COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 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 Nos. 2005AP1619-CR
2005AP2399
2005AP2622

Cir. Ct. Nos. 1998CF271
2005CV1979

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

APPEAL NOS. 2005AP1619-CR, 2005AP2622

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW M. OBRIECHT,

DEFENDANT-APPELLANT.

APPEAL NO. 2005AP2399

STATE OF WISCONSIN EX REL. ANDREW MATTHEW OBRIECHT,

PETITIONER-APPELLANT,

V.

BYRAN BARTOW,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Dane County: ROBERT A. DeCHAMBEAU and RICHARD G. NIESS, Judges. *Affirmed*.

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Andrew Obriecht appeals orders denying postconviction relief following his convictions on one count of attempted second-degree sexual assault of a child, five misdemeanor sexual assault counts, and one disorderly conduct count, all as a repeat offender. In appeal no. 2005AP1619-CR, Obriecht appeals an order denying his motion for reduced sentences on his misdemeanors. In appeal no. 2005AP2399, he appeals an order denying his petition for habeas corpus relief from his conviction and an order denying reconsideration. In appeal no. 2005AP2622, he appeals an order denying a separate petition for habeas corpus relief. We affirm in all three appeals.

¶2 Obriecht was sentenced in 1999 to enhanced prison terms on his misdemeanors, and concurrent probation on his felony. He was released on bond pending appeal, and we affirmed his conviction. Meanwhile, the Department of Corrections revoked Obriecht's probation, and in 2001 he was sentenced to a prison term on his felony charge, consecutive to the misdemeanor terms.

APPEAL NO. 2005AP1619-CR

¶3 In May 2005, Obriecht filed a motion under WIS. STAT. § 973.13 (2003-04),[1] alleging that his misdemeanor sentences exceeded the maximum authorized by law. The circuit court found the motion difficult to understand and directed Obriecht to file an amended motion. When Obriecht failed to provide what the court considered an adequate response, the court denied the motion for lack of specificity.

¶4 On appeal, Obriecht explains that he was sentenced as a repeat offender based on his prior misdemeanor convictions in Dane County case no. 1996CF2331. He argues it was error to sentence him as a repeater because his prior convictions in 1996CF2331 are invalid. However, a defendant may collaterally attack a prior conviction used for sentence enhancement only when deprived of the constitutional right to counsel in the prior proceeding. ***State v. Hahn***, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528. Neither in his motion to the circuit court, nor in arguments to this court, does Obriecht assert that he was denied counsel in the prior proceeding. Wisconsin Circuit Court Access (WCCA) records indicate that counsel continually represented Obriecht in that case from the date of his preliminary hearing until the conclusion of the proceeding. The circuit court, therefore, properly denied the motion, although for a different reason.

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

APPEAL NO. 2005AP2399

¶5 This appeal concerns Obriecht's petition for habeas corpus relief alleging ineffective assistance of trial counsel and postconviction counsel. Trial counsel's alleged ineffectiveness was the failure to investigate and call witnesses who could have provided significant exculpatory testimony on some of the charges. Postconviction counsel's alleged ineffectiveness was his refusal to pursue the issue of trial counsel's ineffectiveness. The circuit court denied the motion declaring, without elaboration, that the petition and supporting documents "demonstrate on their face that petitioner is not entitled to habeas corpus relief." On appeal, the State defends that ruling by arguing that allegations of ineffective representation cannot form the basis for habeas corpus relief because Obriecht had an adequate remedy at law. We reject that contention. This court has ruled that a petition for habeas corpus relief is an appropriate way to raise a claim of ineffective assistance of postconviction counsel. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). However, we affirm dismissal of the petition on other grounds.

¶6 A petition alleging ineffective assistance of counsel is subject to dismissal if it fails to allege sufficient material facts or presents only conclusory allegations. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Our review of this question is *de novo*. ***Id.*** at 310. A postconviction motion sufficient to meet this standard should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433.

¶7 Obriecht's petition alleged that the victim of one of Obriecht's misdemeanor sexual assaults testified to barely knowing him. He alleged that

several witnesses could have testified, if permitted, that Obriecht and the victim previously had a sexual relationship, and had sexual contact immediately preceding the alleged assault. Obriecht alleged that he informed his trial counsel of these witnesses, but trial counsel did not contact them. He further alleged that the witnesses counsel failed to investigate could also have impeached testimony of the other two victims of his misdemeanor sexual assault charges. Finally, Obriecht added that counsel failed to inform him until right before trial that he had not interviewed these witnesses, making it too late for Obriecht to do anything. However, Obriecht's petition never identifies the alleged witnesses nor explains how they knew what Obriecht alleged they knew. It does not explain whether they were willing or available to testify on Obriecht's behalf. Consequently, Obriecht's petition does not contain sufficient facts to show that his trial counsel's omissions prejudiced him by influencing the outcome of his trial. To succeed on a claim of ineffective representation, the defendant must show prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The petition was properly denied.

APPEAL NO. 2005AP2622

¶8 Obriecht filed another habeas petition alleging that he was deprived of his right to postconviction counsel following his 2001 conviction after revocation. However, after Obriecht commenced this appeal he received appointed counsel from the public defender's office, and this court extended the deadline for counsel to commence a WIS. STAT. RULE 809.30 proceeding on his behalf, to seek relief from the 2001 conviction. Obriecht has received the remedy he sought, and appeal 2005AP2622 is moot. *See* ***State ex rel. McDonald v. Circuit Court for Douglas County***, 100 Wis. 2d 569, 572, 302 N.W.2d 462 (1981) (case is moot when the ruling sought would have no practical effect).

By the Court.—Orders affirmed.

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