COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP1578 **Cir. Ct. No. 1999CF6006**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTAE L. DOYLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Dontae L. Doyle appeals *pro se* from an order denying his postconviction motion for a new trial predicated principally on his newly-discovered evidence claim. The issues are: (1) whether the trial court erroneously exercised its discretion in summarily denying Doyle's newly-

discovered evidence claim; (2) whether trial counsel was ineffective for allegedly withholding significant information when advising Doyle whether to testify in his defense; and (3) whether appellate counsel was ineffective for failing to raise postconviction counsel's ineffectiveness for failing to further investigate witnesses, one of whom now claims to have committed two of the eight armed robberies for which Doyle was convicted. We conclude that: (1) Doyle has not clearly and convincingly met the criteria necessary to pursue his newly-discovered evidence claim; (2) his ineffective assistance of trial counsel claim was previously adjudicated; and (3) his ineffective assistance of appellate counsel claim necessarily fails because his criticism of trial counsel's failure to investigate involves the same witnesses whose proffered affidavits have now been rejected in Doyle's failed newly-discovered evidence claim. We affirm.

¶2 The trial court applied the proper legal standards to the relevant facts, and reached the correct decision on the newly-discovered evidence and ineffective assistance of trial counsel claims. We therefore incorporate and adopt the trial court's attached decision and affirm its order on these two issues.[1] *See* WIS. CT. APP. IOP VI(5)(a) (Oct. 14, 2003) (court of appeals may adopt trial court's opinion).

¶3 In his *pro se* postconviction motion, Doyle alleges that appellate counsel was ineffective for failing to raise postconviction counsel's failure to investigate Terrance Prude and Calvin D. Williams, the postconviction affiants

[1] Doyle was convicted of eight armed robberies and other related offenses. In its postconviction order, the trial court referred to six armed robberies. Although the reference to six is insignificant to its decision and to ours, to resolve any apparent discrepancies, we note that the trial court was most likely referring to the six, which occurred in supermarkets, as opposed to the two others, which involved automobiles.

who Doyle now claims will exonerate him. To maintain an ineffective assistance claim, the defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). There is no need to review proof of one if there is insufficient proof of the other. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶4 We affirm the trial court's rejection of the affidavits from Prude and Williams because they fail to clearly and convincingly establish newly-discovered evidence. Thus, Doyle has not shown a reasonable probability that, but for trial counsel's failure to timely investigate Prude and Williams, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694. Consequently, we do not address the performance aspect of counsel's alleged failure. *See* ***Moats***, 156 Wis. 2d at 101.

¶5 Moreover, Doyle's postconviction allegations of ineffective assistance of appellate counsel are insufficient to warrant an evidentiary hearing.

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [*State v.*] *Bentley*, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. *Id.* at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to

> support its decision by written opinion." *Nelson*, 54 Wis. 2d at 498. *See Bentley*, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "Moreover, '[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted; alteration by ***Flynn***).

¶6 In his postconviction motion, Doyle simply alleged that appellate counsel "spoke with Terrance Prude and Calvin Williams concerning several robberies. Through the conversation [appellate counsel] found out very valuable information in detail. Counsel did not investigate this information." Doyle did not identify what the "very valuable information" was, its potential significance, or elaborate on the "detail" to which he referred. Doyle also alleged that counsel "ignored the issues" and "failed to investigate." Doyle concluded that counsel's failures were "due to oversight and not strategic choice." These allegations, without elaboration by affidavit, are not sufficiently specific to adequately pursue a failure-to-investigate ineffective-assistance claim. *See* ***id.***; *see also* ***Allen***, 274 Wis. 2d 568, ¶9.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).