

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 00-1678

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMMY J. GATES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
BRUCE K. SCHMIDT, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Sammy J. Gates appeals pro se from a circuit court order denying his WIS. STAT. § 974.06 (1999-2000)¹ postconviction motion. We affirm.

¶2 This is Gates's third proceeding in the court of appeals. In March 1999, we affirmed his conviction for battery to an inmate as a repeater and party to the crime. *State v. Gates*, 226 Wis. 2d 562, 596 N.W.2d 501 (Ct. App. 1999). In May 2000, we denied his petition for a writ of habeas corpus challenging the effectiveness of his appellate counsel. *State ex rel. Gates v. Berge*, No. 00-0934-W (Wis. Ct. App. May 3, 2000). Thereafter, Gates filed a WIS. STAT. § 974.06 motion in the circuit court, the denial of which is the subject of this appeal.

¶3 In each of these proceedings, Gates has claimed that African-Americans were underrepresented in the Winnebago county jury pool and that trial and appellate counsel were ineffective in connection with this issue. On direct appeal, Gates argued that trial counsel was ineffective for not seeking a change of venue due to the absence of African-Americans in the jury pool. Because Gates did not offer any statistical or demographic evidence to support his claim that African-Americans were underrepresented in the jury pool, he did not prevail on this issue.

¶4 In his habeas petition challenging the assistance provided by appellate counsel, Gates raised the same issue regarding the jury pool. In denying the habeas petition, we held that appellate counsel rendered adequate assistance in

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

this court by briefing the issue based on the record created in the circuit court. We further held that any challenge to the shortcomings of the postconviction record relating to the jury pool issue had to be raised in the circuit court under *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681-83, 556 N.W.2d 136 (Ct. App. 1996).

¶5 In his subsequent WIS. STAT. § 974.06 motion, Gates alleged that postconviction counsel was ineffective for not offering evidence of his contentions regarding the jury pool. In his motion, Gates contended that the involvement of African-American parties and witnesses in the case warranted an exploration of the composition of the jury pool. Gates speculated that the absence of African-Americans from the jury pool and the presentation of the case to an all-white jury may have led to an unfair trial. Gates reasoned that it did not make sense for trial counsel to raise the issue of a change of venue due to the racial composition of the jury pool but fail to adequately litigate the claim.

¶6 The circuit court denied Gates an evidentiary hearing on his WIS. STAT. § 974.06 motion because his allegations regarding trial counsel's failure to litigate the change of venue request were conclusory. The court did not address Gates's contentions about postconviction counsel's failure to litigate the jury pool issue fully by, inter alia, presenting statistical or demographic evidence to support the underrepresentation claim.

¶7 If Gates's WIS. STAT. § 974.06 motion alleged facts which, if true, would entitle him to relief, the circuit court had no discretion but to hold an evidentiary hearing on the motion. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). However, if the motion did not allege sufficient facts, presented only conclusory allegations, or if the record conclusively demonstrates

that Gates was not entitled to relief, the circuit court had the discretion to deny the motion without a hearing. *Id.* at 309-10. However, whether Gates's motion alleged facts which, if true, would entitle him to relief is a question of law we review de novo. *Id.* at 310.

¶8 As a preliminary matter, we agree that the circuit court neglected to address both aspects of Gates's WIS. STAT. § 974.06 motion. The circuit court addressed only the allegations regarding trial counsel's shortcomings, not the allegations regarding postconviction counsel's shortcomings. Nevertheless, we are obliged to uphold a discretionary determination if we can independently conclude that the facts of record applied to the proper legal standards support the circuit court's decision to deny Gates's motion without a hearing. *Andrew J.N. v. Wendy L.D.*, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993).

¶9 We turn to the ineffective assistance claim set forth in Gates's motion to determine whether he alleged sufficient facts which, if true, would entitle him to relief. "There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." *State v. Smith*, 207 Wis. 2d 259, 273, 558 N.W.2d 379 (1997) (citation omitted). However, we need not consider whether counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). A showing of prejudice requires more than speculation; the defendant must affirmatively prove prejudice. *State v. Pitsch*, 124 Wis. 2d 628, 641, 369 N.W.2d 711 (1985). A defendant must allege specific facts as to both the performance and prejudice prongs to sustain an ineffective

assistance of counsel claim. *State v. Saunders*, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995).

¶10 In none of his multiple postconviction proceedings has Gates asserted any basis for his claim that African-Americans are underrepresented in the Winnebago county jury pool or systematically excluded from the jury pool. This showing is necessary to demonstrate that Gates was prejudiced by trial and postconviction counsels' failure to fully litigate this issue. While we appreciate Gates's claim that the failure to present jury pool evidence is attributable to the shortcomings of counsel, an ineffective assistance claim requires proof of prejudice. Gates has merely speculated about the reasons for the absence of African-Americans from the jury pool and what that absence may have meant for his case. Gates has not provided any demographic or statistical evidence about the African-American population in Winnebago county to support his claims. In the absence of any supporting evidence, Gates cannot substantiate, as he must, his claim of prejudice.

¶11 We conclude that Gates did not allege sufficient facts to warrant a hearing on his WIS. STAT. § 974.06 motion. Therefore, the circuit court did not misuse its discretion in denying the motion without a hearing.

¶12 Gates has litigated his jury pool claims on three separate occasions. Successive attempts to litigate the same issue are barred. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Litigation of this issue in the future is barred. *Id.* at 992 (a defendant cannot relitigate or retheorize a previously litigated challenge to his or her conviction).

¶13 We do not address Gates's complaints about the brief filed by appellate counsel. These claims were addressed in Gates's petition for a writ of habeas corpus, which we previously denied. Successive challenges to the

effectiveness of appellate counsel are barred. *Cf. State ex rel. Schmidt v. Cooke*, 180 Wis. 2d 187, 189-90, 509 N.W.2d 96 (Ct. App. 1993) (successive *Knight*² petitions are barred).

By the Court.—Order affirmed.

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

² *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

