COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP712-CR **Cir. Ct. No. 2013CF3688**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE M. MORALES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jose Morales appeals a judgment of conviction for drug-related crimes. He also appeals the postconviction order in which the circuit

court denied his nine claims of ineffective assistance of counsel, without holding a ***Machner***[1] evidentiary hearing. Morales argues that the circuit court erred in rejecting his ineffective assistance claims without holding a ***Machner*** hearing. For the reasons stated below, we disagree and affirm the circuit court.

Background

¶2 The State charged Morales with three counts of possession of a controlled substance with intent to deliver. According to the criminal complaint allegations, the charges arose from a "knock and talk" drug investigation in which police searched the residence of a woman named Reyes-Arroyo with her consent. This search led to evidence connecting Morales to the charged drug crimes.

¶3 A jury found Morales guilty of the three counts, and the circuit court entered a judgment of conviction. In his postconviction motion, Morales sought a new trial based on nine claims of ineffective assistance of counsel. As noted, the circuit court denied Morales's motion without holding a ***Machner*** hearing. We reference additional facts as needed below.

Discussion

¶4 To prevail on ineffective assistance of counsel claims, a defendant must demonstrate that (1) counsel's performance was deficient, and (2) the deficiency was prejudicial. ***State v. Harbor***, 2011 WI 28, ¶67, 333 Wis. 2d 53, 797 N.W.2d 828. To prove prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of

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

the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶5 Morales argues that the circuit court should not have rejected his ineffective assistance claims, at least not without first holding a ***Machner*** hearing. Whether Morales's allegations of ineffective assistance of counsel are sufficient to entitle him to a hearing is a question of law that we review de novo. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must allege "sufficient material facts that, if true, would entitle [Morales] to relief." *See* ***id.***, ¶14.

¶6 In ***Allen***, our supreme court explained that postconviction motions alleging ineffective assistance must state allegations with particularity, alleging "the five 'w's' and one 'h'; that is, who, what, where when, why, and how." ***Id.***, ¶¶10, 23. Conclusory allegations are not enough. *See* ***id.***, ¶¶10, 15. The motion must "'allow the reviewing court to meaningfully assess [the defendant's] claim.'" ***Id.***, ¶21 (quoting ***State v. Bentley***, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996)).

¶7 As especially pertinent here, ***Allen*** makes clear that the sheer number of allegations or arguments does not matter. What matters is whether the defendant's allegations are sufficiently particular on the *material* facts so as to allow the court to meaningfully assess the defendant's claims. Like the court in ***Allen***, we conclude here that, "[t]hough replete with information, the motion contains conclusory allegations and lacks sufficient material facts that ***Bentley*** requires [to entitle the defendant to a hearing]." *See* ***id.***, ¶29.

¶8 In the following sections, we address Morales's nine ineffective assistance claims. For purposes of efficiency, we address some of those claims in a different order than Morales presents them.

1. Failure To Challenge Search Of Reyes-Arroyo's Residence

¶9 We begin with Morales's claim that trial counsel was ineffective for failing to file a suppression motion challenging the search of Reyes-Arroyo's residence. The State argues that this claim fails because Morales makes no allegations identifying any privacy interest Morales has in Reyes-Arroyo's residence. We agree. Without such allegations, there is no basis to conclude that Morales had standing to challenge the search. *See* ***State v. Malone***, 2004 WI 108, ¶22, 274 Wis. 2d 540, 683 N.W.2d 1. And, without standing, there is no basis to conclude that counsel was ineffective in failing to challenge the search.

2. Failure To Object To Hearsay Relating To Reyes-Arroyo's Consent

¶10 Morales claims that trial counsel was ineffective by failing to object to hearsay statements in a police officer's testimony describing the process of obtaining Reyes-Arroyo's consent to the search. However, Morales fails to make any coherent allegation or argument as to why admission of this alleged hearsay was prejudicial. Morales may mean to argue that, without the alleged hearsay, the prosecution could not prove the constitutionality of the search. But the State was not required to prove that the search of Reyes-Arroyo's residence was constitutional. Even if the search of Reyes-Arroyo's residence violated Reyes-Arroyo's rights, such a violation would not require suppression of any evidence found with respect to the prosecution against Morales. Given Morales's lack of standing to challenge the search, the constitutionality of the search was not an issue relevant to Morales's guilt at trial.

3. Reyes-Arroyo's Consent-To-Search Form

¶11 Morales claims that trial counsel was ineffective by failing to object to the admission of a consent-to-search form that Reyes-Arroyo apparently signed when allowing police to search her residence. Morales fails to allege any reason why admission of this form would have been prejudicial.

