OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

November 26, 2025

To:

Hon. Angelina Gabriele
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Kirk D. Henley
Electronic Notice

Kathleen E. Wood
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You are hereby notified that the Court has entered the following opinion and order:

2024AP674-CR State of Wisconsin v. Terrance L. Kirksey (L.C. #2022CF56)

Before Neubauer, P.J., Gundrum, and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Terrance L. Kirksey appeals from a judgment of conviction and order denying postconviction relief in which the circuit court denied him a ***Machner*** hearing on his ineffective assistance of counsel claim.[1] Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

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

(2023-24).[2] This court affirms the judgment and order of the circuit court because Kirksey fails to allege sufficient material facts that would require a ***Machner*** hearing on his claim.

On January 22, 2020, Kirksey was convicted of the felony offense of Aggravated Battery/Domestic Abuse as a Repeat Offender. He was sentenced to five years in prison followed by three years of extended supervision. He was ordered to have no contact with the victim or her family. On December 6, 2021, the victim received two telephone calls from Kirksey's place of incarceration and, recognizing Kirksey's voice, she reported the calls to the police. Subsequently, Kirksey was charged with Knowingly Violating a No Contact Order. *See* WIS. STAT. §§ 813.12(4). (8)(a); 941.39(1). Kirksey pleaded guilty on June 21, 2022. In the presentence investigation report (PSI), Kirksey denied intentionally calling the victim. Instead, he explained that while he was confined, he wrote down approximately 70 phone numbers from memory because he did not have access to his cell phone. He acknowledged that very few numbers started with a 262 area code and that one of those numbers likely belonged to the victim in his domestic abuse case, but he asserts he did not mean to dial her number.

During Kirksey's plea hearing, the circuit court informed him of the elements of his offense, including "intention[al] violat[ion of] the no contact order"; ascertained that he "had enough time to discuss all [of his case] with [his] attorney"; and confirmed that he had read the criminal complaint with the understanding that the court would rely on those facts as the basis for accepting his plea. The court also affirmed Kirksey's understanding that by pleading he was giving up his constitutional right to a trial. The court determined that Kirksey entered his plea

[2] All references to the Wisconsin Statutes are to the 2023-24 version.

"freely, voluntarily, knowingly, and intelligently." The court sentenced him to two years of initial confinement and two years of extended supervision to run consecutive to his current sentence.

Kirksey filed a postconviction motion to withdraw his guilty plea, alleging ineffective assistance of counsel on the basis that his trial counsel had failed to obtain a series of phone records from the Department of Corrections. Kirksey stated he told trial counsel that on the day the victim received two calls from him, he made many phone calls. He said that because he pulled the numbers from memory, he could not recall to whom each phone number belonged. Kirksey argued that, had his trial counsel investigated the phone records, he would not have pleaded guilty and instead would have gone to trial because the records would confirm he never intended to contact the victim.

The circuit court denied Kirksey's postconviction motion without a ***Machner*** hearing, stating that Kirksey failed to allege specific facts and presented only conclusory allegations that would support his assertion that he would have proceeded to trial but for his attorney's failure to obtain the phone records. The court held that Kirksey was aware at the time that he entered his plea that the phone records would show that he made the numerous calls on the same day he made calls to the victim. The court further concluded that Kirksey's claim that he would have gone to trial was contradicted by the thorough plea colloquy and his statements during the plea colloquy.

The circuit court noted that when Kirksey spoke to the PSI writer, he affirmatively claimed that he made many calls on the date he called the victim. The court also noted that Kirksey's comments and his attorney's comments at sentencing contradicted his current

assertation that obtaining the phone records would have caused him to choose to have a trial rather than enter a plea. Kirksey already had all of that information. In addition, the court determined that the assertion that Kirksey was randomly calling numbers from his memory 1,075 days after his placement in custody was not credible. Thus, the court denied Kirksey's motion to withdraw his plea without holding a hearing.

