

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1520

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

QUINN JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Quinn Johnson appeals an order denying his § 974.06, STATS., postconviction motion in which he alleged ineffective assistance of postconviction counsel based on counsel's failure to challenge trial counsel's

effectiveness.¹ He argues that trial counsel ineffectively represented him because counsel failed to: (1) investigate and establish that a police officer lied at a suppression hearing; (2) object to other crimes evidence presented by a rebuttal witness; (3) request a limiting instruction on other crimes evidence; (4) challenge the sentence on the ground that the complaint did not adequately allege that he was a repeat offender; and (5) move for sentence credits for all of the time Johnson spent incarcerated on this offense. Because we conclude that each of these issues lacks merit, we affirm the trial court's decision denying relief without a hearing.

To establish ineffective assistance of trial counsel, Johnson must show deficient performance and prejudice from his counsel's conduct. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To obtain an evidentiary hearing on these issues, Johnson's motion must allege with specificity both components of the *Strickland* test and must identify enough supporting facts to raise a question of fact for the trial court. *See State v. Washington*, 176 Wis.2d 205, 214-15, 500 N.W.2d 331, 335 (Ct. App. 1993).

The complaint charged Johnson with possessing cocaine with intent to deliver as a repeat offender. An undercover officer, Sgt. Thomas Bennie, arranged to purchase the cocaine through Lisa Watson. The police arrested Johnson and seized the cocaine shortly after Johnson arrived at the location where the sale was to occur.

Bennie testified at a suppression hearing that he bought cocaine from Watson nine days earlier at Watson's home under circumstances that strongly

¹ Johnson also argues that the trial court erred in denying a motion to modify the sentence. That order was not identified in the notice of appeal and the record does not contain the motion itself. Issues arising from that order are not properly before this court.

suggest that Johnson supplied Watson with the drugs. Johnson contends that a private investigator he hired after his conviction proved that it was not possible for Bennie to have seen the transaction between Watson and Johnson from where he was sitting. He argues that this transaction formed the basis for his arrest and the search that led to the present charge. He faults his trial counsel for failing to investigate or challenge Bennie's testimony at the suppression hearing that he saw Watson pass money to Johnson moments before Watson handed Bennie the drugs.

Johnson has not established deficient performance or prejudice from his counsel's failure to investigate or challenge Bennie's testimony for several reasons. First, while Bennie testified that he sat on the couch, he did not specifically testify that he saw the transaction from the couch or that he stayed on the couch the entire time. Second, he did not testify that he saw the entire transaction. Probable cause did not depend on Bennie's ability to clearly see the entire transfer from Johnson to Watson. Watson's words, the timing of the transaction and Bennie's observations established probable cause for Johnson's arrest. Third, that transaction was not the only basis for Johnson's arrest. He had sold drugs to another undercover agent in an unrelated transaction. In addition, on the day he was arrested, Johnson drove to a parking lot where Bennie had previously arranged another drug buy through Watson. Any discrepancy regarding Bennie's ability to view the transaction between Johnson and Watson nine days earlier would not affect the officers' right to arrest Johnson based on any of the three transactions. Therefore, trial counsel reasonably chose not to challenge Bennie's testimony on that basis and Johnson was not prejudiced by that decision.

Counsel's failure to object to other crimes evidence presented by Officer Thomas Kraus did not prejudice Johnson. Counsel had filed a motion in

limine to exclude all evidence of other crimes Johnson committed. The trial court denied that motion. In Johnson's first appeal, this court upheld the trial court's decision to admit other crimes evidence to show Johnson's intent to sell the cocaine that he possessed. While that analysis focused on the transaction involving Johnson, Watson and Bennie, the result is the same when reviewing Johnson's sale to Kraus. Because Kraus's testimony was admissible, counsel's failure to object did not prejudice Johnson.

Johnson's motion does not identify and the record does not disclose any specific prejudice that resulted from his counsel's failure to request a limiting instruction on the use of other crimes evidence. In some cases, a limiting instruction is necessary due to the nature of the other crimes. In this case, the State presented evidence of two sales nine days before Johnson's arrest to prove intent to deliver. Bennie's description of the circumstances, the physical evidence, Johnson's confession and the proper use of other crimes evidence presented overwhelming evidence of Johnson's guilt. It is highly unlikely that the jury would have entertained reasonable doubt that Johnson intended to deliver the cocaine in his possession, but sought to punish him for the previous sales.

Johnson's trial counsel was not ineffective for failing to file a motion to vacate the repeater enhancement on his sentence. The original complaint charged Johnson as a repeat offender. He negotiated a plea bargain in which the State agreed to dismiss the repeater allegation in return for his no contest plea. Johnson later withdrew his no contest plea. He contends that the complaint, as amended, did not charge him as a repeat offender. Johnson is attempting to enforce a part of the plea agreement from which he ultimately withdrew. Johnson's decision to withdraw from the plea agreement nullified the State's

agreement to drop the repeater allegation. Therefore, the initial complaint and information charging Johnson as a repeat offender were reinstated.

Finally, Johnson's § 974.06 motion does not establish ineffective assistance of counsel based on sentence credit issues. Johnson served time in prison for this offense before he was allowed to withdraw his plea. At sentencing, the trial court stated its intention to credit Johnson for the time served from his original sentence. All that is required is a mathematical calculation of the number of days to be credited. A motion under § 974.06 challenging counsel's effectiveness is not the appropriate method for presenting the correct calculation to the trial court.

By the Court.—Order affirmed.

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

