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October 3, 2016

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

2015AP2432-CR State of Wisconsin v. Dante Latrell Graf (L.C. # 2014CF2358)

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

Dante Graf appeals a judgment of conviction for possession of a firearm by a felon, possession of cocaine, and obstructing an officer, and an order denying postconviction relief. Graf contends that he is entitled to a new trial based on a violation of his right to disclosure of exculpatory evidence under WIS. STAT. § 971.23 (2013-14),[1] and ***Brady v. Maryland***, 373 U.S. 83 (1963), and his right to the effective assistance of counsel. Graf also argues that the circuit

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

court improperly imposed misdemeanor DNA surcharges. 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. We summarily affirm.

The State charged Graf with multiple criminal counts arising out of a late night incident in a tavern parking lot. According to the criminal complaint, police responded to a report of shots fired in the parking lot and observed a group of individuals fighting. Two officers approached the group. One of the individuals, later identified as Graf, got into a vehicle and started to drive away, and the officers instructed him to stop. Graf exited the car and started walking away, despite the officers' attempts to stop him. Eventually, the officers sprayed Graf with pepper spray and placed him in handcuffs. Graf gave false identifying information; a search of Graf's person revealed cocaine; and a firearm was discovered in the car Graf had driven.

At a jury trial, Graf defended on grounds that he was not the individual who drove the car, ran from police, and was sprayed with pepper spray; rather, Graf argued, Graf was stopped and arrested when he was walking away after watching the fight in the parking lot. Graf argued that the scene in the parking lot was crowded and chaotic, and that police chased the wrong individual when they followed him. Graf was convicted of all charges.

Graf filed a postconviction motion arguing that he was entitled to a new trial based on the State's failure to disclose evidence and ineffective assistance of counsel. He argued that the State failed to provide his defense counsel with two video recordings from the squad cars of the officers on scene, and that the videos may have supported Graf's mistaken identity defense. He also argued that his counsel was ineffective by failing to obtain and review the squad videos after the State listed the videos in discovery. Finally, Graf argued that the misdemeanor DNA

surcharges imposed by the circuit court violated the ex post facto clause because Graf was sentenced after the effective date requiring courts to impose the surcharge, but before the effective date for courts to authorize collection of DNA samples. The court denied the motion without a hearing.

The State must disclose exculpatory evidence to the defendant; failure to do so violates the defendant's due process rights. *See* WIS. STAT. § 971.23(1)(h); ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. To establish a ***Brady*** violation for the State's failure to disclose exculpatory evidence, a defendant must show that the State withheld evidence that was both favorable to the defendant and material. ***Id.***, ¶13. "'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" ***Id.***, ¶14 (quoted source omitted). Similarly, a claim of ineffective assistance of counsel 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.'" ***State v. Thiel***, 2003 WI 111, ¶¶18-20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoted source omitted).

Thus, to entitle Graf to a hearing on his motion for a new trial, Graf's motion needs to allege facts showing that the squad videos would have created a reasonable probability of a different result at trial or facts sufficient to undermine our confidence in the outcome. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (to entitle a defendant to an evidentiary hearing, a postconviction motion must set forth "sufficient material facts that, if true,

would entitle the defendant to relief"; otherwise, "the circuit court has the discretion to grant or deny a hearing"). Graf's motion fails to do so.

The postconviction motion alleges the following. The responding officers' squad videos were listed in discovery but were not provided to defense counsel. The squad videos were not in the possession of the district attorney or defense counsel and the district attorney stated that, per the police department's retention policy, the videos would no longer exist. The videos may have supported Graf's mistaken identity defense by showing he was not the individual involved in the charged conduct.

To allege sufficient facts to warrant a hearing, a postconviction motion must set forth material facts to support each allegation; conclusory allegations are insufficient. ***Id.***, ¶¶9; 22-23. The motion must "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how" so that the reviewing court may meaningfully assess the defendant's claims. ***Id.***, ¶23. Here, the postconviction motion asserts that the squad videos could have bolstered Graf's defense at trial that he was not the individual in the car, that he did not run from police, and that he was not sprayed with pepper spray. However, Graf's motion does not contain any factual allegations as to what the squad videos would have shown at trial to support that defense. For example, Graf does not state where the squad cars were located relative to the crowded parking lot or how they were positioned relative to the events leading to Graf's arrest. Additionally, Graf does not assert what material facts the videos captured that would have supported his mistaken

identity defense.[2] Graf's conclusory assertions that the squad videos could have been exculpatory by supporting his mistaken identity defense do not establish that the videos would have put his case "in such a different light as to undermine confidence in the verdict." *See* ***Harris***, 272 Wis. 2d 80, ¶15. Because Graf's postconviction motion does not contain sufficient material facts alleging that the squad videos were exculpatory, the circuit court properly denied Graf's motion without a hearing.

Next, Graf contends that the imposition of misdemeanor DNA surcharges at his sentencing on November 3, 2014, was an ex post facto violation. He cites ***State v. Elward***, 2015 WI App 51, ¶¶2, 7, 363 Wis. 2d 628, 866 N.W.2d 756, for the proposition that the misdemeanor DNA surcharge is an ex post factor violation when it is imposed after the effective date for courts to impose the surcharge (January 1, 2014) but before the effective date for courts to authorize the collection of the DNA sample (April 1, 2015). Graf's reliance on ***Elward*** is misplaced.

In ***Elward***, we explained that the ex post facto clause was implicated because Elward committed a misdemeanor "before the law imposed the surcharge" and the surcharge was then imposed during the period when courts were mandated to impose the surcharge but not

[2] According to the postconviction motion, the squad videos no longer exist. Graf does not argue that the destruction of the videos would support a ***Brady*** claim. *See* ***State v. Weissinger***, 2014 WI App 73, ¶10, 355 Wis. 2d 546, 851 N.W.2d 780 ("[A] defendant's due process rights as to the loss of evidence are violated if the police (1) fail to preserve evidence that is apparently exculpatory or (2) act in bad faith by failing to preserve evidence that is potentially exculpatory.").

authorized to order a sample. ***Id.***, ¶¶3-7. Because "the surcharge as applied to Elward was a fine, not a fee" in that it "served only to punish Elward without pursuing any type of regulatory goal," the imposition of the surcharge "constituted an ex post facto violation because it was not part of the law when [Elward] committed the offense leading to his conviction." ***Id.*** Here, Graf committed his offenses on March 8, 2014, after the law imposing the mandatory misdemeanor surcharges went into effect. Accordingly, imposition of the misdemeanor surcharges was not an ex post facto violation. *See* ***State v. Thiel***, 188 Wis. 2d 695, 703, 524 N.W.2d 641 (1994) (explaining that the ex post facto clause is violated by a law "which makes more burdensome the punishment for a crime, after its commission"). To the extent Graf is arguing that imposition of the DNA surcharge at his sentencing on November 3, 2014, was necessarily improper because the payment of the surcharge was unrelated to the direct cost of collecting a DNA sample, we reject that contention. *See* ***State v. Scruggs***, 2015 WI App 88, ¶12, 365 Wis. 2d 568, 872 N.W.2d 146 (explaining that the DNA surcharge does not relate solely to the collecting of the sample, but rather "the DNA surcharge is specifically dedicated to fund the collection and analysis of DNA samples and the storage of DNA profiles").

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