COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1154-CR **Cir. Ct. No. 2012CF5540**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAKAJUST K. SCOTT,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Sakajust K. Scott appeals a judgment of conviction entered after a jury found him guilty of first-degree intentional homicide while using a dangerous weapon. He also appeals an order denying postconviction relief. He claims his trial counsel was ineffective for failing to seek suppression of

his custodial statement on the ground that he invoked his right to counsel at the time of his arrest. The trial court rejected his claim without a hearing, and we affirm.

BACKGROUND

¶2 In mid-October 2012, Henry Bishop was shot and killed in a gas station parking lot. On November 6, 2012, at 4:30 p.m., the police arrested Scott in a Milwaukee residence and took him to jail. At approximately 8:15 p.m., police interrogated him after reading him his ***Miranda*** rights.[1] During the course of the interrogation, he admitted that he shot Bishop. The State charged Scott with first-degree intentional homicide while using a dangerous weapon.

¶3 Scott made his initial appearance with a lawyer who did not appear in the case again. Over the course of seven months, two more lawyers represented Scott but ultimately withdrew from the case. The state public defender then appointed a fourth and final trial lawyer to represent Scott. With the assistance of that lawyer, Scott moved to suppress his custodial statement on the ground that he was under the influence of drugs and alcohol at the time of the interrogation, and therefore his statement was not voluntary. The trial court conducted an evidentiary hearing and denied the motion.

¶4 The matter proceeded to trial. The evidence included Scott's inculpatory custodial statement. The jury found Scott guilty as charged.

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966) (holding that before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one).

¶5 Scott moved for postconviction relief. He alleged that his trial counsel was ineffective for not raising an alternative ground for suppressing his custodial statement, namely, that Scott invoked his right to counsel at the time of his arrest. The trial court rejected the claim without a hearing. Scott appeals.

ANALYSIS

¶6 A defendant who claims that trial counsel was ineffective must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's performance was deficient and whether any 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). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions were "professionally unreasonable." *See* ***Strickland***, 466 U.S. at 691. 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. If a defendant fails to satisfy one component of the analysis, the court need not consider the other. ***Id.*** at 697.

¶7 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 pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Nonetheless, a defendant alleging ineffective assistance of counsel is not automatically entitled to a hearing. A trial court must grant a hearing only if the postconviction motion contains sufficient allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 13, 274 Wis. 2d 568, 682 N.W.2d 433. To be

sufficient, the motion should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *See* ***id.***, ¶23. Whether the motion contains sufficient allegations of material fact to earn a hearing presents an additional question of law for our independent review. *See* ***id.***, ¶9. If the convicted defendant does not allege sufficient material facts that, if true, would entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the trial court has discretion to deny a postconviction motion without a hearing. *See* ***id.*** We review a trial court's discretionary decisions with deference. ***Id.***

¶8 Scott alleged in his postconviction motion that his trial counsel was constitutionally ineffective for overlooking a basis to seek suppression of his custodial statement, specifically, that police should not have interrogated him when he reached the jail because he had earlier requested an attorney during the course of his arrest. In support of this claim, he relied on affidavits executed by two people who stated that they were present while Scott was being arrested and that they heard him say he wanted a lawyer. On appeal, he contends the trial court erred by denying his claim without a hearing. We disagree.

¶9 Preliminarily, we address a flaw in the trial court's analysis. The trial court concluded that the affidavits Scott submitted with his postconviction motion "are hearsay and therefore insufficient to show that the defendant requested an attorney at the time of his arrest." The State correctly concedes error on this point. A defendant may move for postconviction relief based on matters outside the record, *see* ***State v. Balliette***, 2011 WI 79, ¶¶56-57, 336 Wis. 2d 358, 805 N.W.2d 334, and such a motion may, and likely often will, include allegations

in the form of hearsay, *see* WIS. STAT. § 908.01(3) (2013-14)[2] (defining hearsay as an out-of-court statement offered for its truth). While hearsay is generally inadmissible as evidence, *see* WIS. STAT. § 908.02, a convicted person need not include a theory of admissibility with every factual assertion in a postconviction motion. *See* ***State v. Love***, 2005 WI 116, ¶36, 284 Wis. 2d 111, 700 N.W.2d 62. Rather, the convicted person is only required to offer sufficient allegations of material fact that, if true, warrant relief. ***Id.***, ¶50.

