COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP982 **Cir. Ct. No. 1994CF81**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS E. STURDEVANT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Grant County: ROBERT P. VANDEHEY, Judge. *Affirmed*.

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Marcus Sturdevant appeals from an order denying his postconviction motion alleging ineffective assistance of counsel. We affirm.

¶2 Sturdevant pled no contest in 1994 to three counts of first-degree sexual assault of a child. In June 2006 he moved to withdraw his pleas on the ground that he had not been informed that one consequence of the pleas was that he would be ordered to pay a $50 annual sex offender registration fee. Although Sturdevant did not cite the statute, that was essentially a postconviction motion under WIS. STAT. § 974.06 (2005-06).[1] The circuit court denied that motion. Sturdevant then filed a "motion for a Machner hearing based on ineffective assistance of counsel." Although Sturdevant again did not cite § 974.06, this was also a motion under that statute.

¶3 The State argues that Sturdevant's second postconviction motion was barred by WIS. STAT. § 974.06(4) because Sturdevant did not give a sufficient reason why he did not raise these claims in his prior motion under § 974.06. We agree. A defendant cannot properly file a second § 974.06 motion unless he shows a sufficient reason for not having raised the new claims in the first motion. ***State ex rel. Dismuke v. Kolb***, 149 Wis. 2d 270, 274, 441 N.W.2d 253 (Ct. App. 1989).

¶4 Even if the motion was not procedurally barred, we further conclude that it could properly be denied on the merits without an evidentiary hearing. The circuit court denied the motion without holding an evidentiary hearing, on the ground that the motion failed to allege facts which, if true, would entitle Sturdevant to relief. The State erroneously asserts that we defer to that decision because it is a discretionary one. For that proposition the State cites ***State v. Allen***, 2004 WI 106, ¶¶9, 12, 274 Wis. 2d 568, 682 N.W.2d 433. However, that

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

paragraph states: "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. If the motion raises such facts, the circuit court must hold an evidentiary hearing." ***Id.*** at ¶9 (citation omitted).

¶5 Sturdevant's motion in this case made very few factual assertions. Instead, it contained general statements of relevant law, and a series of questions, apparently directed toward trial counsel. Some of the questions could arguably be read as implying an allegation of certain facts, such as, "Why did you not show me a copy of the hospital records?" However, even if we view the motion in that light, we conclude that it fails to allege sufficient facts to warrant a hearing on the issue of ineffective assistance of counsel. There are not sufficient facts from which a clear allegation of deficient performance by counsel can be read, or an explanation of how counsel's acts prejudiced Sturdevant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (to establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense).

By the Court.—Order affirmed.

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