COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP964-CR **Cir. Ct. No. 2013CF294**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK ANTOINE SEALS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Mark Antoine Seals appeals a judgment of conviction entered after a jury found him guilty of one count of possessing a firearm as a felon. He also appeals an order denying postconviction relief. He contends the circuit court erred when it: (1) denied him a new trial without

granting a hearing on his claim that trial counsel was ineffective; and (2) denied his request for postconviction DNA testing. He further contends he is entitled to discretionary reversal of his conviction in the interest of justice. We reject his contentions and affirm.

BACKGROUND

¶2 The State charged Seals with possessing a firearm as a felon. Seals pled not guilty. On the day set for trial, before prospective jurors entered the courtroom for *voir dire*, trial counsel advised the circuit court on the record that a potential witness, Seals's brother Arquan Jackson, was unavailable. Trial counsel explained that Seals did not know how to locate Jackson and did not want an adjournment to search for him. Seals confirmed that trial counsel accurately described the decision to try the case without Jackson.

¶3 The matter proceeded to trial. The State's first witness was Milwaukee Police Officer Daniel Floyd. He said he was on patrol on January 8, 2013, when he stopped two male pedestrians at 10:30 p.m. to investigate suspicious activity near a parked car at 5229 West Center Street, Milwaukee, Wisconsin. The stop escalated into a struggle between Floyd and one of the men, later identified as Seals. As the struggle continued, Floyd said, he pushed Seals against the car and then saw him put a silver handgun on the car bumper.

¶4 Police Sergeant Charles Grimm testified that he arrived at the scene after Seals was handcuffed and seated in a squad car. Grimm heard Seals shouting for attention, and when Grimm responded, Seals said that "the gun was not his, it was his brother's, and that [Seals] had just gotten it from his brother." Seals also said his brother was in a nearby barbershop and nodded toward a figure in a

doorway, but the person withdrew into the shop and would not answer when Grimm knocked at the door.

¶5 A detective testified that he traced the ownership of the gun found at the scene and determined that Jackson had purchased it a few weeks before the incident. The parties stipulated that the gun had no fingerprints on it.

¶6 The parties also stipulated that law enforcement collected DNA from the gun and took a DNA sample from Seals. Sarah Ozanick, an analyst from the Wisconsin Crime Lab, then told the jury that she conducted DNA testing and determined that two individuals contributed the DNA found on the gun. Ozanick compared the DNA profiles of both contributors with the DNA profile she developed for Seals and determined that he was excluded as a source of the DNA found on the gun. Ozanick went on to explain that DNA is not necessarily left behind when a person handles an object, and she described some of the factors that affect the likelihood of a DNA transfer.

¶7 Seals testified on his own behalf. He told the jury that on January 8, 2013, he drove his brother, Jackson, to a barbershop on West Center Street and Jackson placed his gun on the car's bumper before he entered the shop. Seals stipulated that he was a felon as of January 8, 2013, but he denied that he ever handled or possessed Jackson's gun.

¶8 The jury found Seals guilty as charged, and he moved for a new trial. He claimed he had newly discovered evidence and that his trial counsel had been ineffective for failing to present that evidence. In support of these claims, Seals submitted a transcript of Jackson's testimony at Seals's probation revocation

hearing held several months before trial.[1] As reflected in the transcript, Jackson testified that before he went into the barbershop on January 8, 2013, he put his gun on the bumper of the car Seals was driving that night.

¶9 Seals also filed affidavits in support of his postconviction motion. An affidavit from Jackson reiterated his description of leaving the hand gun on the car bumper. He further averred that he was in communication with his mother before Seals's trial and told her he had a job in Illinois that would prevent him from testifying at trial on Seals's behalf.

¶10 In Seals's own affidavit, Seals said he told his trial counsel repeatedly that he wanted Jackson to testify at trial, "advised trial counsel of Jackson's whereabouts[,] and asked [counsel] to send Jackson a subpoena." Further, Seals averred, he was unaware that Jackson would not testify until trial counsel spoke to the prospective jurors at the start of *voir dire* and told them that the defense had "one witness in this case, Mr. Seals."