4. Failure To Call Reyes-Arroyo As A Witness

¶12 Morales claims that trial counsel was ineffective by failing to subpoena Reyes-Arroyo as a witness at trial. Morales alleges that Reyes-Arroyo's testimony "would have supplied the reasonable doubt necessary to change the outcome of the case." This allegation is insufficient because Morales does not identify what helpful testimony Reyes-Arroyo would have provided. Morales *does* allege that Reyes-Arroyo would have testified that she knew Morales because she sold him drugs, but, without more detailed allegations, we fail to see how such testimony could have benefitted Morales.

¶13 For the first time in his reply brief, Morales asserts that, if Reyes-Arroyo would have testified, "there would not have been a need for Morales to testify on his own behalf in order to tie up any loose ends for the sake of the jury." This assertion, like Morales's other allegations we have discussed, is conclusory and insufficient.

5. Morales's Right Not To Testify

¶14 Morales next appears to claim that trial counsel was ineffective by failing to inform Morales of his right not to testify. However, as the State points out, Morales fails to clearly allege that counsel did not give him this information. Rather, Morales alleges that he told counsel he did not wish to testify and that

counsel called Morales to testify anyway. This allegation does not amount to an allegation that counsel failed to inform Morales of his right not to testify. Obviously, defendants sometimes decide to testify even when they would prefer not to and even knowing they have a right not to. For example, despite not wanting to testify, they reasonably believe that testifying is in their best interests. We also note that Morales does not allege that he did not know or understand his right not to testify, or that he would not have testified if counsel had given him more information.

¶15 In the part of his appellate briefing (and postconviction motion) addressing his right not to testify, Morales further alleges that counsel told him to lie in his testimony on the topic of how well Morales knew Reyes-Arroyo. Morales alleges that this lying caused him to come off as not credible to the jury. We are uncertain if Morales means this claim as a stand-alone ineffective assistance claim. If he does, we conclude that Morales's allegation that he came off as not credible to the jury is too conclusory to satisfy his burden of showing prejudice.

6. Stipulations As To Trial Evidence

¶16 Morales claims that trial counsel was ineffective by entering into "multiple stipulations," but the only stipulation Morales identifies is a stipulation relating to fingerprint evidence. Morales alleges that "defense counsel simply stipulated to the fact that the fingerprints relied upon by the latent fingerprint examiner were those of … Morales." This allegation falls far short of demonstrating either deficient performance or prejudice. Morales does not adequately explain what fingerprint evidence he is talking about nor does he allege

any basis to conclude that the fingerprint evidence was subject to reasonable dispute.

7. Failure To Move For Mistrial Or Curative Instruction Relating To Alleged Juror Bias

¶17 Morales claims that trial counsel should have moved for a mistrial or a curative instruction based on alleged juror bias. Understanding this claim will be aided by a brief summary of additional, undisputed facts regarding what occurred at trial.

¶18 During the trial, juror #6 overheard Morales speaking English on a cell phone. This was arguably significant because Morales had requested an interpreter for purposes of trial. Toward the end of trial, but before deliberations, juror #6 gave a note to a deputy indicating what she had overheard. After receiving this note, and outside the presence of the other jurors, the court questioned juror #6. Juror #6 stated that she did not tell any other jurors about what she overheard. Additionally, juror #6 stated that she did not think it "would be appropriate" to tell the other jurors. The court allowed juror #6 to remain on the jury panel up to the point of deliberations, at which time the court excused her.

¶19 As noted, Morales argues that counsel should have moved for a mistrial, or at least a curative instruction, based on juror bias. However, Morales makes no particularized allegations suggesting any reason to believe that juror #6 shared what she knew with the other jurors. Morales thus fails to sufficiently allege ineffective assistance on this topic.

8. Failure To Request Presentence Investigation

¶20 Morales claims that trial counsel was ineffective by failing to request a presentence investigation (PSI). According to Morales, a PSI would have shown that he had a prescription drug problem, and Morales asserts that this information would have been relevant and beneficial to him at sentencing. However, we agree with the State that Morales fails to allege sufficient supporting facts as to what his alleged prescription drug problem was and why it would have been a significant factor at sentencing. Therefore, Morales fails to sufficiently allege ineffective assistance as a result of counsel's failure to request a PSI.

9. Lack Of Cooperation With Appellate Counsel

¶21 Finally, Morales claims that trial counsel was ineffective by failing to respond to communications from appellate counsel. More specifically, Morales alleges that trial counsel failed to respond to two letters from appellate counsel and that trial counsel is now suspended from the practice of law. We agree with the State that these factual allegations, even if true, do not demonstrate prejudice.

Conclusion

¶22 For the reasons stated above, we affirm the judgment of conviction and the order denying Morales's motion for postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).