¶10 Although the trial court erroneously disregarded as hearsay the affidavits that Scott offered in support of his motion, nonetheless, we agree with the trial court's ultimate conclusion that the postconviction motion was inadequate to require a hearing. *See* ***State ex rel. West v. Bartow***, 2002 WI App 42, ¶7, 250 Wis. 2d 740, 642 N.W.2d 233 (trial court will be affirmed if it reached the correct result but articulated an incorrect rationale).

¶11 Scott contends his trial counsel should have moved to suppress his custodial statement on the ground that he requested a lawyer at the time of his arrest. To prevail on this claim, Scott was required to show that he told his trial counsel about his alleged request for a lawyer. *Cf.* ***Allen***, 274 Wis. 2d 568, ¶24 (defendant sufficiently alleges material facts supporting claim of ineffective counsel by describing information not presented at trial and stating that defendant disclosed that information to counsel). Although Scott asserts "it is [his] position that trial counsel should always investigate whether a defendant requested an attorney at any time from the time of arrest to the time of questioning," he offers

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

no citation for this proposition. In fact, as the United States Supreme Court long ago explained, "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. *In particular, what investigation decisions are reasonable depends critically on such information*." ***Strickland***, 466 U.S. at 691 (emphasis added). This court has held that a defendant's "contention that his lawyer was ineffective for not investigating something that [the defendant] could have revealed to [the lawyer] at the time is wholly without merit." ***State v. Jones***, 2010 WI App 133, ¶33, 329 Wis. 2d 498, 791 N.W.2d 390.

¶12 In the instant case, the postconviction motion does not show that Scott ever told his trial counsel that he requested an attorney while being arrested. The only allegation in this regard is a single clause in the body of the postconviction motion stating that Scott "attempted to raise the issue with defense counsel prior to trial, but no action was taken to address the issue." This oblique assertion is inadequate to satisfy the requirements for a sufficient postconviction motion. *See* ***Allen***, 274 Wis. 2d 568, ¶24. Scott neither explains how he attempted to raise the issue of his request for counsel, nor precisely when he made his attempt, nor does he describe what he did in aid of that attempt. *See* ***id.***, ¶23. Moreover, Scott fails to reveal who among his four trial lawyers was the person he attempted to inform about his claim. *See* ***id.*** Our supreme court concluded that a defendant who had two attorneys filed an "ambiguous and plainly deficient" postconviction motion because it referred to only one attorney as ineffective and did not identify that person. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶52-53, 360 Wis. 2d 522, 849 N.W.2d 668.

¶13 In sum, Scott's postconviction motion failed to allege sufficient material facts that, if true, would warrant relief. The trial court therefore had no

obligation to hold a hearing before denying the claim. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶14 Further, we agree with the State that Scott's postconviction motion was insufficient for an additional and independent reason. The law is currently unclear as to whether a defendant may effectively invoke the Fifth Amendment right to counsel at a time when custodial interrogation is not imminent or impending.[3] *See* ***State v. Hambly***, 2008 WI 10, ¶¶2, 4-5, 307 Wis. 2d 98, 745 N.W.2d 48. Because a defendant's lawyer in a criminal case "is not required to object and argue a point of law that is unsettled," *see* ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994), Scott's trial lawyers had no obligation to pursue the claim Scott raises now.

¶15 To explain our conclusion, we briefly review the current state of the law on the issue Scott presents. In ***Hambly***, our supreme court recognized that a suspect in custody may invoke the right to counsel when interrogation is actually impending. *See* ***id.***, 307 Wis. 2d 98, ¶24. The court then advised it was "divided on the question whether to adopt a temporal standard ... that a suspect may effectively invoke the Fifth Amendment ***Miranda*** right to counsel when a suspect is in custody and has made an unequivocal request to speak with an attorney even before interrogation is imminent or impending." ***Hambly***, 307 Wis. 2d 98, ¶4 (quotation marks and footnote omitted). The ***Hambly*** court ultimately did not

