COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1515-CR **Cir. Ct. No. 2011CF3305**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALFREDO J. HOLLIMAN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Alfredo J. Holliman, Jr. appeals a judgment convicting him of delivery of a controlled substance-cocaine (one gram or less) as

a second or subsequent offense. *See* WIS. STAT. §§ 961.41(1)(cm)1g. & 961.48(1)(b) (2011-12).[1] He also appeals an order denying his motion for postconviction relief. The sole issue on appeal is whether Holliman's postconviction motion alleging ineffective assistance of counsel set forth sufficient material facts to warrant a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). The circuit court concluded that it did not. We agree and affirm.

BACKGROUND

¶2 Holliman was convicted of selling cocaine to a confidential informant (C.I.), who bought the cocaine during a "controlled buy." Police provided the pre-recorded buy money for the purchase and a digital recorder captured the discussion between the C.I. and Holliman.

¶3 The State's evidence at the jury trial included testimony from the C.I., three police officers, and a State Crime Lab analyst. The C.I. did not leave the officers' sight during the controlled-buy process. However, the officers were not able to see the hand-to-hand transaction itself, which took place inside the C.I.'s car. Police investigator Jon Rivamonte testified that he coordinated the controlled buy and searched the C.I. and her car before and after it occurred. Rivamonte testified that the C.I. gave him 1.0 grams of crack cocaine following the controlled buy.

¶4 Holliman did not testify and no witnesses were called on his behalf.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶5 The jury found Holliman guilty after fourteen minutes of deliberation. He was sentenced to four years of initial confinement and four years of extended supervision.

¶6 Holliman filed a postconviction motion alleging ineffective assistance of counsel. The circuit court denied the motion without a hearing.

DISCUSSION

¶7 "Both the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution afford a criminal defendant the right to counsel. This right to counsel includes the right to the effective assistance of counsel." ***State v. Trawitzki***, 2001 WI 77, ¶39, 244 Wis. 2d 523, 628 N.W.2d 801. A convicted defendant such as Holliman who claims that his trial counsel was ineffective must satisfy the two-prong test pronounced by the United States Supreme Court in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***Trawitzki***, 244 Wis. 2d 523, ¶¶39-40. The test requires the defendant to prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland***, 466 U.S. at 687.

¶8 To demonstrate deficient performance, the defendant must show that counsel's actions or omissions fell "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶9 Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v.***

Johnson, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). A reviewing court may approach an ineffectiveness claim by first considering either the performance component or the prejudice component, and if a defendant fails to satisfy one component of the analysis, the court need not address the other. *See* ***Strickland***, 466 U.S. at 697.

¶10 When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony in a postconviction hearing. *See* ***Machner***, 92 Wis. 2d at 804. Nonetheless, a defendant is not automatically entitled to a ***Machner*** hearing upon filing a postconviction motion that alleges ineffective assistance of counsel. ***State v. Curtis***, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). A circuit court must grant a hearing only if the motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This presents an additional question of law for our independent review. *See* ***id.*** If the defendant does not allege sufficient material facts that, if true, warrant relief, or if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.***

¶11 Holliman maintains on appeal that he is innocent and that the C.I. gave her own cocaine to Rivamonte. To support his cause, he relies on the following as "material facts":

> 1) Defense counsel's theory of defense was not a defense, as it did not address any of the elements of the charge and was completely unsupported by any available evidence.
>
> 2) Defense counsel failed to investigate the amount of time the police had to search the C.I. for drugs on her person and

> in her vehicle prior to the undercover buy; therefore, failing to identify and present a defense to the jury that was supported by available evidence.
>
> 3) Defense counsel failed to cross[-]examine the police officer at trial on the timing of [the] search even though he had a one-page police report available that contradicted their testimony.
>
> 4) Finally, defense counsel objected only once during the two-day trial.

We address each of Holliman's assertions in turn.

1) ***Theory of Defense***

¶12 Holliman faults his trial counsel for focusing, in his opening statement, on the delay in charging Holliman and on the reduction in the weight of the cocaine between the time Rivamonte weighed it and the time it was weighed at the State Crime lab.[2] He asserts that neither point provides a defense to the charge of delivery of a controlled substance-cocaine (one gram or less). However, by focusing his attention on his trial counsel's opening and closing statements, Holliman seemingly overlooks the other evidence that his trial counsel brought out during his trial.