¶11 In addition to seeking a new trial, Seals moved the circuit court "to order forensic deoxyribonucleic acid testing of Arquan Jackson's biological specimen" for comparison with the DNA profile developed from the sample found on the gun. Alternatively, Seals asked the court to permit testing of Jackson's specimen at Seals's own expense.

¶12 The circuit court denied Seals's motion in its entirety without a hearing. This appeal followed.

[1] The record reflects that Seals's probation was revoked following the hearing.

DISCUSSION

¶13 Seals first contends that his postconviction motion stated sufficient facts to earn him an evidentiary hearing on his claim of trial counsel's alleged ineffectiveness.[2] To show ineffective assistance of counsel, a defendant must prove both that trial counsel's performance was deficient and that the deficiency was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. *See* ***id.*** at 697. Proof of deficiency requires showing that counsel's actions or omissions were "professionally unreasonable." *See* ***id.*** at 691. Proof of prejudice requires showing that counsel's errors had an actual, adverse effect on the defense. *See* ***id.*** at 693. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶14 A defendant alleging ineffective assistance of trial counsel must seek to preserve trial counsel's testimony in a postconviction hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Nonetheless, a defendant pursuing postconviction relief is not automatically entitled to a hearing. A circuit court must grant a hearing only if the postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This is another question of law for our independent review. *See* ***Id.*** If, however, the

[2] Seals's appellate brief does not include any discussion of a newly discovered evidence claim. We conclude that Seals has abandoned this claim, and we discuss it no further. *See* ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

defendant does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. ***Id.*** We review a circuit court's discretionary decisions with deference. ***Id.***

¶15 Seals alleges his trial counsel was ineffective for failing to call Jackson to testify at trial. Seals contends he wanted and expected Jackson's testimony and first learned that Jackson would not testify only when trial counsel told the prospective jurors that Seals was the only defense witness. The record conclusively refutes his position and shows that he is not entitled to relief. *See* ***id.***

¶16 Before jury selection began, trial counsel told the circuit court:

> [TRIAL COUNSEL]: Judge, there was a potential defense witness Arquan Jackson, which I believe is A-R-Q-U-A-N. He was – or he is the defendant's brother. And there may have been - - if Mr. Jackson could have been located, maybe he would say that he was the one that possessed the firearm and put it in the vehicle [on] the night in question.
>
> But Mr. Jackson is [in] Illinois. Mr. Seals does not know how to reach him. He does not wish an adjournment to try to get him here.
>
> Is that right, Mr. Seals?
>
> THE DEFENDANT: Yes sir.
>
> [TRIAL COUNSEL]: Okay. So based on that, we're going to go forward knowing that that's a witness we could use, but Mr. Seals wants to go without.
>
> THE COURT: Okay. We're going to bring the jury up.

¶17 Seals acknowledges in his appellate brief that the foregoing exchange took place, and he admits he "indicated a desire to go forward." The

record thus incontrovertibly shows that he in fact did know before trial began that Jackson was unavailable and further shows that Seals elected to proceed without Jackson as a witness.

¶18 In light of the foregoing, we must reject Seals's claim that trial counsel's performance was professionally unreasonable. "'[T]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.'" ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985) (citation omitted). Moreover, "'[i]f a defendant selects a course of action, that defendant will not be heard later to allege error or defects precipitated by such action. Such an election constitutes waiver or abandonment of the right to complain.'" ***State v. Krancki***, 2014 WI App 80, ¶11, 355 Wis. 2d 503, 851 N.W.2d 824 (citation omitted). Here, Seals himself opted to proceed to trial when he was unable to locate Jackson. Seals will not be heard to fault his trial counsel for a decision that Seals personally made. Because Seals fails to demonstrate as a matter of law that trial counsel's performance was deficient, he cannot prevail on his claim of ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 697.

