

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2018

Sheila T. Reiff
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1068-CR

Cir. Ct. No. 2014CF5282

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HAROLD ALEX ROBINSON,

DEFENDANT-APPELLANT.

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

Before Lundsten, P.J., Sherman, and Blanchard, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Harold Alex Robinson appeals a judgment of conviction and an order denying postconviction relief. Robinson contends that he was denied the effective assistance of counsel at trial when his counsel failed to present alibi witnesses in his defense. He argues that the circuit court erred by denying his postconviction motion without a hearing. For the reasons set forth below, we agree that the circuit court erred by denying Robinson’s motion without a hearing. We reverse and remand for an evidentiary hearing on the motion.

¶2 Robinson was convicted at a jury trial of armed robbery. He filed a postconviction motion arguing that his trial counsel was ineffective by failing to investigate and subpoena alibi witnesses for trial. The circuit court denied the motion without a hearing. Robinson appeals.

¶3 If a postconviction motion alleges sufficient facts that, if true, would entitle the defendant to relief, the circuit court must hold an evidentiary hearing. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does not allege sufficient facts or presents only conclusory allegations, the circuit court may deny the motion without a hearing. *Id.* To allege sufficient facts that, if true, would entitle a defendant to relief on a claim of ineffective assistance of counsel, a postconviction motion must explain “the five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how” showing that counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Id.*, ¶¶23, 26. Counsel’s performance is deficient if counsel’s performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense if, absent the errors, there is a reasonable probability of a different result. *See Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). We review de novo whether a postconviction motion alleged sufficient facts to require the circuit court to hold an evidentiary hearing. *Allen*, 274 Wis. 2d 568, ¶9. Our review is limited

to the four corners of the postconviction motion, and we do not consider additional assertions contained in a brief on appeal. *Id.*, ¶27.

¶4 We turn, then, to the factual allegations set forth in Robinson’s postconviction motion. Robinson alleged the following within the four corners of the motion. Robinson informed his trial counsel that he wanted counsel to investigate two named witnesses to support Robinson’s alibi that he was providing in-home care to a man named Peter Griffin, who suffered from disabilities, at the time of the robbery. Prior to trial, Robinson’s counsel filed a notice of alibi witness naming Griffin as an alibi witness. However, counsel failed to investigate or subpoena the potential alibi witnesses for trial. At trial, Robinson testified that he was providing in-home care to Griffin at the time of the robbery, but the defense did not present any supporting alibi witnesses. Had counsel investigated the alibi and subpoenaed Griffin, Griffin “would have provided a full account of Robinson’s whereabouts during the time that the robbery occurred.” Postconviction counsel spoke with Griffin, who stated that Griffin would provide testimony “consistent with the representation made in Robinson’s notice of alibi” witness, which was that “at the time the crime is alleged to have been committed, [Robinson] was at the home of Mr. Peter Griffin’s house. At the time of the alleged crime taking place Mr. Harold Robinson was providing in home care for Mr. Griffin.” Trial counsel was deficient by failing to investigate and present Griffin’s testimony to corroborate Robinson’s alibi defense because there was no strategic purpose for failing to investigate and call the alibi witnesses listed in Robinson’s notice of alibi witness to corroborate Robinson’s testimony. Counsel’s deficient performance prejudiced Robinson because there is a reasonable probability that the jury would have reached a different result if it had heard testimony corroborating Robinson’s alibi.

¶5 We conclude that the allegations in Robinson’s postconviction motion, if true, would entitle Robinson to relief on his claim of ineffective assistance of counsel. The motion alleges the five “w’s” and one “h” of Robinson’s ineffective assistance of counsel claim: that trial counsel was ineffective by failing to investigate and call Griffin (who); that Griffin would have corroborated Robinson’s otherwise unsupported alibi defense (why, how); and that Griffin would testify that Robinson was at Griffin’s home providing in-home care for Griffin at the time the robbery occurred (what, where, when). *See Allen*, 274 Wis. 2d 568, ¶24 (explaining that a hypothetical postconviction motion that alleged ineffective assistance of counsel for failing to call a named witness who would have supported the defendant’s alibi testimony was sufficient to entitle the defendant to a hearing because it alleged “the name of the witness (who), the reason the witness is important (why, how), and facts that can be proven (what, where, when)”).

