COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP982 **Cir. Ct. No. 2013CF384**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DESMOND ANTHONY MATTIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed*.

¶1 STARK, P.J.[1] Desmond Mattis, pro se, appeals an order denying his motion for postconviction relief without a hearing. We affirm.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶2 Mattis was charged with three counts: (1) attempting to flee or elude a traffic officer; (2) disorderly conduct with a domestic abuse enhancer; and (3) contact after a domestic abuse arrest. According to the complaint, Mattis was arrested outside of the residence of P.H.—his then-girlfriend—in response to a 911 call. He subsequently was arrested again after engaging in a high-speed chase with law enforcement after he was discovered near P.H.'s apartment in violation of a seventy-two-hour no-contact order. Mattis entered no-contest pleas to counts one and two, and entered into a deferred prosecution agreement on the third count.

¶3 Mattis filed a pro se motion pursuant to WIS. STAT. § 974.06(2). He argued that his trial counsel was ineffective for failing to investigate the complaint, that new evidence regarding P.H.'s credibility existed, and that he was mentally incompetent at the time he entered his pleas. Mattis attached a "memorandum" to his motion, in which he provided his own account of the incident prompting the first arrest, as well as a "Motion for admissibility of new evidence" regarding P.H.'s credibility and "violent and deceptive character."[2] The circuit court denied Mattis's postconviction motion without a hearing, concluding Mattis's claims lacked merit.

¶4 Mattis's appellate arguments are difficult to follow, do not clearly identify the circuit court's claimed error, or indicate what relief Mattis requests on

[2] In responding to this motion, the State argued Mattis failed to conform to the requirements of WIS. STAT. § 974.06(2) because Mattis did not file a notice of intent to pursue postconviction relief within twenty days after he was sentenced as required by WIS. STAT. RULE 809.30(2)(b). The State does not contend on appeal that Mattis's claims were untimely or otherwise procedurally barred under § 974.06, so we deem that argument abandoned. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344-45, 516 N.W.2d 463 (Ct. App. 1994).

appeal.[3] We nevertheless discern the issue is whether Mattis is entitled to an evidentiary hearing on the claims raised in his WIS. STAT. § 974.06 motion.

¶5 The standard of review for a circuit court's denial of a postconviction motion without an evidentiary hearing is mixed. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). An evidentiary hearing on a postconviction motion is only required if the defendant alleges "sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle [the defendant] to the relief he [or she] seeks." ***State v. Romero-Georgana***, 2014 WI 83, ¶37, 360 Wis. 2d 522, 849 N.W.2d 668 (citation omitted). Whether the defendant has alleged sufficient material facts in a postconviction motion is an issue of law reviewed de novo. ***Bentley***, 201 Wis. 2d at 310. If a defendant's postconviction motion does not allege sufficient facts, only presents conclusory allegations, or is refuted by the record, we review the circuit court's decision to grant or deny a hearing for an erroneous exercise of discretion. ***Id.***

¶6 Mattis first argues that newly discovered evidence exists in this case. He points to his unsworn affidavit filed in support of his postconviction motion describing the original incident and his own appraisal of P.H.'s credibility and violent character. A plea may be withdrawn based upon newly discovered evidence if the defendant proves: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the

[3] Mattis's briefing contains several other deficiencies. Mattis does not provide citations to the record in violation of WIS. STAT. RULE 809.19(1)(d)-(e). Mattis also routinely refers to the victim by name rather than another identifier in violation of WIS. STAT. RULE 809.86(4). Finally, Mattis cites several documents in his appendix bearing upon his mental health history that are not part of the record on appeal, which we shall not consider. *See* ***Parr v. Milwaukee Bldg. & Constr. Trades***, 177 Wis. 2d 140, 144 n.4, 501 N.W.2d 858 (Ct. App. 1993).

evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Fosnow***, 2001 WI App 2, ¶9, 240 Wis. 2d 699, 624 N.W.2d 883 (2000). Newly available testimony does not constitute newly discovered evidence if the defendant was aware of that testimony's existence at the time of a plea. *See* ***id.***, ¶16. Here, Mattis was aware prior to the plea hearing of his own potential testimony about the incident involving the first arrest and his concerns about the victim's truthfulness and violent character. Thus, his unsworn affidavit does not contain newly discovered evidence providing a basis for the court to hold a postconviction hearing.

¶7 Mattis next argues he was not competent to enter a plea due to his then-mental illness. In support, he attaches to his appellate brief unverified copies of what he claims are portions of his medical records and selections from medical treatises. A defendant "who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may [not] be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." WIS. STAT. § 971.13(1). A circuit court must conduct competency proceedings if there is "reason to doubt" the defendant's mental capacity based upon "the defendant's demeanor in the courtroom, colloquies with the court, or … a motion from either party." ***State v. Byrge***, 2000 WI 101, ¶29, 237 Wis. 2d 197, 614 N.W.2d 477.

¶8 Mattis provides only conclusory allegations in his postconviction motion that his severe depression did not allow him to comprehend the legal proceedings, and that the circuit court was aware Mattis was incompetent based upon the sentencing conditions requiring Mattis to "maintain current health care treatment." Competency to stand trial, however, is "a legal standard, not a medical determination." ***Id.***, ¶48. Mattis is not entitled to a hearing on his

claimed incompetency because his motion presents no legitimate evidence indicating he was incapable of understanding and participating in the proceedings. *See* ***id.***, ¶¶48-50; *see also* ***Bentley***, 201 Wis. 2d at 313-14 (defendant must provide facts allowing circuit court to meaningfully assess postconviction claims).

¶9 Furthermore, to the extent Mattis disputes the circuit court's conclusion upon denying his postconviction motion that Mattis "knowingly, voluntarily, [and] intelligently" entered a no-contest plea, he has not included a transcript of the plea hearing in the record. Mattis, as the appellant, is responsible for ensuring that the record is complete for our review. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). We thus assume, because of Mattis's failure to include the transcript in the record, that the facts within the missing transcript support the court's decision. *See* ***id.*** at 27.

¶10 Finally, Mattis alleges his trial counsel was deficient for failing to raise competency concerns during the proceedings and failing to investigate and challenge the witnesses to the incident.[4] "To state a claim for ineffective assistance of counsel, the defendant must demonstrate: (1) that his [or her] counsel's performance was deficient; and (2) that the deficient performance was prejudicial." ***Romero-Georgana***, 360 Wis. 2d 522, ¶39 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). To demonstrate deficiency, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.***, ¶40 (citing ***Strickland***, 466 U.S. at 688). To demonstrate prejudice, the defendant must show "that there is a reasonable probability that, but

[4] Mattis also alleges his trial counsel coerced him into pleading no-contest rather than going to trial. The record belies his claim. The plea questionnaire and waiver of rights form Mattis signed represents that he was not threatened or forced into the plea.

for the counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." ***Bentley***, 201 Wis. 2d at 312 (citing ***Hill v. Lockhart***, 474 U.S. 52, 59 (1984)).

¶11 As discussed above, Mattis presents no legitimate evidence indicating he was incapable of understanding and participating in the proceedings. As a result, he cannot show counsel was deficient for failing to raise an issue concerning his competency in the circuit court. As to his claim that trial counsel failed to investigate and challenge the witnesses, Mattis's motion alleges only that trial counsel told him "don't pay that any mind" when Mattis tried to bring up the reliability of the police report. He fails to allege with specificity what an investigation into the report would have revealed and how it would have altered the outcome of his case. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Mattis fails to provide specific facts showing deficiency or prejudice. Accordingly, the circuit court properly exercised its discretion by denying Mattis's motion without a hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.