¶19 We turn to Seals's pursuit of DNA testing. In postconviction proceedings, Seals "move[d] the [circuit] court to order forensic [DNA] testing of Arquan Jackson's biological specimen" in order to compare Jackson's DNA profile with the DNA profiles "described in the testimony of Ms. Sarah Ozanick." On appeal, Seals complains that the circuit court erroneously exercised its discretion by denying his request.

¶20 Pursuant to WIS. STAT. § 974.07(6) (2013-14),[3] a convicted defendant may seek postconviction testing of biological material at his or her own expense. *See* ***State v. Moran***, 2005 WI 115, ¶55, 284 Wis. 2d 24, 700 N.W.2d 884. A defendant who cannot afford postconviction testing may pursue court-ordered testing at the State's expense, but to succeed the defendant must satisfy the heightened requirements in § 974.07(7). *See* ***Moran***, 284 Wis. 2d 24, ¶¶3, 55.

¶21 In his appellate brief, Seals notes that he asked the circuit court to order DNA testing under WIS. STAT. § 974.07(7), and he then goes on to describe the statutory basis for self-funded testing under § 974.07(6). The latter provision permits DNA testing if the defendant meets three conditions:

> [f]irst, the evidence containing biological material must be 'relevant to the investigation or prosecution that resulted in the conviction....' Second, the evidence must be in the government's possession. Third, the evidence must not have been subjected to forensic DNA testing or, if so tested, 'may now be subjected to another test that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.'

Moran, 284 Wis. 2d 24, ¶42 (citations omitted). After describing the foregoing requirements for self-funded testing, Seals ends his discussion of the issue with the statement that "[t]he [c]ircuit [c]ourt erroneously exercised its discretion in denying Mr. Seals'[s] request for postconviction DNA testing."

¶22 As the State accurately asserts, Seals's appellate brief is wholly inadequate to address the claim that Seals purports to raise. We generally do not consider an issue in the absence of arguments by the complaining party showing

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

why the circuit court erred and why the party should prevail. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶23 Further, the record simply does not support Seals's claim for DNA testing. WISCONSIN STAT. § 974.07(6) requires that the State possess the biological material that the convicted defendant wants to test. *See* ***Moran***, 284 Wis. 2d 24, ¶¶27, 42. Here, however, nothing suggests that Jackson's biological specimen is in the State's actual or constructive possession. Seals fails to show, for example, that the State has ever collected DNA from Jackson or that Jackson himself is currently in the State's custody. Moreover, assuming, for the sake of argument only, that the State has a biological specimen from Jackson, Seals fails to explain why testing it would meet the relevancy requirement. *See* ***id.***, ¶42. The jury learned that the DNA deposited on the gun did not come from Seals, a fact that Seals does not dispute. Additional evidence about the source of the DNA puts no greater distance between Seals and the gun. Accordingly, we reject Seals's claims in regard to postconviction DNA testing.

¶24 Finally, Seals seeks discretionary reversal in the interest of justice pursuant to WIS. STAT. § 752.35. Discretionary reversal is a formidable power that we exercise "sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. In this case, Seals's only argument in support of such extraordinary relief is his assertion that "were the jury to have heard Arquan Jackson's testimony, the strength of the State's case would have been eroded." We reject the claim.

¶25 First, we agree with the State that, as with the claim for DNA testing, Seals fails to adequately brief his position. This alone warrants denying relief. *See* ***Pettit***, 171 Wis. 2d at 646-47. Second, we have already explained that

trial counsel was not ineffective for proceeding to trial without Jackson. The rule is long settled that WIS. STAT. § 752.35 was not intended to empower this court to grant discretionary reversal on a theory that we rejected as inadequate to support a claim of ineffective assistance of counsel. *See* ***State v. Flynn***, 190 Wis. 2d 31, 49 n.5, 527 N.W.2d 343 (Ct. App. 1994). Third, Seals himself elected to forego pursuit of the testimony that he now claims the jury should have heard. "It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court [accepts] that position, argue on appeal that the action was error." *See* ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). Accordingly, we conclude that we should not exercise our discretionary power of reversal here.

By the Court.—Judgment and order affirmed.

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