COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2014AP1623-CR **Cir. Ct. No. 2010CF5111**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT-PETITIONER,

V.

RAYMOND L. NIEVES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and JEFFREY A. WAGNER, Judges. *Affirmed*.

Before Kessler, Brash and Dugan, 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. This case comes before us on remand from the supreme court. The supreme court reversed our decision vacating Raymond L. Nieves's judgment of conviction and remanding for a new trial. *See* ***State v. Nieves***, No. 2014AP1623-CR, unpublished slip op. (WI App Apr. 5, 2016) (***Nieves I***), *rev'd*, 2017 WI 69, 376 Wis. 2d 300, 897 N.W.2d 363 (***Nieves II***). On remand, we conclude that the postconviction court properly denied Nieves's ineffective assistance of counsel claim without holding a hearing. Therefore, we affirm.[1]

I. BACKGROUND

¶2 At this point in the proceedings, it suffices to state that a jury found Nieves guilty of first-degree intentional homicide, as a party to a crime, with the use of a dangerous weapon, and of attempted first-degree intentional homicide, as a party to a crime, with the use of a dangerous weapon. Nieves filed a postconviction motion containing the following arguments: (1) the trial court erred by failing to sever Nieves's case from that of his co-defendant; (2) the trial court improperly allowed inadmissible hearsay; and (3) his trial counsel was ineffective. *See* ***Nieves I***, No. 2014AP1623-CR, ¶6.

¶3 The postconviction court denied the motion without a hearing, and Nieves appealed. This court then reversed and remanded for a new trial after concluding that the trial court erred in denying Nieves's motion to sever and in admitting unreliable and prejudicial hearsay testimony. *See* ***id.***, ¶1. In resolving

[1] The Honorable Richard J. Sankovitz presided over the trial and entered the judgment of conviction. The Honorable Jeffrey A. Wagner denied the postconviction motion.

the appeal, we did not address Nieves's claim that his trial counsel was ineffective for failing to properly investigate a potential alibi defense. *See* ***id.***, ¶44.

¶4 Our supreme court subsequently granted the State's petition for review. *See* ***Nieves II***, 376 Wis. 2d 300, ¶14. The supreme court reversed our decision, reinstated Nieves's judgment of conviction, and remanded this matter to us for consideration of Nieves's ineffective assistance of counsel claim. *See* ***id.***, ¶4.

¶5 Consequently, the sole issue before us is whether Nieves's trial counsel gave him ineffective assistance by failing to present an alibi defense. Nieves claims a ***Machner*** hearing was warranted. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). Additional background details will be set forth below as necessary.

II. DISCUSSION

¶6 According to Nieves, "[t]he most obvious problem" in his case was the omission of his alibi defense at trial. Nieves argues his trial counsel was ineffective in the following regards: (1) for failing to conduct an adequate investigation and obtain pretrial monitoring records from Waukegan, Illinois, which he claims would provide evidence that he was not in Milwaukee at the time of the crimes; (2) for failing to have his cell phone records reviewed by an expert; (3) for failing to interview his family members who would confirm additional facts relevant to his alibi defense; and (4) for failing to file a notice of alibi to preserve his right to present that defense at trial.

¶7 To prevail on an ineffective assistance of counsel claim, a defendant 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). If the defendant fails to prove one component, a court need not consider the other. *See* ***id.*** at 697. To prove deficiency, Nieves must show that trial counsel's actions or omissions were "professionally unreasonable." *See* ***id.*** at 691. To prove prejudice, Nieves must show that trial counsel's errors had an actual, adverse effect on the defense. *See* ***id.*** at 693. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶8 A defendant claiming ineffective assistance of trial counsel must seek to 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 hearing on the claim. A postconviction court must grant a hearing only if the motion contains 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. 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. 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. If the 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 postconviction court has discretion to deny a motion without a hearing. *See* ***id.***, ¶9. We review the postconviction court's discretionary decisions with deference. *See* ***id.***