[3] The right to counsel under the Fifth Amendment to the U.S. Constitution was recognized in ***Miranda*** and "applies whenever a defendant is subjected to custodial interrogation.... That right to counsel is not directly conferred by the [F]ifth [A]mendment, but rather is a prophylactic rule designed to safeguard the privilege against self-incrimination that is directly conferred by the [F]ifth [A]mendment." ***State v. McNeil***, 155 Wis. 2d 24, 32, 454 N.W.2d 742 (1990), *aff'd*, 501 U.S. 171 (1991) (citations omitted).

resolve the question. *See* ***id.***, ¶¶100-01. Neither the parties to this appeal nor our own research reveal Wisconsin decisions after ***Hambly*** that further develop the issue. Accordingly, our law currently provides that a suspect in custody may successfully invoke the Fifth Amendment right to counsel only when interrogation is imminent or impending.

¶16 Scott did not allege in his postconviction motion that an interrogation was imminent or impending when he allegedly requested counsel during his arrest. The record shows that an interrogation was not, in fact, imminent or impending; nearly four hours passed before police began to question him. Moreover, although Scott asserts in his appellate brief that he spent those four hours waiting in an "interview room," he asserted in his postconviction motion only that he was in a "room," and he testified in pretrial proceedings that he was in the "bullpen," which is a holding area for prisoners. *See bull pen*, BLACK'S LAW DICTIONARY **(**10th ed. 2014); *see also* ***State v. Reed***, 2002 WI App 209, ¶8, 256 Wis. 2d 1019, 650 N.W.2d 885.

¶17 Because Scott did not demonstrate that an interrogation was imminent at the time he allegedly requested counsel, his postconviction motion necessarily failed to show that any of his attorneys performed deficiently by forgoing an argument that police violated his right to counsel when they questioned him after he allegedly made that request. His trial attorneys had no obligation to pursue the unsettled theory that a request for counsel at the time of arrest when interrogation was not imminent bars police from questioning a suspect

later without a lawyer present.[4] "[I]neffective assistance of counsel cases should be limited to situations where the law or duty is clear." ***McMahon***, 186 Wis. 2d at 85.

¶18 Accordingly, Scott's postconviction motion did not demonstrate a right to relief, and he therefore was not entitled to develop the matter in an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. In light of our discussion, we are satisfied that the trial court properly denied his claim without a hearing. We affirm.

By the Court.—Judgment and order affirmed.

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

[4] Scott argues that Wisconsin law predating ***State v. Hambly***, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48, establishes that any request for counsel by a person in custody prevents police from interrogating that person without a lawyer present. As evidence, he points to ***State v. Collins***, 122 Wis. 2d 320, 363 N.W.2d 229 (Ct. App. 1984). In fact, the supreme court discussed ***Collins*** at length in ***Hambly*** and, far from supporting Scott, the discussion illuminates the uncertainty surrounding both the issue of when a suspect may invoke the right to counsel and the meaning of ***Collins***. The ***Hambly*** court stated that ***Collins*** "may be read" as adopting a standard "that a suspect may effectively invoke his or her Fifth Amendment ***Miranda*** right to counsel by requesting counsel any time the suspect is in custody." ***Hambly***, 307 Wis. 2d 98, ¶30. The ***Hambly*** court itself, however, did not expressly adopt such a reading of ***Collins***. Rather, the supreme court in ***Hambly*** observed: "[t]he ***Collins*** court quotes ***Miranda*** for the rule that an invocation of counsel is effective if it comes 'at any stage of *the process*.' Neither ***Collins*** nor ***Miranda*** states precisely what is denoted by the term 'process' or when that 'process' begins or ends." ***Hambly***, 307 Wis. 2d 98, ¶30 n.29 (emphasis added, internal citations omitted). Further, ***Hambly*** noted an opinion by a sister jurisdiction characterizing ***Collins*** as a case "involving a suspect who 'invoked his right to have counsel present during his *impending interrogation*.'" *See* ***Hambly***, 307 Wis. 2d 98, ¶31 n.31, citing ***State v. Torres***, 412 S.E.2d 20, 25 (N.C. 1992) (emphasis added).