¶13 We conclude that trial counsel pursued a reasonable defense strategy, which hinged on questioning the reliability of the State's evidence and the credibility of its witnesses. Notably, trial counsel elicited testimony from Rivamonte that his search of the C.I. prior to the controlled buy was limited to the C.I.'s pockets, shoes, and socks and that Rivamonte did not have a female officer

[2] When Rivamonte weighed it, the crack cocaine weighed 1.0 grams. When the State Crime Lab weighed it, it was just under 0.7 grams.

perform a more thorough search.[3] Trial counsel also elicited testimony from the C.I. that Holliman's nickname was "Fredo," not "Fonte" as Rivamonte had testified.

¶14 Moreover, trial counsel highlighted for the jury other perceived inconsistencies and shortcomings in the police department's handling of the case. For instance, trial counsel elicited testimony from a detective and a lieutenant who observed Holliman getting into the C.I.'s car to the effect that they did not take notes or prepare written reports regarding the incident.

¶15 Finally, during his closing, trial counsel argued that the C.I. was not trustworthy and her testimony was not reliable. He also pointed out the discrepancy in the weight of the cocaine recovered and the lack of testimony from a crime lab expert as to the reason, only Rivamonte's explanation that it had evaporated.

¶16 What Holliman is really arguing is that trial counsel should have chosen a different defense: namely, the defense that Holliman is innocent and that the C.I. provided her own cocaine to police. But, Holliman chose not to testify at trial. We agree with the State that without his testimony, there was not a factual basis for the jury to believe that the C.I. did not purchase the cocaine from him, and instead possessed it all along. Holliman has not established that his trial counsel was deficient based on the theory of defense he presented. *See* ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620 ("Trial

[3] Holliman points out that this first came out on direct examination. Notwithstanding, reiterating it again on cross-examination presumably added emphasis.

counsel is not ineffective simply because an otherwise reasonable trial strategy was unsuccessful.").

2) *Failure to Investigate*

¶17 Holliman claims that he asked his trial counsel to investigate and that had trial counsel done so, his theory of defense would have been presented to the jury. According to Holliman, through postconviction investigation, his private investigator learned that the "predetermined meet spot" where Rivamonte and the C.I. met before she met Holliman was at least five minutes away by car. Holliman contends that by using a one-page police report prepared by Rivamonte, counsel could have established that Rivamonte had only a brief period of time—approximately five minutes—with the C.I. prior to the drug buy. Holliman concludes that if the jury knew of the limited time police had to initially search the C.I. and her car, it would have questioned the thoroughness of the search. From this, the jury could have concluded that the cocaine recovered from the C.I. was, in fact, hers all along—having been hidden on her person or in her car.

¶18 We agree with the State's assessment that, even assuming Holliman's timeline is correct, his allegation that there was not sufficient time to conduct an adequate search prior to the controlled buy is wholly conclusory. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Without more, Holliman was not entitled to a hearing on this claim. An "evidentiary hearing is not a fishing expedition." ***State v. Balliette***, 2011 WI 79, ¶68, 336 Wis. 2d 358, 805 N.W.2d 334.

¶19 Holliman also claims that had trial counsel hired a private investigator, he would have learned how the cocaine was stored and why 0.3 grams were missing. Specifically, he would have known that evaporation was the explanation the witnesses would provide at trial. Even if trial counsel had not

brought up the weight loss, as the State aptly points out, "what difference would that have made?" *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) ("'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*.'" (Citation and brackets omitted; emphasis added)). Holliman has not shown that he was prejudiced by trial counsel's failure to investigate why the weight of the cocaine decreased after Rivamonte recovered it from the C.I.

3) ***Failure to Cross-Examine***

¶20 Next, Holliman challenges trial counsel's failure to cross-examine the C.I. and Rivamonte on the timeline of events. Holliman contends: "cross[-]examination would have shown that Rivamonte had little time to search the C.I. and her vehicle prior to the undercover drug buy. Inadequate search of the C.I.'s person and her vehicle supports Mr. Holliman's claim that the cocaine belonged to the C.I." As we previously concluded, Holliman's allegations in this regard are wholly conclusory. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶21 Holliman also takes issue with the trial counsel's failure to cross-examine the C.I. about statements in the recording, her drug use, and whether the dime-sized bag of cocaine was hers. Without this cross-examination, Holliman concludes that the jury was left with an understanding that the C.I. was a credible person.

¶22 Holliman notes that the digital recording, which includes a reference to hiding something, does not reflect what exactly the parties were talking about. There is no reference to cocaine or the use of any slang term for cocaine in the context of the exchange itself. The C.I., however, testified on direct examination

that she gave Holliman the money, he gave her the crack cocaine, she hid it at Holliman's suggestion, and she did not remember where she hid it. It is unclear what additional questions should have been asked or what the answers to such questions would have revealed.

¶23 On the issue of the C.I.'s drug use, again, it is unclear what questions Holliman believes should have been asked and how the C.I.'s answers would have been helpful to Holliman's case. The jury knew that the C.I had been arrested for a drug offense and charged as a result. The jury also heard that the C.I. told Rivamonte she would be willing to testify about drug buys or provide information regarding drug dealers in the Milwaukee area, "to prevent her case from getting her in a lot of trouble." The C.I. testified on direct that she was in a program through drug treatment court with regard to the pending cases against her, that she was being treated for drug abuse issues, and that she was using narcotics the month the controlled buy occurred. Holliman does not explain what additional information should have been elicited by trial counsel.

¶24 Lastly, regarding trial counsel's failure to ask the C.I. "whether the dime-sized crack cocaine was in fact hers," Holliman does not explain how he was prejudiced. We agree with the State that after the C.I. testified that Holliman gave her the cocaine, "[i]t defies credulity to suggest that had [trial] counsel asked her whether the cocaine actually was hers, she would have admitted … that she had just lied about purchasing the cocaine from Holliman and that it was hers all along."

¶25 "When a defendant claims that trial counsel was deficient for failing to present testimony, the defendant must allege with specificity what the particular witness would have said if called to testify." ***State v. Arredondo***, 2004 WI App 7,

¶40, 269 Wis. 2d 369, 674 N.W.2d 647. Holliman has failed to shoulder this burden.

4) ***Failure to Object***

¶26 Holliman argues defense counsel was ineffective for objecting only once during the two-day trial. He then identifies two objections that he believes trial counsel should have made: (1) an objection to the playing of the audio recording in its entirety; and (2) an objection to the C.I.'s testimony about setting up a future drug buy.

¶27 According to Holliman, trial counsel's failure to object to the playing of the entire audio recording allowed the jury to hear a conversation started by the C.I. about setting up a future drug buy. He also claims trial counsel should have objected to the C.I.'s testimony about setting up a future drug buy. Holliman submits that allowing a conversation about a future drug buy that never happened was highly prejudicial and irrelevant.

¶28 Holliman does not explain why this evidence was not relevant. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address arguments that are undeveloped). In any event, we disagree. As Holliman himself points out, there is no reference to cocaine or any slang term for cocaine during the portion of the recording when the exchange occurred. Consequently, we, like the State, conclude that the fact that immediately after this key portion of the recording, the C.I. and Holliman had a discussion about the cost of an "8-ball" and a "quarter" had a tendency to make it more probable that a drug transaction had just occurred. *See* WIS. STAT. § 904.01 (Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.").

¶29 Additionally, Holliman argues that counsel should have objected to the recording because "[w]oven into the highly prejudicial discussion of a future drug buy was the C.I.'s statements that she needed to buy and sell in the future to support her children, which gave jurors a reason to be sympathetic to the C.I." The jurors, however, knew that the C.I. was working with police and that this was a controlled buy, where the money and the recorder were provided to her. From this we are unable to jump to the conclusion that the jurors viewed the C.I. as a victim.

¶30 Finally, Holliman asserts: "Because defense counsel provided successor counsel with a blank CD marked as the audio recording, there is no evidence defense counsel had in his possession or had reviewed the audio recording prior to the trial." This is speculative insofar as the fact that the CD provided to postconviction counsel was blank does not automatically demonstrate that trial counsel did not review the recording prior to trial. Moreover, as detailed above, even if trial counsel had objected to the portion of the recording relating to a future drug buy, there is no indication that a motion *in limine* or an objection would have been sustained. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (counsel is not deficient for failing to pursue a meritless motion).

¶31 Holliman submits that considering the circumstances of the various errors he alleges as a whole should lead us to conclude that he was entitled to a hearing. We disagree. *See* ***State v. Marhal***, 172 Wis. 2d 491, 507, 493 N.W.2d

758 (Ct. App. 1992) ("Zero plus zero equals zero." (Citations; brackets; and one set of quotations omitted.)).

By the Court.—Judgment and order affirmed.

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