¶9 Nieves argues that his postconviction motion "presented an alibi or pseudo-alibi defense [that was] not investigated or preserved by [his] trial

attorney." The "thrust" of Nieves's defense was that he was living with his grandmother, reporting regularly to pretrial monitoring services, and was not in Milwaukee when the crimes occurred. He claimed that the following were key pieces of supporting evidence:

- Pretrial monitoring records showing that Nieves participated in pretrial monitoring services during the time period of the crimes (April 2009) and that on the night of the crimes (April 10-11), he called pretrial monitoring services from phone number 623-2089.

- The affidavits of Hector Perez and Patricia Perez. Patricia Perez, Nieves's grandmother, asserts that he was living with her at the time of the crimes and that her phone number is 847-623-2089. Hector Perez, Nieves's brother, asserts that he lived at the same address and that he and Nieves worked for the same company during that time period.[2]

- Cell phone records for the number attributed to Nieves and an analysis of those records by cell phone expert Michael O'Kelly, which show that the phone was not in the Milwaukee area the night of the incident. Also a search warrant affidavit indicating that police believed this phone number belonged to Nieves.

¶10 In his postconviction reply brief, Nieves argued that the pretrial monitoring records in combination with the cell phone records and affidavits are sufficient to undermine confidence in the outcome of his trial. According to Nieves, this evidence would have established that he was not in Milwaukee at the time the underlying crimes were committed. We disagree.

[2] Although Hector Perez avers that he and Nieves worked together in an effort to establish that Nieves was in Waukegan when the crimes occurred, he does not provide the employer's address.

¶11 Here, there is no need for this court to make a determination of deficiency because Nieves has failed to show that the alleged deficiency prejudiced him. *See* ***Strickland***, 466 U.S. at 697.

¶12 As summed up by the postconviction court in its decision denying Nieves's motion:

> The crime occurred at approximately 12:35 a.m. on April 11, 2009. In all of the documentation attached to the defendant's motion, there is nothing to show that he had a cell phone with the number 847-770-8905 in his possession on April 10 or 11, 2009[3] or that he was home with his grandmother at 12:35 a.m. on April 11, 2009. Mr. O'Kelly's declaration assumes a fact not in evidence (possession of the cell phone), and the court agrees with the State that the defendant's argument is conclusory at best and does not establish that the defendant could not have been at the scene of the crimes at the time the crimes were committed. The court also finds that even if this documentation had been presented to the jury, there is not a reasonable probability the outcome of the trial would have been any different[.]

We adopt this summation of the shortcomings related to the evidence and allegations set forth in Nieves's postconviction motion. *See* WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009) ("When the trial court's decision was based upon a written opinion ... of its grounds for decision that adequately express the panel's view of the law, the panel may incorporate the trial court's opinion or statement of grounds, or make reference thereto."); *see also* ***Allen***, 274 Wis. 2d 568, ¶15 (categorically declaring that a postconviction motion requires more than

[3] The closest Nieves gets to alleging that he was in possession of the cell phone at the time of the crimes are his postconviction counsel's averments in an attachment to Nieves's postconviction reply brief. Specifically, postconviction counsel avers that Nieves told him his personal cell phone number was 847-770-8905 and that postconviction counsel "believe[d] Nieves [would] testify that he was carrying this phone at all times during the time period of the alleged [crimes]." The latter speculative averment is inadequate to warrant a hearing.

conclusory allegations). We further note that as to the affidavits of Patricia Perez and Hector Perez, Nieves's postconviction motion fails to explain why living and working in Waukegan somehow meant that Nieves could not have been in Milwaukee on the night of the shooting.

¶13 Because we conclude that Nieves did not allege sufficient facts to establish that he is entitled to a ***Machner*** hearing on his ineffective assistance claim, we affirm the postconviction court.

By the Court.—Judgment and order affirmed.

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