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DISTRICT IV

August 25, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP1061-CR State of Wisconsin v. Wesley A. Ismert (L.C. # 2012CF321)

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

Wesley Ismert appeals a judgment of conviction for homicide by intoxicated use of a motor vehicle and an order denying postconviction relief without a hearing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In November 2012, the State filed an information charging Ismert with homicide by intoxicated use of a vehicle, and homicide by intoxicated use of a vehicle with a prohibited alcohol concentration. The criminal complaint alleged that police responded to the accident scene after Ismert called 9-1-1 and stated that he had been in a car crash. According to the complaint, Ismert stated during the 9-1-1 call that "I fucking crashed ok, I'm stupid and I drove fast and I crashed"; that he hit "a curb and I fucking flipped the car"; that his girlfriend was in the car; and that "she's not breathing, I killed my girlfriend." Police transported Ismert to the hospital, where he submitted to a legal blood draw that showed he had a blood alcohol concentration of .14%. After Ismert refused to sign a medical release, the State obtained a subpoena for Ismert's medical records and lab results as to treatment for the injuries he sustained in the accident. Ismert then pled no contest to homicide by intoxicated use of a vehicle.

After sentencing, Ismert moved to withdraw his plea. Ismert argued that his trial counsel was ineffective by failing to move to suppress Ismert's medical records and that Ismert would not have pled no contest had the medical records been suppressed. Ismert argued that the medical records should have been suppressed because the affidavit in support of the subpoena lacked probable cause; his medical records were privileged; and the subpoena improperly authorized release of the medical records directly to law enforcement rather than to the court.[2]

[2] Under WIS. STAT. § 968.135:

> Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12, a court shall issue a subpoena requiring the production of documents, as specified in s. 968.13(2). The documents shall be returnable to the court which issued the subpoena. Motions to the court, including, but not limited to, motions to quash or limit the subpoena, shall be addressed to the court which issued the subpoena. Any person who unlawfully refuses to produce the documents may be compelled to do so as provided in ch. 785. This

(continued)

The circuit court denied the motion, finding that a motion to suppress would have lacked merit and that Ismert had not alleged any facts contained in the medical records that were prejudicial to the defense. The court denied the motion without a hearing.

A claim of ineffective assistance of counsel must show that counsel's representation was both deficient and prejudicial to the defense. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. To show deficient performance, a defendant must show that counsel's conduct fell below an objective standard of reasonableness. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Thiel***, ¶20 (quoted source omitted). To show prejudice following a no contest plea, a defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled no contest and would have exercised his right to go to trial. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). If a postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court must hold a hearing on the motion. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "However, if the motion does not raise facts sufficient to entitle the defendant to relief, or presents only 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." ***Id.***

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section does not limit or affect any other subpoena authority provided by law.

Here, Ismert contends that his trial counsel's performance was deficient by failing to move to suppress his medical records, and that he was prejudiced because he would not have pled no contest had the records been suppressed. He contends that his postconviction motion was sufficient to entitle him to a hearing on the motion. We disagree. We conclude that Ismert's postconviction motion failed to allege sufficient material facts to show that he would not have entered his plea had the medical records been suppressed. Because we conclude that Ismert's claim of ineffective assistance of counsel fails on the prejudice prong, we need not address whether counsel's performance was deficient. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (we need not analyze deficiency prong if defendant fails to show prejudice).

Ismert's postconviction motion asserted, in wholly conclusory fashion, that "the records did in fact turn out [to] contain incriminating evidence," and that his "decision to plead to the charge would have been different if his medical records had been excluded from evidence." In his appellant's brief, Ismert argues that his trial counsel should have pursued a motion to suppress his medical records and that, had counsel done so, the records would have been suppressed and that "suppression of the medical records would have impacted his eventual decision" to enter a plea. Ismert does not, however, explain what in his medical records was significant, or why suppression of these records would have affected his decision to enter a plea.

After the State points out the lack of any showing as to what in the medical records was critical to the defense, Ismert, for the first time in the reply brief, points to the following specific information in the medical records that he argues was prejudicial: (1) Ismert's "account of the accident"; (2) that Ismert "smelled of alcohol"; (3) that Ismert was distraught and repeated "I killed someone" and "Just kill me"; (4) that, at the scene of the accident, Ismert called his father,

who was in intensive care at the hospital; (5) that Ismert had lost control of the car, causing the car to roll and hit a pole, resulting in the victim's death; (6) that Ismert had a collapsed left lung and bruised left thigh; (7) that, upon admission, Ismert had a blood alcohol concentration of .20; (8) that Ismert consulted with a pastor by his hospital bed; and (9) that Ismert's mother stated that the victim was "the love of [Ismert's] life."[3] However, Ismert does not develop any argument as to why disclosure of that information to the police affected his decision to enter a plea. Much of that information was already obtained by police through Ismert's 9-1-1 call and at the scene of the accident, and through the legal blood draw. Ismert does not explain how any of the additional information he cites would have affected his decision to enter a plea, in light of the other overwhelming evidence against him. In sum, Ismert has not set forth sufficient material facts to support his claim that, had the medical records been suppressed, Ismert would not have pled no contest and would have insisted on going to trial. We conclude that Ismert was not entitled to a hearing on his claim of ineffective assistance of trial counsel.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[3] Ismert also contends in the reply brief that, as a general proposition, "[i]t is highly prejudicial for a governmental agency to obtain and possess one's treatment records without one's consent." As set forth above, that is not the test for prejudice in a claim for ineffective assistance of counsel following a no contest plea.