COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-1708

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

STATE OF WISCONSIN EX REL RODNEY ROWSEY,

PETITIONER-APPELLANT,

V.

KENNETH MORGAN, WARDEN,
RACINE CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Rodney Rowsey appeals from an order denying his petition for a writ of habeas corpus. He also appeals from an order denying his motion for reconsideration. He argues that his habeas corpus petition and reconsideration motion sufficiently alleged that he received ineffective assistance

of counsel at a parole revocation proceeding, and that the trial court, therefore, erred in denying the petition and motion without holding an evidentiary hearing. We affirm.

I. BACKGROUND

On March 3, 1994, Rowsey was convicted of burglary, battery, criminal damage to property, and violating a restraining order. Rowsey was released on parole on October 31, 1995. On June 30, 1996, Rowsey's parole was revoked based upon allegations that, on June 11, 1996, he had tested positive for cocaine use; that, on June 15, 1996, he had hit and kicked Martha Nathaniel; and that, on June 15, 1996, he had violated a restraining order that was filed against him by Nathaniel. Although no transcript of the revocation proceeding has been provided on appeal, the administrative law judge's findings of fact and conclusions of law indicate that: (1) the allegations concerning Rowsey's cocaine use were substantiated by a urinalysis and Rowsey's admissions to Agent Mary Olson; (2) the remaining allegations were substantiated by testimony from Nathaniel; and (3) although Rowsey testified, his testimony was internally inconsistent and directly contradicted by the testimony from Olson and Nathaniel. The substance of Rowsey's testimony, however, is not in the record.

On April 18, 1997, Rowsey filed a petition for a writ of habeas corpus, alleging that his counsel at the revocation hearing was ineffective. Specifically, Rowsey alleged:

> a. Counsel did not meet with the petitioner or talk to him at any time prior to the morning of the hearing. As a result, alibi witnesses that could have given testimony exonerating petitioner of the most serious allegation underlying the revocation, the battery of Martha Nathaniel,

> could not be subpoenaed for the hearing, causing prejudice to the petitioner at the hearing.
>
> b. Counsel had difficulty staying awake during her meeting with petitioner prior to the hearing.
>
> ….
>
> f. Counsel did not understand the standards governing parole revocation, which is evident from the copy of the transcript of the parole revocation hearing, attached and labelled [sic] Exhibit B.[1]

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[1] Rowsey's petition contained additional allegations of ineffective assistance; however, Rowsey has conceded on appeal that those allegations are insufficient to warrant a hearing. Although Rowsey's allegations assert that the transcript of the parole revocation hearing is attached to his petition as Exhibit B, the exhibit contains only the last two pages of the transcript, which reflect only the final statements of the parties, as follows:

> ADMINISTRATIVE LAW JUDGE: Is there any final statement for the department today?
>
> AGENT OLSON: Yes. It's my opinion, it's the opinion of the Department that Mr. Rowsey has been untruthful under supervision, that his parole should be revoked and that the allegations that we've put forth today have been proven.
>
> ADMINISTRATIVE LAW JUDGE: Attorney Peterson, any final statements?
>
> ATTORNEY PETERSON: Oh yes, very briefly, Your Honor. I will ask that you hold open your decision to see if Mr. Rowsey's going to be accepted by DIS and I would also like to say that I, that, ask that you consider that the allegations by Ms. Nathaniel are not substantiated by a criminal case. Apparently there is no (inaudible) Court case against Mr. Rowsey in regard to the incident that occurred on June 15th involving her and so I would ask that you consider that. Thank you, Your Honor.
>
> ADMINISTRATIVE LAW JUDGE: Okay. With regard to holding this open for response from Intensive Sanctions, there are some cases where I do that. I would not do it in this case where there's a battery conviction because the standard procedure of DIS is to reject anyone with assaultive history. So, with both the battery and the domestic violence as well as the allegations here that were violent conduct, there's no way Intensive Sanctions would take it, so I'm not going to keep the record open for that. Anything else before we turn the tape off for today? Agent Olson?
>
> AGENT OLSON: No, sir.

(continued)

On April 23, 1997, the trial court denied Rowsey's petition for habeas corpus. On April 30, 1997, Rowsey filed a motion for reconsideration. In the motion, Rowsey argued, among other things, that "[b]ecause of petitioner's counsel's gross misunderstanding of the law, she did not subpoena alibi witnesses, who would have testified that, at the time of the alleged battery against Martha Nathaniel, Petitioner was at home with his parents." On May 5, 1997, the trial court denied Rowsey's motion for reconsideration.

II. DISCUSSION

Rowsey argues that the trial court erred in denying his habeas corpus petition and reconsideration motion without a hearing. He argues that his allegations were sufficient to raise an issue of fact as to whether his counsel was ineffective at the parole revocation hearing.[2]

If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996).

> ADMINISTRATIVE LAW JUDGE: Attorney Peterson?
>
> ATTORNEY PETERSON: No, Your Honor.
>
> ADMINISTRATIVE LAW JUDGE: Okay, with that we'll go off the record.