Kirksey asks this court to review the circuit court's denial to grant a ***Machner*** hearing on his postconviction motion to withdraw his guilty plea. "A defendant seeking to withdraw a plea after sentencing must show by clear and convincing evidence that 'allowing the withdrawal of the plea is necessary to correct a manifest injustice.'" ***State v. Savage***, 2020 WI 93, ¶24, 395 Wis. 2d 1, 951 N.W.2d 838 (quoting ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996)). "One way to demonstrate manifest injustice is to establish that the defendant received ineffective assistance of counsel." ***Savage***, 395 Wis. 2d 1, ¶25 (quoting ***State v. Breitzman***, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93).

Whether a postconviction motion has alleged sufficient material facts to grant a defendant a ***Machner*** hearing is a question of law that we review de novo. ***State v. Ruffin***, 2022 WI 34, ¶27-28, 401 Wis. 2d 619, 974 N.W.2d 432. Similarly, whether the Record conclusively demonstrates that the defendant is entitled to no relief is a question of law that is reviewed de novo. ***Id.***, ¶27. "If the motion does not raise facts sufficient to entitle the defendant to relief, or if it presents only conclusory allegations … the circuit court has the discretion to grant or deny a hearing." ***Id.***, ¶28. We uphold a circuit court's factual findings unless they are clearly erroneous. ***Id.***

Kirksey's claim arises in the context of ineffective assistance of counsel. "[W]hether a defendant received ineffective assistance of counsel is a mixed question of fact and law." ***State v. Gutierrez***, 2020 WI 52, ¶19, 391 Wis. 2d 799, 943 N.W.2d 870. Whether a trial counsel's performance constitutes ineffective assistance of counsel is a question of law that is reviewed de novo. ***Id.***, ¶19. In order for Kirksey to prove ineffective assistance of counsel he must prove two prongs: deficient performance and prejudice. ***State v. Jackson***, 2023 WI 3, ¶10, 405 Wis. 2d 458, 983 N.W.2d 608. In demonstrating deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness after considering all of the circumstances. ***Id.*** When reviewing deficient performance, this court is highly deferential to a counsel's strategic decisions. ***Ruffin***, 401 Wis. 2d 619, ¶30. In fact, counsel's performance does not need to be perfect or even very good to be constitutionally adequate. ***Id.*** To establish prejudice within the plea process, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Savage***, 395 Wis. 2d 1, ¶33.

Defendants have two independent options to prove that they would not have pleaded guilty and would have instead proceeded to trial. ***Id.***, ¶35. First, the defendant can show based on "contemporaneous evidence" that the deficient performance offended their "expressed preferences" such that the defendant would not have pleaded guilty. ***Id.*** Second, the defendant can demonstrate that the defense would have been likely to succeed at trial. ***Id.***

In order for a defendant to be entitled to a ***Machner*** hearing for ineffective assistance of counsel, the defendant must allege in their postconviction motion sufficient material facts to entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. To allege sufficient facts a defendant should answer the five "w's" and one "h": who, what,

where, when, why, and how. ***Allen***, 274 Wis. 2d 568, ¶23. If a motion does not allege sufficient facts, then the motion is conclusory and does not allow a court to meaningfully assess the defendant's claim. ***State v. Balliette***, 2011 WI 79, ¶59, 336 Wis. 2d 358, 805 N.W.2d 334; ***Jackson***, 405 Wis. 2d 458, ¶24. For the purposes of determining whether a defendant is entitled to a ***Machner*** hearing, this court must assume that all of the factual claims made in support of the motion are true. ***Jackson***, 405 Wis. 2d 458, ¶18.

Our review of the Record establishes that Kirksey has not alleged sufficient material facts to entitle him to relief. His postconviction motion is purely conclusory in nature. Kirksey never explains why having the phone records would help him with his defense. The records do not refute that he called the victim; to the contrary, they establish that he *did* call the victim. Moreover, as the circuit court held, the information in the phone records was already known to Kirksey when he entered his plea. Thus, this was not new information that he needed in order to present a full defense in this case.

Additionally, nowhere in Kirksey's postconviction motion does he state how his attorney's failure to obtain the phone records offended his expressed preferences. Nor does he demonstrate how his defense would have likely succeeded at trial had he had the phone records. Accordingly, the circuit court did not err when it exercised its discretion to deny Kirksey's postconviction motion without a ***Machner*** hearing.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals