COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP868 **Cir. Ct. No. 1993CF934055**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CASEY M. FISHER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Kessler, P.J., Brennan and Dugan, JJ.

¶1 BRENNAN, J. Casey M. Fisher appeals from an order denying without a hearing his second motion for a new trial. A jury convicted Fisher of armed robbery and first-degree intentional homicide for the October 26, 1993 murder of Yaser Mousa, a grocery store owner who was a friend of Fisher's.

Fisher was seen in Mousa's vehicle at the store less than fifteen minutes before Mousa was found dead in his vehicle three blocks away. Witnesses testified that Fisher talked about the crime both before and after he committed it.

¶2 In his 1996 direct appeal, Fisher chose to proceed *pro se*. The trial court denied his motion for a new trial and this court affirmed.[1]

¶3 In 2017, Fisher, through counsel, filed the WIS. STAT. § 974.06 (2017-18)[2] motion underlying this appeal.[3] Fisher argued that he is entitled to a new trial because trial counsel failed to present evidence from a police report that described a lead police investigated on the night of the shooting. The lead consisted of an unidentified man's statement to police that the shooting had been done by three men who had then run to a nearby drug house.

¶4 The State first argues that Fisher has not shown a "sufficient reason" for failing to raise this claim in his first appeal such that he can overcome ***Escalona***'s procedural bar to successive motions. *See* WIS. STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184, 517 N.W.2d 157 (1994)

[1] On direct appeal, Fisher argued unsuccessfully that he was entitled to a new trial based on trial counsel's failure to present certain witnesses and trial counsel's failure to object to alleged misstatements in a police report. He also challenged the trial court's failure to grant a continuance, but that claim was deemed waived because it had not been preserved below. ***State v. Fisher***, No. 1996AP1081, unpublished slip op. at 3-4 (WI App Mar. 11, 1997).

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[3] Fisher filed two motions, only one of which is at issue in this appeal. One was a motion under WIS. STAT. § 974.07 seeking postconviction DNA testing of several items; the other was the motion that is the subject of this appeal. In one order, the postconviction court decided both motions. The court granted the motion as to the request for DNA testing of the bloodstain on Jones' T-shirt; it denied the motion for testing of a plastic bag and four bullet casings. Fisher has not appealed the portion of the order denying bag and bullet casing testing, and the State has not appealed the portion of the order granting Fisher's motion.

(barring successive claims except for any claim that "for *sufficient reason* was not asserted or was inadequately raised in his original, supplemental or amended postconviction motions").

¶5 Fisher argues against the procedural bar, saying he was unaware of the police report involving the drug house lead until after retaining his current postconviction counsel. *See* ***State v. Aaron Allen***, 2010 WI 89, ¶91, 328 Wis. 2d 1, 786 N.W.2d 124 (a "sufficient reason" can include "ignorance of the facts … underlying the claim"). He furnishes corroboration in the form of a letter from his appointed postconviction attorney[4] saying that the lawyer had mailed Fisher all of the "court records and transcripts" in counsel's possession, without any explicit mention of the police report Fisher relies on in this appeal. That lawyer is now deceased. Therefore, on this record, there is no basis for concluding that Fisher had received the relevant police reports prior to his direct appeal such that he could have raised this claim at that time. We conclude that this constitutes a sufficient reason to overcome the procedural bar.[5]

[4] Although the public defender appointed postconviction counsel for Fisher, he declined it and represented himself *pro se* in his direct appeal.

[5] This court initially released an opinion in this case in which we addressed only the procedural question and concluded that ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), did not bar Fisher's claim. After receiving questions on the remand instructions from the State, we then withdrew the opinion and ordered supplemental briefing on the merits. In the supplemental briefing, the State, for the first time, responded to Fisher's arguments on the merits. Accordingly, our earlier withdrawn opinion did not have the benefit of these arguments nor did it reach the issues that we resolve in this opinion.

¶6 However, we reject Fisher's claim on its merits. Fisher argued that trial counsel rendered ineffective assistance of counsel by failing to present evidence from the later-discovered police report about the drug house lead.[6]

¶7 We conclude that Fisher is not entitled to an evidentiary hearing on his ineffective assistance claim because this record "conclusively demonstrates that the defendant is not entitled to relief." *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (citation omitted). There is no evidence linking the three men found in the drug house to the murder.

¶8 Fisher argues in the alternative that it appears from the record that the real controversy was not fully tried and that he is therefore entitled to a new trial in the interest of justice.[7] For the reasons that follow, it is apparent from the record that the real controversy was fully tried. Therefore, we affirm.

BACKGROUND

The murder.

¶9 Witnesses described Fisher as a regular at the small neighborhood grocery and someone who had been on good terms with Mousa for years. Fisher lived across the street from the grocery, which is at the corner of Garfield Avenue and 25th Street in Milwaukee. Andre Ward testified that he, Andre Goodman, and

[6] *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (a conviction must be reversed where defendant shows that counsel performed deficiently and that the deficient performance prejudiced the defense).

[7] *See* WIS. STAT. § 752.35 ("[I]f it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court [of appeals] may reverse the judgment or order appealed from[.]").

Jay Wonders were at the grocery on the night of October 26, 1993. Ward testified that Fisher approached him at about 8:30 p.m. and asked him for money. Both Ward and Wonders testified that Fisher told them at that point that he planned to rob Mousa's store. Three additional witnesses—Goodman, Will Nelson, and Bryan Gibbs—also put Fisher at Mousa's store just as Mousa closed for the night, alarming the building at 8:48 p.m. The undisputed testimony was that Fisher asked Mousa to give him a ride as he left the store, and Mousa agreed.

¶10 Nelson, Mousa's employee, testified that as Mousa locked the store and set the alarm, Nelson went to Mousa's Chevy Blazer and put plastic grocery bags containing Mousa's holstered handgun, eggs, milk, and a bank bag that held food stamps and a few hundred dollars in cash. Gibbs, who lived on the same block, saw Mousa get into the vehicle and drive away with Fisher sitting in the passenger seat.

¶11 Jordan Johnson, a thirteen-year-old boy who lived three blocks away from Mousa's store, testified that at about 9:00 p.m. he was standing in the kitchen and he heard gunshots. His mother sent him outside to see what had happened, and he discovered Mousa sitting in his vehicle in the alley bleeding from a gunshot wound to his head. Johnson's mother then called 911. The 911 call calling police to that address was placed at 9:04 p.m. As the jury heard later via a stipulation, Johnson's older brother Adam Booker told police two days later that he had been on the front porch at the time of the shooting, and a man had run past him immediately after the shooting and had pointed a gun at him.

¶12 The State presented the testimony of an officer who was dispatched to the scene. He testified about the photos taken at the scene depicting the interior of the vehicle. Every surface in Mousa's Blazer from the rearview mirror to the

back floorboard was covered in blood and brain matter—with the sole exception of the passenger seat, where the blood spatter "stops right at the portion … of the passenger seat" where someone had been sitting at the moment Mousa's head had "exploded" when he was repeatedly shot at close range. The officer described finding four shell casings that had ejected inside the front of the cab and were found in the visor and floorboard, and he explained that casings eject from the right hand side of the gun, making it clear that the shooter had been to Mousa's right. He described finding the driver's side window shattered. The gun and the groceries were on the floor behind the passenger seat, sitting in an open plastic bag that was spattered with blood. The bank bag was gone.

Fisher's statement to police.

¶13 Police went to Fisher's home on October 27, 1993. Fisher was not there. Police spoke to his mother, who said Fisher had arrived home the previous night at about 11:00 p.m., had stayed the night, and then left with friends to see a movie. On November 2, 1993, a week after Mousa's murder, Fisher turned himself in, was arrested, and gave police a statement about the night of the murder. He told police that on October 26, 1993, he walked to the store for cigarettes just as Mousa and his employee were walking away from the store after closing for the night. Fisher stated that he then asked Mousa, whom he had known for two to three years, to give him a ride to a gas station at 27th Street and Lisbon Avenue, and Mousa agreed. The gas station is located nine blocks south and two blocks west of Mousa's store. Fisher stated that Mousa dropped him off, and Fisher then saw Mousa turn and drive south on 27th Street.