[2] Rowsey argues, and the State concedes, that Rowsey had the right to effective assistance of counsel at his revocation hearing, *see* WIS. ADM. CODE § HA 2.05(3)(f) (granting parolees the right to counsel at revocation hearings); ***State ex rel. Schmelzer v. Murphy***, 201 Wis.2d 246, 253, 548 N.W.2d 45, 48 (1996) (statutory grant of the right to counsel includes the right to effective assistance of counsel), and that a petition for a writ of habeas corpus is a proper vehicle through which to pursue relief for ineffective assistance of counsel at a parole revocation hearing, *see* ***State v. Ramey***, 121 Wis.2d 177, 182, 359 N.W.2d 402, 405 (Ct. App. 1984).

Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review de novo. ***Id.***

> However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Id., 201 Wis.2d at 309–310, 548 N.W.2d at 53 (citations omitted). We will reverse the trial court's discretionary decision to deny an evidentiary hearing only for an erroneous exercise of discretion. *See* ***id.***, 201 Wis.2d at 311, 548 N.W.2d at 53.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to establish both that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis.2d 219, 232–236, 548 N.W.2d 69, 74–76 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

As noted, Rowsey alleged that his trial counsel was deficient in failing to subpoena alibi witnesses who would have testified that he was at home with his parents at the time that he was alleged to have battered Nathaniel. In his petition for habeas corpus, Rowsey alleged that he was prejudiced by this claimed deficiency; however, he failed to allege how he was prejudiced. In his motion for reconsideration, Rowsey stated: "The issue of prejudice cannot be resolved by this brief, but would properly be addressed at a hearing on the issue. That prejudice

resulted from failure to call alibi witnesses, however, would seem to be self-evident." Rowsey also alleged in his petition that his trial counsel was deficient because she had trouble staying awake during their meeting prior to the revocation proceeding, and because she did not understand the standards governing the proceeding. He made no allegation of prejudice with respect to these claims.

These allegations are insufficient to warrant an evidentiary hearing. With respect to Rowsey's claim that his counsel had trouble staying awake during their meeting and his claim that she did not understand the applicable standards, Rowsey failed to explain how these alleged facts affected counsel's performance at the revocation proceeding, and thus failed to sufficiently allege either deficient performance or prejudice based upon these assertions.[3] With respect to Rowsey's alibi-witness claim, Rowsey failed to specifically identify the alibi witnesses whom he claims that his trial counsel should have subpoenaed; as phrased, Rowsey's assertion may or may not refer to his parents, and he makes no offer of proof either as to the precise nature of what his "alibi witnesses" would have said, or the personal-knowledge foundation for their testimony, *see* RULE 906.02, STATS.[4] Rowsey's assertions supporting his claim of prejudice are thus

[3] Relying on ***Javor v. United States***, 724 F.2d 831, 833 (9th Cir. 1984), for the proposition that "when an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary," Rowsey urges us to presume prejudice in his case. Rowsey concedes that his counsel did not fall asleep during the revocation proceeding, and his petition does not allege that counsel fell asleep during their meeting. We therefore find ***Javor*** inapposite and decline to presume prejudice.

[4] On appeal, Rowsey argues that he was prejudiced by his counsel's failure to present the alibi witness testimony that he was with his parents at the time of the alleged offenses against Nathaniel because there is a reasonable probability that the trial court would have found that he did not commit the offenses against Nathaniel and that the trial court would not have revoked his parole based upon his drug use alone. Rowsey did not include this allegation in his motions to the trial court.

conclusory. *See* ***State v. Washington***, 176 Wis.2d 205, 216, 500 N.W.2d 331, 336 (Ct. App. 1993) (a postconviction motion "must contain at least enough facts to lead the trial court to conclude that an evidentiary hearing is necessary").[5]

By the Court.—Orders affirmed.

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

[5] Under ***State v. Bentley***, 201 Wis.2d 303, 309–310, 548 N.W.2d 50, 53 (1996), a trial court may, in its discretion, deny a postconviction motion without an evidentiary hearing if the allegations themselves are insufficient or if the record conclusively demonstrates that the defendant is not entitled to relief. As noted, Rowsey has not provided the record of the revocation proceeding on appeal; we are, therefore, unable to analyze whether the record additionally supports the trial court's decision to deny Rowsey's petition and motion without a hearing. We are, of course, bound by the record as it comes to us. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). It is the appellant's duty to ensure that the record is sufficient to address the issues raised on appeal. *See* ***State Bank of Hartland v. Arndt***, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986); RULE 809.15(1)(a)(13), STATS. (the record on appeal shall include a transcript of reporter's notes). Indeed, when the record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. Thus, we must assume that the record of the revocation proceeding conclusively demonstrates that Rowsey is not entitled to relief and thereby supports the trial court's decision to deny Rowsey's petition and motion without a hearing.