¶6 As required under *Allen*, Robinson alleged specific facts to support his claim. Robinson alleged that he told his trial counsel that Griffin would support Robinson’s alibi that Robinson was at Griffin’s home providing in-home care to Griffin at the time the robbery occurred, and that his counsel failed to investigate or call Griffin at trial. He asserted that his counsel listed Griffin as an alibi witness, but then failed to investigate Griffin or present his testimony at trial with no strategic purpose for failing to do so. Robinson alleged that his counsel’s failure to call Griffin was deficient and prejudiced Robinson because there is a reasonable probability that the jury would have reached a different result if the jury had heard Griffin’s testimony confirming Robinson’s alibi defense.

¶7 The State argues that Robinson’s postconviction motion was insufficient because it was not supported by an affidavit by Griffin. However, the

State does not cite any authority for the proposition that a postconviction motion must be supported by affidavit. It is well settled that, when we review a postconviction motion, we assume that the facts asserted in the postconviction motion are true. See *State v. Balliette*, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334; *Allen*, 274 Wis. 2d 568, ¶9. Thus, we assume the facts in Robinson's postconviction motion are true, even if not supported by affidavit.

¶8 The State also asserts that Robinson's motion failed to overcome the presumption that trial counsel rendered reasonably competent assistance. See *Balliette*, 336 Wis. 2d 358, ¶¶25, 27 (counsel is presumed to have rendered competent assistance, and it is the defendant's burden to overcome the presumption). The State argues that Robinson was required to detail what trial counsel told Robinson or postconviction counsel about counsel's decision not to present Griffin's testimony at trial. The State also asserts that trial counsel made statements at trial that indicated that trial counsel investigated and made a strategic decision not to call Griffin as a witness. We do not agree with the State that Robinson's motion fails on this basis.

¶9 To repeat, Robinson's motion asserted that trial counsel failed to investigate and call Griffin, who would have testified consistent with Robinson's stated alibi defense that Robinson was at Griffin's home providing in-home care at the time of the robbery. The motion also asserted that counsel had no strategic purpose for his failure to investigate and call Griffin as a witness. The State has not cited any authority for the proposition that a postconviction motion must include trial counsel's explanation for failing to call an alibi witness to overcome the presumption of competent assistance. Indeed, the hypothetical motion provided in *Allen* as an example of a motion that *would* be sufficient to entitle a defendant to a hearing alleged that counsel was ineffective by failing to call an

alibi witness, and contained no allegations as to how counsel would explain the failure to call the witness. *Allen*, 274 Wis. 2d 568, ¶24.

¶10 Moreover, we do not share the State's reading of the trial transcript as indicating that trial counsel made a strategic decision not to call Griffin at trial. When the court asked counsel whether the defense would call any alibi witnesses, counsel stated that counsel did not know whether he would call Griffin at that point, and that counsel had been unable to contact the second named alibi witness. The court asked whether the court should read the names of the alibi witnesses to the jury, and counsel stated that the court could read Griffin's name. Counsel's statements to the court do not indicate whether or not counsel had a conversation with Griffin and made a strategic decision not to call him as a witness.

¶11 The State also cites *Burt v. Titlow*, _ U.S. __, 134 S. Ct. 10, 17 (2013), for the proposition that the absence of evidence cannot overcome the presumption that trial counsel's performance was reasonable. In *Burt*, the defendant claimed that her trial counsel was ineffective by advising her to withdraw her guilty plea without thoroughly reviewing the strength of the State's case. *Id.* at 14, 17-18. The Supreme Court concluded that the defendant could not overcome the presumption that counsel acted reasonably to show that counsel was ineffective without evidence that her trial counsel gave her incorrect advice or failed to give her material advice. *Id.* at 17-18. While we agree that an absence of allegations will not overcome the presumption of reasonableness, here, Robinson does allege the evidence he intends to introduce: that his trial counsel failed to investigate and present Griffin's testimony, which would have supported Robinson's alibi defense, and that counsel had no strategic reason for failing to act.

¶12 We do not opine on the likely strength of Robinson’s evidence. Our opinion on that topic does not matter. “If the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing.” *Allen*, 274 Wis. 2d 568, ¶12 n.6.

¶13 Accordingly, we reverse and remand for an evidentiary hearing.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

