would not have changed the results of the trial. If Scheel disagreed with that finding, it was his obligation to appeal the court's August 7, 2013 decision. He did not and, therefore, he forfeited the argument on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("[i]ssues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal"). We affirm the circuit court on that basis.

By the Court.—Order affirmed.

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