COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 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. 2004AP2310 **Cir. Ct. No. 2002CF1815**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WARREN J. HAMPTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Warren J. Hampton appeals from an order summarily denying his motion for postconviction relief. The issue is whether postconviction counsel was ineffective for failing to raise trial counsel's ineffectiveness in failing to raise or pursue a variety of issues. We conclude that

Hampton was not entitled to an evidentiary hearing on his postconviction motion because he failed to affirmatively allege the prejudice necessary to maintain his ineffective assistance claims. Therefore, we affirm.

¶2 Incident to a plea bargain, Hampton pled guilty to second-degree reckless homicide while armed, and second-degree recklessly endangering safety while armed, in exchange for the State's motion to dismiss a possession of marijuana charge and its sentencing recommendation of an unspecified period of confinement. The trial court accepted Hampton's guilty pleas, dismissed the marijuana charge, and imposed eighteen- and four-year consecutive sentences, comprised of equal nine- and two-year periods of confinement and extended supervision.

¶3 Hampton was represented throughout proceedings in the trial court. Postconviction counsel was appointed, but she refused to pursue the claims Hampton identified, and rather than pursuing a no-merit appeal, she closed the file as Hampton requested. Hampton failed to pursue postconviction or appellate relief pursuant to WIS. STAT. RULE 809.30(2) (2003-04), but later filed a *pro se* postconviction motion pursuant to WIS. STAT. § 974.06 (2003-04).[1] The trial court summarily denied that motion, which Hampton now appeals.

¶4 In his postconviction motion, Hampton moves for plea withdrawal, challenging: (1) the legality of his arrest in the marijuana case, which led to his arrest for the felony charges; (2) the admissibility of his statements to police despite his having allegedly invoked his right to counsel; and (3) the timeliness of

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

a probable cause determination. He raises these challenges in the context of postconviction counsel's alleged ineffectiveness for failing to pursue trial counsel's alleged ineffectiveness. He also alleges a direct claim of ineffectiveness against postconviction counsel for refusing to pursue further relief, other than her willingness to file a no-merit appeal.

¶5 "To withdraw his plea after sentencing, [the defendant] need[s] to establish by clear and convincing evidence, that failure to allow a withdrawal would result in a manifest injustice." ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. "[T]he 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citation omitted).

¶6 To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "*affirmatively* prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). The necessity to prove both deficient performance and prejudice obviates the 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).

¶7 The supreme court reiterated the well-established standards for a postconviction 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. *Bentley*, 201 Wis. 2d at 309-10. 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 [defendant] 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.

¶8 Hampton challenges the legality of his arrest, the potential admissibility of his statements to police, and the timeliness of his probable cause determination. "[A] guilty plea, voluntarily and understandingly made constitutes a waiver of nonjurisdictional defects and defenses including claims of violations of constitutional rights prior to the plea." ***Mack v. State***, 93 Wis. 2d 287, 293, 286 N.W.2d 563 (1980). Unless Hampton clearly and convincingly proved that the ineffectiveness of counsel negated his guilty pleas, he waived his challenges, with

the exception of postconviction counsel's refusal to pursue any relief other than a no-merit appeal.[2]

¶9 To prove counsel's ineffectiveness, Hampton must affirmatively prove prejudice, namely that "but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Although trial counsel indicated that Hampton might move for suppression, he did not do so, but pled guilty to two of the charges in exchange for the dismissal of a third charge and a sentencing recommendation of an unspecified period of confinement. He does not allege that but for counsel's ineffectiveness, he would have instead proceeded to trial.[3] Consequently, he has not clearly and convincingly proven ineffective assistance, necessary to negate the waiver by his guilty plea of his challenges to his arrest, the admissibility of his statements, and the timeliness of his probable cause determination. *See* ***Mack***, 93 Wis. 2d at 293.

¶10 Hampton also alleges that his postconviction counsel was ineffective for refusing to pursue postconviction or appellate relief, other than her willingness to pursue a no-merit appeal. His postconviction allegations, however, only

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[2] Hampton does not challenge the validity of his guilty pleas in any context other than that of trial counsel's ineffectiveness for essentially misadvising him to plead guilty. Nevertheless, we have reviewed the transcript of the guilty plea hearing and are satisfied that the trial court, in accepting Hampton's guilty pleas, complied with WIS. STAT. § 971.08 (2001-02) and ***State v. Bangert***, 131 Wis. 2d 246, 267-74, 389 N.W.2d 12 (1986). Similarly, Hampton's signed guilty plea questionnaire and waiver of rights form indicates that he understood the ramifications of his guilty pleas. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (a completed plea questionnaire and waiver of rights form is competent evidence of a knowing, voluntary and intelligent plea).

[3] He alleges this repeatedly in his appellate brief, but not in his postconviction motion, as required. *See* WIS. STAT. § 974.06. Additionally, Hampton is required to allege "factual-objective" rather than "opinion-subjective" information. *See* ***State v. Saunders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995).

demonstrate Hampton's disagreements with postconviction counsel's assessments of the merits of pursuing further relief. He has not alleged the factual-objective information necessary to maintain an ineffective assistance claim. *See* ***State v. Saunders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995).

¶11 Hampton alleges that his postconviction motion was initially returned to him because it exceeded the twenty-page limit for postconviction motions in Milwaukee County.[4] Hampton claims that to file a motion complying with that Local Rule, he could not include the allegations necessary to meet the ***Allen*** requirements for an evidentiary hearing. We disagree.[5] Consequently, the trial court properly exercised its discretion when it declined to conduct an evidentiary hearing simply to confirm that Hampton's conclusory allegations were insufficient to establish the ineffective assistance of trial or postconviction counsel, necessary to allow him to withdraw his guilty pleas.

By the Court.—Order affirmed.

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[4] Milwaukee County Circuit Court Local Rule 427 establishes twenty pages as the maximum length for a postconviction motion pursuant to WIS. STAT. § 974.06.

[5] An evidentiary hearing to further develop the record is not permissible.

> [T]he facts must be alleged in the [mo]tion and the *[defendant] cannot stand on conclusory allegations, hoping to supplement them at a hearing*. … If there is merit in the facts, it should be an easy matter and a prime requisite to state those facts in the [mo]tion so they can be evaluated at the commencement of the proceeding. A statement of ultimate facts … *is not sufficient for a [mo]tion for postconviction relief.*

Levesque v. State, 63 Wis. 2d 412, 421-22, 217 N.W.2d 317 (1974) (emphasis added). "A conclusory allegation of ineffective assistance of counsel, unsupported by any factual assertions, is legally insufficient and does not require the trial court to conduct an evidentiary hearing." ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

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