¶14 Fisher said that as soon as Mousa dropped him off, Fisher saw his friend Andre Ward at the gas station, and he got into the car with Ward, who was

alone. Fisher said they first drove to another gas station, and then went to a house where nobody else was home. He said he then returned to his house at 11:00 p.m., saw his mother, and went to bed. The next day, he said, he heard about Mousa's death and heard that police were looking for him. He said he then left his house, walked the streets, and slept in a park until turning himself in.

The evidence presented to the jury.

¶15 The murder investigation led police to Fisher, who was the last person seen with Mousa. The following facts are taken from trial testimony.

¶16 Nelson, Mousa's sole employee, testified that Fisher was a regular at the store and was friends with Mousa. Two witnesses, Ward and Wonders, testified that Fisher told them on the afternoon of the murder, October 26, 1993, that he needed money and that he was going to rob Mousa's store. Gibbs, who lived a few doors down from the grocery, and Nelson both testified that Fisher spoke to them about getting a ride from Mousa just as Mousa was locking the store. The State forcibly brought Gibbs to court after he failed to come voluntarily. Gibbs testified that he had seen Fisher with a nine-millimeter gun two days before the murder, that he had seen Fisher in the passenger seat of Mousa's vehicle, and that Fisher had threatened to shoot him if he testified. He refused to give details of the threat.

¶17 Three witnesses—Ward, Wonders, and Deon Wesley—testified that Fisher told them in the days immediately following the murder that he had shot Mousa, with Ward and Wonders describing the gruesome neck and head wounds accurately. Ward testified that Fisher said he had killed a man "for nothing," and indicated that the bank bag he had taken had contained less than $100 and a roll of food stamps.

¶18 Ward, who testified that Fisher told him he killed Mousa, and Goodman, another witness who testified about seeing Fisher at the store just before it closed, initially gave statements to police acknowledging that they knew Fisher but claiming they did not know anything about the crime. Both men had been friends of Fisher's for years. Defense counsel impeached Ward and Goodman with their prior statements.

¶19 The defense and the State stipulated to read a statement concerning an unavailable defense witness to the jury. The statement concerned a photo array and lineup that had been conducted for a witness, Adam Booker. Booker is the brother of the boy who found Mousa's body in the alley behind their house; on the night of the shooting, Booker had been at home. The stipulation stated that Booker told police two days after the murder that on the night of the shooting, a man had run past him immediately after the shooting and had pointed a gun at him. Booker had been shown a photo array that included Fisher's photo. He told police he knew Fisher, and that he looked "something similar" to the man who had pointed the gun at him on the night of the shooting. When he was then sent to a lineup that included Fisher, Booker told police he was unable to make an identification.

The evidence that is the focus in this appeal.

¶20 As noted above, Fisher's focus in this appeal is on trial counsel's failure to question the State's police witnesses about a lead the officers investigated on the night of the murder. Fisher attached the police report to his postconviction motion. The report describes how two officers responding to the murder scene on the night of the crime were approached by a man who refused to

give his name. The report said the man said he "was told" that "'Little Rob' was involved" and that police should go to a drug house nearby to find him:

> Upon our arrival, I P.O. [James] Williams was approached by an unknown black male[] who stated *he don't want to get involved or give his name.* He stated the subjects who shot the … victim ran eastbound from 2137 N. 28th Street across N. 28th into the vacant lot at about 2140 N. 28th Street and northbound in the alley toward the dope house. He further stated *he was told that a person known as "Little Rob" was involved.* He stated if we go into the alley … and look northbound toward Garfield you would be looking at the [drug] house with the lower door boarded up.

(Emphasis added.)

¶21 The police followed that lead and at the drug house indicated, police immediately located three men—Robert Williams, known as "Little Rob," Kevin Jones, and Tywan Beard. Police took the men to the station for questioning. The police report notes that Jones was wearing a gray T-shirt with a "possible blood stain on the right side shoulder area." Police took the gray T-shirt and sent it to the crime lab for analysis. The police report transmitting the T-shirt for testing states, "It is to be noted that this spot of blood on the shirt is very minute and may not, in fact, be human blood[.]" The lab's analysis showed that "[the] very small stain in the right shoulder area of the shirt tested positive for blood and human origin." The hands of the three men found in the drug house were swabbed, and lab tests showed that Jones and Williams tested positive for gun residue.

DISCUSSION

I. Standard of review.

¶22 Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of

review. ***Bentley***, 201 Wis. 2d at 310. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *See* ***id.*** This is a question of law that we review *de novo*. ***Id.*** If the motion raises such facts, the trial court must hold an evidentiary hearing. *See* ***id.***; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. We review a trial court's discretionary decisions under the deferential erroneous exercise of discretion standard. *See* ***Bentley***, 201 Wis. 2d at 311.

II. *Escalona* does not bar Fisher's claim.

¶23 The State argues that Fisher's claim is barred by ***Escalona***'s rule that all postconviction claims must be brought at the same time and that Fisher has shown no sufficient reason for failing to raise this claim in his 1996 appeal. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 184. Fisher alleges that he had no knowledge—at trial or when he filed his 1996 postconviction motion—of evidence that the police had investigated an eyewitness and collected physical evidence from other potential suspects. He alleges that "[o]nly after retaining the Wisconsin Innocence Project did [he] learn of the evidence of the third-party perpetrators."

¶24 The State responds that the facts in the record rebut Fisher's claim of lack of knowledge of the police reports. It relies on the first postconviction counsel's letter and the second postconviction court's fact finding about discovery. The State's reliance is misplaced. Postconviction counsel sent Fisher a letter with

his file. But the letter made no reference to the *discovery* in general or the *police reports* in particular. The letter says, "I gave you the court records and transcripts which I had." The letter does not state that the police reports were contained therein. And the postconviction court's April 26, 2017 order denying Fisher's motion states, "The reports attached as exhibits to the defendant's moving papers were part of discovery." It is not disputed that the reports were part of discovery; however, that is not dispositive of Fisher's assertion that he had no knowledge of them and that he "did not receive these pieces of discovery." Therefore, the record is devoid of any finding that contradicts Fisher's allegation of lack of knowledge.

¶25 The State's alternative argument on procedural bar is that an ineffective assistance of counsel claim cannot be pursued by a defendant who has elected to represent himself. The State argues that Fisher was "the 'attorney' who failed to raise these two available claims" in his 1996 postconviction motion. In support of this argument, the State cites to language from a footnote in ***Faretta v. California***, 422 U.S. 806, 834 n.46 (1975): "[W]hatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *See also* ***United States v. Moya-Gomez***, 860 F.2d 706, 741 (7th Cir. 1988); ***United States ex rel. Smith v. Pavich***, 568 F.2d 33, 40 (7th Cir. 1978).

¶26 The State's argument is based on the assumption that Fisher received the police report and failed to make arguments based on it. As we noted above, there is no support in the record to find that as a fact. Accordingly, Fisher has alleged a sufficient reason for not raising this defense in his direct appeal.

III. We construe Fisher's ineffective assistance of counsel claim as a motion for an evidentiary hearing.

¶27 Fisher's motion seeks a new trial on the basis of ineffective assistance of counsel. A defendant is denied his Sixth Amendment right to effective assistance of counsel when his counsel performs deficiently and the deficiency prejudices his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). When a postconviction motion alleges facts that if true would warrant relief, the movant is entitled to an evidentiary hearing to prove the allegations. *See* ***Bentley***, 201 Wis. 2d at 310; *see also* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (holding that "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel"). The legal standard and the remedy are both well established law.

¶28 Fisher argues in his briefing to this court, however, that under the circumstances of this case, this court has authority to order a new trial without the need of a remand for an evidentiary hearing because in this case the State has conceded the deficient performance argument. Fisher argues that because the State made no argument before the trial court or this court on the question of deficient performance, it has failed to refute his arguments and therefore conceded them. He argues that "[b]ecause the deficiency prong is conceded, a ***Machner*** hearing is not necessary." For this proposition, he cites ***State v. Smith***, 207 Wis. 2d 258, 282, 558 N.W.2d 379 (1997), a case in which our supreme court held that an evidentiary hearing was unnecessary and remanded for the requested relief: a new sentencing hearing.

