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DISTRICT III

December 20, 2016

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

2015AP2043 State v. Christopher Wayne Haakenstad (L. C. No. 2011CF40)

Before Stark, P.J., Hruz and Seidl, JJ.

Christopher Haakenstad, pro se, appeals an order denying his WIS. STAT. § 974.06[1] motion for postconviction relief. Haakenstad contends he was denied the effective assistance of postconviction counsel and the circuit court erred by denying his § 974.06 motion without a hearing. Based upon our review of the briefs and record, we conclude at conference that this

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

case is appropriate for summary disposition. We reject Haakenstad's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21.

Haakenstad was convicted upon his guilty pleas of possession with intent to deliver methamphetamine and delivery of methamphetamine. Haakenstad's guilty pleas followed the denial of his motion to suppress evidence seized during the search of his apartment.

Haakenstad moved to suppress drug paraphernalia and material that field-tested positive for methamphetamine and tetrahydrocannabinol (THC) discovered by police when they conducted a search of Haakenstad's residence. He alleged a warrant affidavit from Brent Standaert, who worked for the St. Croix County Sheriff's Office and was assigned to the St. Croix Valley Drug Task Force, omitted material information relevant to the determination of probable cause.[2] This information included allegations about the informant who provided information contained in the search warrant affidavit, M.H., that Haakenstad asserted would have created serious doubt about M.H.'s credibility.[3] Haakenstad claimed that, because the allegedly omitted information was known to Standaert at the time he signed the affidavit, his averment that M.H. was "known to the West Central Drug Task Force and has given good information in the past" was made with reckless disregard for the truth.

[2] Most of the information Standaert provided in his affidavit he appears to have received from Marty Folczyk, a City of Menominee detective assigned to the task force.

[3] In this court's decision affirming Haakenstad's convictions on direct appeal, we explained in detail the circumstances surrounding the application for, and issuing of, the warrant to search Haakenstad's apartment. ***State v. Haakenstad***, No. 2014AP1339-CR, unpublished slip op. ¶¶3-7 (WI App Mar. 24, 2015).

Haakenstad consequently requested a ***Franks/Mann*** hearing, at which Haakenstad would have had the opportunity to show, by a preponderance of the evidence that Standaert deliberately or recklessly included false information in, or omitted material information from, the warrant affidavit. *See* ***Franks v. Delaware***, 438 U.S. 154, 156 (1978); ***State v. Mann***, 123 Wis. 2d 375, 388-89, 367 N.W.2d 209 (1985). The circuit court determined Haakenstad was not entitled to a ***Franks/Mann*** hearing after holding an evidentiary hearing at which Folczyk, but not Standaert, testified. Following his subsequent guilty pleas and convictions, Haakenstad filed a WIS. STAT. RULE 809.30 postconviction motion reasserting his request for a ***Franks/Mann*** hearing. The motion asserted his trial counsel was ineffective by failing to call Standaert as a witness at the evidentiary hearing, as it was Standaert's state of mind and knowledge that should have been the focus of the hearing.

The circuit court denied the postconviction motion after a ***Machner***[4] hearing. At that hearing, Haakenstad's trial counsel testified the evidentiary hearing was preliminary to a ***Franks/Mann*** hearing and that, if it had been a ***Franks/Mann*** hearing, he would have called Standaert as a witness. Relevant to this appeal, postconviction counsel acknowledged that he mistakenly believed the earlier hearing had been a ***Franks/Mann*** hearing and that, if it was not, the postconviction motion was baseless.

In his direct appeal, Haakenstad asserted the circuit court erroneously denied his suppression motion without holding a ***Franks***/***Mann*** hearing. Haakenstad claimed he was entitled to such a hearing so as to demonstrate that Standaert's assertion in the warrant affidavit

[4] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

that M.H. was "known" and previously provided "good information" had been made with deliberate or reckless disregard for the truth. We noted in our decision that when a defendant challenges the veracity of the warrant affidavit, he or she must first make a "substantial preliminary showing" that deliberately or recklessly false statements were included in the affidavit. ***Franks***, 438 U.S. at 155-56. If the defendant makes a substantial preliminary showing, the challenged statements are excised from the affidavit and the affidavit is then examined to determine whether, with the statements excised, the affidavit provides probable cause for a search warrant. ***State v. Anderson***, 138 Wis. 2d 451, 464, 406 N.W.2d 398 (1987). If not, and if the defendant successfully demonstrates at an evidentiary hearing—known as a ***Franks*** hearing—that the affiant deliberately or recklessly included false information, the warrant is voided and any evidence seized pursuant to it must be suppressed. ***Franks***, 438 U.S. at 155-56. We assumed, without deciding, that Haakenstad's suppression motion made a substantial preliminary showing that Standaert's challenged averment was made with deliberate or reckless disregard for the truth. ***State v. Haakenstad***, No. 2014AP1339-CR, unpublished slip op. ¶19 (WI App Mar. 24, 2015). We concluded, however, that if the challenged portion of the affidavit were excised, the affidavit nonetheless established probable cause for the search warrant. ***Id.***

In his underlying WIS. STAT. § 974.06 motion, Haakenstad alleged his postconviction counsel performed deficiently by failing to challenge what Haakenstad characterized as trial counsel's "perjured" ***Machner*** hearing testimony about the nature of the evidentiary hearing held on the suppression motion; and by failing to challenge the circuit court's belief that it had not held a ***Franks/Mann*** hearing. Haakenstad claimed he was prejudiced by his postconviction counsel's alleged deficiencies because counsel "was on firm legal ground in his original

postconviction motion, but failed to offer any of the arguments set forth in this motion that would have required the court to grant the motion." In a supplemental § 974.06 motion, Haakenstad argued he was entitled to a hearing on his motion. The motion was denied without a hearing.

The circuit court may deny a postconviction motion without a hearing if the motion presents only conclusory allegations or if the record otherwise conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. In order to establish ineffective assistance of his postconviction counsel, Haakenstad must show both that his counsel's representation was deficient and that this deficiency prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance is established by showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** Prejudice is shown when the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

The circuit court properly denied Haakenstad's WIS. STAT. § 974.06 motion without a hearing because the record conclusively demonstrates Haakenstad is not entitled to relief. We need not reach the question whether counsel performed deficiently because Haakenstad cannot establish that he was prejudiced by any claimed deficiencies. Haakenstad's assertions about postconviction counsel's ineffectiveness hinge on Haakenstad's belief that the evidentiary hearing *was* a ***Franks/Mann*** hearing at which he was entitled to call Standaert to establish that his challenged averments were made with deliberate or reckless disregard for the truth. On direct appeal, however, we assumed, without deciding that Haakenstad had made a substantial

preliminary showing that the search warrant affidavit included information made with deliberate or reckless disregard for the truth. We nevertheless concluded that the untainted remaining portions of the affidavit established probable cause for the search warrant. Thus, there is no reasonable probability that, absent postconviction counsel's claimed deficiencies, the outcome of the suppression motion would have been different.

Therefore, upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals