COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1916 **Cir. Ct. No. 2009CF50**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL T. MORELAND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Samuel T. Moreland, *pro se*, appeals from an order of the circuit court that denied without a hearing his WIS. STAT. § 974.06 (2013-14)[1] motion for postconviction relief. We affirm.

¶2 Moreland was convicted on one count of first-degree reckless homicide by delivery of a controlled substance. Moreland provided a prescription pain patch containing Fentanyl to Niki Dominick, who died of a Fentanyl overdose. *See* ***State v. Moreland***, No. 2011AP1705-CR, unpublished slip op. ¶¶2-4 (WI App Nov. 1, 2012). After his conviction, Moreland claimed ineffective assistance of trial counsel and moved for a new trial in the interests of justice. The circuit court denied the motion without a hearing. Moreland appealed; we affirmed. *See* ***id.***, ¶1.

¶3 In July 2014, Moreland filed a postconviction motion under WIS. STAT. § 974.06. He alleged ineffective postconviction and appellate counsel for failing to challenge his competency, object to juror bias, investigate prosecutorial misconduct, and pursue additional witnesses and information. The circuit court denied the motion without a hearing, explaining that Moreland "has not set forth any specifics related to his claims, and therefore, his motion does not set forth a viable claim for relief." Moreland appeals.

¶4 The issue in this case is whether Moreland's WIS. STAT. § 974.06 motion is sufficient on its face to entitle him to an evidentiary hearing on his claim of ineffective postconviction counsel. Sufficiency of the motion is a question of law that we review *de novo*. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d

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

568, 682 N.W.2d 433. If the motion raises sufficient material facts that, if true, show the defendant is entitled to relief, the circuit court must hold an evidentiary hearing. *See* ***id.*** However, if the motion does not raise such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the grant or denial of the motion is a matter of discretion entrusted to the circuit court. *See* ***id.*** (citing ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)).

¶5 Whether a defendant received ineffective assistance of counsel presents a mixed question of law and fact. *See* ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. This court will uphold the circuit court's findings of fact, unless they are clearly erroneous. *See* ***id.*** The ultimate question of whether counsel actually was ineffective is a question of law we review *de novo*. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). Counsel will be said to have provided constitutionally inadequate representation if the defendant can show that counsel performed deficiently and that such deficient performance prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶6 The circuit court here determined that, under ***Nelson***, Moreland's motion was conclusory. On appeal, we typically review only the allegations contained in the four corners of the postconviction motion, not any additional allegations that are contained in the appellate brief. *See* ***Allen***, 274 Wis. 2d 568, ¶27.

¶7 In his motion, Moreland claimed postconviction/appellate counsel overlooked "defendant's competency" and his "prescription records." In his brief

on appeal, he claims he "is entitled to a new trial because of his schizophrenia" and contends that if trial counsel had been aware of the diagnosis then counsel "would have done a better job communicating with Moreland."

¶8 We agree with the circuit court that Moreland's motion is conclusory. Merely attaching doctors' diagnoses does not constitute an argument, nor was the circuit court required to sift through documents and guess which facts Moreland believes are relevant. Further, competency means different things at different stages of litigation. *See* ***State v. Debra A.E.***, 188 Wis. 2d 111, 124-25, 523 N.W.2d 727 (1994). At the trial stage, a defendant must possess "sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of a proceeding against him or her." ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997). Moreland does not explain how his schizophrenia impaired his competency. The mere fact that he has a psychiatric illness does not necessarily render him incompetent to participate in his defense. *See* ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477.

¶9 Moreland next claimed juror bias. The postconviction motion is largely devoid of facts, although Moreland did include a page from the *voir dire* transcript, where trial counsel asked a juror, "When the judge told you Mr. Moreland committed first-degree reckless homicide, then what did you do?" Moreland worries this comment tainted the entire jury pool, which could have perceived counsel to be offering an admission of Moreland's guilt.

¶10 A single question out of context does not raise concerns of juror bias. Even reviewing the single page of the transcript, we see that counsel was attempting to ascertain jurors' preconceptions—he started by asking how many of

them were wondering "what [Moreland] did before any questions were asked." Counsel then asked one of the jurors who raised her hand what her reaction was when the court said Moreland "committed first-degree reckless homicide." Her response was, "I thought, what a shame, somebody lost their life." Counsel followed up by asking whether she would be able to listen to evidence in a case where someone had lost their life. She answered that she could. The next juror responded, "I had no clue," when asked for a reaction to the court's statement, and indicated agreement with the concept of "innocent until proven guilty."

¶11 While counsel perhaps should have said that Moreland "allegedly committed" reckless homicide, it is clear that the jurors were holding no particular preconceived notions about or bias against Moreland. In short, even if Moreland has adequately alleged deficient performance from the phrasing of counsel's question, he fails to demonstrate any prejudice in light of the jurors' answers to that and counsel's follow-up questions.

¶12 Moreland asserted prosecutorial misconduct. The motion itself is no more specific than that, but in his brief, he complains the district attorney introduced false evidence about the Fentanyl patches and whether the drug could be ingested. However, from what we are able to discern, this is essentially the same issue as one raised in the first appeal about whether defense counsel should have introduced an expert to counter the State's evidence about how Dominick achieved fatal drug amounts in her system.[2] An issue once litigated cannot be

[2] For example, as an attachment to his motion, Moreland has included a letter from pharmaceutical company Mylan, manufacturer of one type of Fentanyl patch. He wrote at the top of the letter that his attorneys "overlooked this issue," which goes to the level of drug in Dominick's system at the time of her death, and asserts that the State's expert testimony was wrong.

(continued)

relitigated, no matter how the issue is rephrased. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶13 Finally, Moreland claimed ineffective postconviction counsel for not pursuing additional witnesses like "other drug addicts" Dominick lived with "who could possibly explain her drug habits in more dept[h]" than what Moreland told police. The postconviction motion is not that specific, but even this claim, from the appellate brief, is conclusory. Moreland has not identified with any specificity who would have more information, what that information is, why it matters, or how it would have changed the results of the trial. *See* ***Allen***, 274 Wis. 2d 568, ¶23 (adequate postconviction motion covers who, what, where, when, why, and how).

¶14 Conclusory postconviction motions receive evidentiary hearings at the circuit court's discretion. Moreland's motion was conclusory. We discern no erroneous exercise of discretion in its denial of the motion without a hearing.[3]

However, the body of the letter simply states:

> Dear Mr. Moreland:
>
> Thank you for your interest in Mylan's product line. Per your request, please find enclosed the Medication Guide for the above-referenced product. If you have any further questions, please direct them to your health care professional.

[3] After submission of the briefs, Moreland submitted a copy of postconviction counsel's time sheet in an attempt to show she was deficient for not spending enough time reviewing the State's response to her postconviction motion regarding the Fentanyl. Moreland identifies the entry where counsel recorded 0.2 hours (twelve minutes) in which she "Reviewed reply from state." Aside from the fact that this document appears to be extraneous to the record the circuit court had, *see* ***State v. Aderhold***, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979), we note that the very next entry shows counsel spent 3.6 hours in which she "Drafted correspondence to client; continued reviewing reply." Later, she spent 3.6 hours and 4.2 hours drafting her reply, reviewing cases cited in the State's response, reviewing correspondence from a pharmacist, and (continued)

By the Court.—Order affirmed.

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

drafting other correspondence. It is clear that counsel spent well more than twelve minutes dealing with the State's response.