¶29 ***Smith***, however, is distinguishable for several reasons. ***Smith*** concerned an appeal in which the State had breached the plea agreement by recommending a sentence. ***Id.*** at 262. Trial counsel failed to make a timely

objection. ***Id.*** In ruling on Smith's postconviction motion, without an evidentiary hearing, the trial court concluded, as a matter of law, that trial counsel had performed deficiently. ***Id.*** at 263-64. However, it denied his motion on the basis that he had not shown prejudice. ***Id.*** at 264. Smith appealed. ***Id.*** On appeal, the State conceded that: (1) the prosecutor breached the plea agreement; (2) defense counsel's deficient performance prejudiced Smith because a term of his agreement with the State was not met; (3) the breach of the plea agreement and the failure to object to that breach rendered the proceedings flawed and unfair; and (4) Smith was entitled to relief in the form of resentencing. ***Id.*** at 264-65. The court of appeals affirmed the trial court's conclusion of deficient performance but disregarded the State's concessions and concluded that there was no prejudice. ***Id.*** at 265-66.

¶30 On supreme court review, the State again conceded deficient performance but withdrew its concessions about prejudice and the remedy and argued instead that Smith's motion should be neither summarily rejected nor summarily granted and that an evidentiary hearing was necessary. ***Id.*** at 269. Our supreme court noted that the trial court, the court of appeals, and the State had *all* concluded that trial counsel's performance was deficient. ***Id.*** at 274. It further held that the case fell into the category of cases in which prejudice is presumed: "[W]hen a prosecutor agrees to make no sentence recommendation but instead recommends a significant prison term, such conduct is a material and substantial breach of the plea agreement[,]" and "[s]uch a breach of the State's agreement on sentencing is a 'manifest injustice' and *always results in prejudice* to the defendant." ***Id.*** at 281 (emphasis added). "In light of the State's concession of deficient performance *as well as* [*the court's*] *own conclusion on deficient performance*," our supreme court held that "no ***Machner*** hearing is necessary

given the facts of [the] case." ***Id.*** at 275 n.11 (emphasis added). Instead, the case was remanded for a new sentencing hearing. ***Id.*** at 282.

¶31 Fisher incorrectly reads ***Smith*** as applicable to his case. ***Smith*** created an exceedingly narrow exception to the ***Machner*** rule where (1) a *court* has concluded as a matter of law that counsel performed deficiently—in that case, every court did—*and* (2) the case is the rare type of case in which prejudice is presumed. Neither of those is true here. There has been no determination that counsel performed deficiently by any court, including this one. No presumption of prejudice exists here. Therefore, his motion for postconviction relief is correctly construed as one for an evidentiary hearing, and we apply the well established standard for determining whether his motion has alleged sufficient facts to entitle him to a hearing. *See* ***Bentley***, 201 Wis. 2d at 310.

IV. The record conclusively demonstrates that Fisher is not entitled to relief.

¶32 A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief. ***Bentley***, 201 Wis. 2d at 310; ***State v. Washington***, 176 Wis. 2d 205, 215, 500 N.W.2d 331 (Ct. App. 1993). "The mere assertion of a claim of 'manifest injustice,' in this case the ineffective assistance of counsel, does not entitle a defendant to the granting of relief[.]" ***State v. John Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433 (citation omitted). A defendant must allege the necessary facts "within the four corners of the [postconviction motion] itself[.]" ***Id.***, ¶23. Here, to warrant a hearing, Fisher's motion must allege sufficient facts to show that trial counsel was deficient and that his deficiency prejudiced Fisher. We review Fisher's motion first.

¶33 Fisher's postconviction motion alleges that "[t]rial counsel failed to present important exculpatory evidence that demonstrated that Little Rob and two others murdered Mousa." He argues that counsel should have cross-examined police officers about their investigation into Little Rob, presented police reports and witness statements that implicated Little Rob, called lab technicians who identified the blood and gunshot residue, and "investigated and interviewed the eyewitness who claimed to see the shooting … and interviewed other people who might have seen the shooting." His postconviction motion argues that these failures "rendered Fisher's trial unreliable" because trial counsel "presented no real defense." But he does not say *why* doing so would have assisted his defense. Given that the police did investigate the tip and it led nowhere, Fisher fails to show how trial counsel's failure to cross-examine the police about that investigation would have helped him.

¶34 We start by noting what the police report does and does not say. The report says that the anonymous man "stated *the subjects who shot the above victim ran eastbound* from 2137 N. 28th Street across N. 28th into the vacant lot at about 2140 N. 28th Street and northbound in the alley toward the dope house" (emphasis added). The police report does not indicate whether the man was an eyewitness to the shooting. According to the report, the man alluded to an unidentified third party as the source of the information: "He further stated *he was told that a person known as 'Little Rob' was involved*" (emphasis added). The same report in which the tip is reported indicates that the police immediately went to the drug house and apprehended the three men.

¶35 In ***John Allen***, 274 Wis. 2d 568, ¶30, our supreme court addressed a similar claim based on investigated leads. In that case, it denied relief on the basis that "the record conclusively show[ed]" that the defendant was not entitled to the

relief he requested. It cited ***Nelson***, 54 Wis. 2d at 496, which states, "[W]here the record sufficiently refutes the allegations raised by the defendant in the motion, no hearing is required." The court noted that Allen had objected that trial counsel was not investigating leads:

> [He] complained during a transfer hearing ... and then later at the start of trial ... that his lawyer was not allowing him to call certain witnesses on his behalf, *nor investigating his claims of exculpatory evidence*. At both court appearances, trial counsel informed the court that the witnesses Allen wanted to call did not have any relevant information, and that *all leads had been investigated and did not amount to anything*.

John Allen, 274 Wis. 2d 568, ¶30 (emphasis added).

¶36 As with the complained of evidence in that case, this is a case in which the lead from the anonymous man who approached police near the scene "had been investigated and did not amount to anything." *See* ***id***. This is not a case of an unpursued lead. The anonymous tipster—who did not claim to have seen the shooting and said only that he "was told" that "Little Rob" was "involved"—directed police to the drug house as soon as police arrived on the scene, and the men were immediately located, detained, and questioned. The record reflects extensive evidence about the scene of the crime, particularly the quantity of blood that was on every surface except the passenger seat. The record conclusively demonstrates that a person with a T-shirt that had only a "minute" amount of blood near the shoulder could not have been the person sitting in the passenger seat at the time of the shooting. The results showed that two of the men had evidence of gun residue on their hands, but without further connection to Mousa's murder, that evidence "did not amount to anything." The record reflects extensive testimony from multiple witnesses placing Fisher in the passenger seat of Mousa's

vehicle. Multiple witnesses who knew Fisher described conversations with him admitting the robbery and murder.

¶37 Nothing in the police report of the investigated lead supported the defense version and therefore the trial counsel cannot be deficient for failing to use it to attempt an impeachment of officers that would have been unsuccessful. It would have simply reinforced their conclusion that the information from the police investigation of this lead was not helpful to Fisher at all. Relatedly, trial counsel did vigorously cross-examine the other witnesses and impeached the two witnesses who had given prior inconsistent statements. Therefore, we conclude Fisher failed to sufficiently allege facts that support the conclusion that trial counsel performed deficiently.

¶38 Additionally, nothing in Fisher's pleading shows prejudice to Fisher from the failure of trial counsel to attempt to cross-examine and impeach the officers on the police report describing that portion of the investigation. As noted above, it offered him no viable third-party perpetrator evidence and was completely rebutted by the strength of the State's case given the witnesses placing Fisher in the vehicle, on the scene, the blood spatter, and his admission of shooting the victim. Certainly there is nothing in his pleading that suggests any reasonable probability of a different result had counsel used the tip police report.

¶39 We conclude that the record conclusively demonstrates that Fisher is not entitled to relief.

V. The fact that the jury did not know of the unsuccessful drug house lead did not prevent the controversy from being fully tried.

¶40 We reject Fisher's motion for a new trial in the interest of justice for the same reasons. The record of this case shows that the real controversy—the identity of the person who killed Mousa—was fully tried.

¶41 We therefore affirm the postconviction court's denial of Fisher's motion for postconviction relief.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.