COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1910

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHULBERT Z. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Shulbert Z. Williams, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (1999-2000) motion for postconviction relief.[1]

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

He argues that postconviction counsel was ineffective for failing to pursue the ineffective assistance of trial counsel. We affirm.

I. BACKGROUND

¶2 Williams, his brother, and a friend were charged with multiple counts of armed robbery while concealing their identities, as parties to the crimes. The three men confessed and each implicated the others. Pursuant to plea negotiations, Williams agreed to plead guilty to one count of attempted armed robbery while concealing his identity, as a party to the crime, contrary to WIS. STAT. §§ 943.32(1)(b) and (2), 939.641, 939.32 and 939.05 (1995-95), and to four counts of armed robbery while concealing his identity, as party to the crime, contrary to WIS. STAT. §§ 943.32(1)(b) and (2), 939.641 and 939.05 (1995-96). In exchange for the State's recommendation of an unspecified prison sentence on two of the counts and an unspecified term of probation on the other three counts, Williams agreed to testify against his brother and their friend. Williams then entered his pleas.

¶3 Prior to his sentencing, Williams moved to withdraw his pleas, contending that counsel tricked him into pleading guilty. After a hearing, the trial court denied his motion, concluding that counsel had "done everything that a lawyer--good lawyer--should have done" and consequently, that no fair and just reason existed for plea withdrawal. This court summarily affirmed the trial court's decision. ***State v. Williams***, No. 97-1213-CR, unpublished slip op. (Wis. Ct. App. Oct. 12, 1998). On July 12, 1996, the trial court sentenced Williams to four, twenty-five year consecutive terms of imprisonment for the armed robberies and to a ten-year concurrent term on the attempted armed robbery.

¶4 In May 2000, Williams filed a *pro se* WIS. STAT. § 974.06 motion contending that postconviction counsel was ineffective for failing to challenge trial counsel's alleged failure to investigate his alibi defense and to pursue a ***Miranda-Goodchild*** motion.[2] Williams also contended that his sentence was unduly harsh and excessive. Denying his motion without a hearing, the circuit court concluded that Williams's allegations were conclusory, that the record refuted his claims, and that his request for sentence modification was untimely.

II. ANALYSIS

¶5 Williams first argues that the circuit court erred in denying, without a hearing, his claim that postconviction counsel was ineffective for failing to assert that trial counsel had failed to properly investigate his case. We disagree.

¶6 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶7 Ineffective assistance of counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

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[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687, 697.

¶8 A defendant is not automatically entitled to a hearing on a postconviction motion. ***State v. Bentley***, 210 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations, which fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the court may deny the motion on its face. ***Id.*** Whether a motion alleges facts warranting relief and thus entitling a defendant to a hearing is a question of law, which we review *de novo*. ***Id.*** at 310. If the motion and affidavits fail to allege sufficient facts, the trial court has the discretion to deny the postconviction motion without a hearing, ***id.*** 310-11, and this court reviews that denial solely to determine whether the court erroneously exercised discretion, ***id.*** at 311.

¶9 In the instant case, the postconviction court properly rejected Williams's request for an evidentiary hearing based on its conclusion that Williams's motion failed to show that he was entitled to relief. In his motion, Williams claimed that counsel had failed to adequately investigate an alibi defense. Specifically, he alleged that he had "presented his trial attorney with alibi witnesses, yet his trial attorney, not believing there was a reason to investigate [his] alibi witnesses, reinforced [his] belief that his trial attorney would not effectively represent him during a trial." He also maintained that "the court did

not examine this issue of effective assistance of counsel as to the investigation of the facts of the case and [his] assertion that he was not present at the robberies which could have been proven through alibi witnesses." Williams's claims do not merit a hearing.

¶10 As the circuit court noted, these statement are wholly conclusory and lack the requisite factual support to merit an evidentiary hearing. Williams's motion and the attached affidavit offer nothing more than Williams's opinion of the case.[3] Moreover, each fails to offer what further investigation would show and how that information would have changed his decision to plead guilty. The circuit court noted:

> The defendant's first claim is that trial counsel did not properly investigate a defense. The defendant sets forth no specifics in support of his claim, merely that the investigator did not spend enough time talking to witnesses. The claim is wholly conclusory and without the type of factual support required by caselaw.

We agree. Consequently, the court properly denied Williams's request for an evidentiary hearing.

¶11 Williams also contends that trial counsel was ineffective in failing to pursue a ***Miranda-Goodchild*** hearing to determine the voluntariness of his confession. We disagree; the record clearly refutes his contention and establishes that Williams waived his right to the hearing. At the plea hearing, the trial court specifically asked defense counsel and Williams whether he understood that, by

[3] In the appendix to his appellate brief, Williams offers two affidavits in support of his motion—the first is from his codefendant and brother, Laurence Williams; the second from himself. Although the former affidavit is not part of the appellate record and ordinarily cannot be considered on appeal, *see* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), we have reviewed it. We conclude that neither affidavit adequately supports Williams's claim.

pleading guilty, he was giving up his right to pursue the ***Miranda-Goodchild*** motion. Williams and counsel acknowledged their understanding of that consequence, and counsel stated that he and Williams had discussed the decision and that Williams had decided not to proceed with the motion. Now, however, Williams maintains that counsel should have pursued the motion irrespective of his wishes. Williams fails, however, to show what would have been proven at such a hearing or how it would have affected his case. Consequently, the circuit court properly concluded that Williams's motion failed to show that either trial or postconviction counsel was deficient. Accordingly, no hearing was warranted.

¶12 Finally, Williams argues that the circuit court erred in denying his request for sentence modification. We disagree. As the circuit court aptly noted:

> A motion for sentence modification based on erroneous exercise of [sentencing] discretion . . . must be brought pursuant to sec. 973.19, Wis. Stats., within ninety days of sentencing, or pursuant to sec. 809.30, Wis. Stats., within the appellate time limit. The defendant was sentenced in 1996, and his sec. 809.30 appellate time limits have expired. A motion filed pursuant to section 974.06, Wis. Stats., is limited to jurisdictional or constitutional issues or errors that go directly to guilt. ***Cresci v. State***, 89 Wis. 2d 495, 505, [556 N.W.2d 136] (1979). The erroneous exercise of discretion at sentencing is neither constitutional nor jurisdictional and cannot be raised in a section 974.06 motion.

The circuit court was correct.

¶13 To establish a constitutional claim under WIS. STAT. § 974.06, Williams contends that his trial counsel "failed to object or to request a sentence modification due to the sentence being excessive." We disagree; counsel had no basis to challenge Williams's sentence.

¶14 The record establishes that the trial court employed the required sentencing factors. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987) (The primary sentencing factors are the gravity of the offense, the character of the offender, and the protection of the public.). After considering each of these factors, the court noted its particular concern about Williams's failure to take responsibility for his actions and his failure to take advantage of his previous opportunity for rehabilitation. Clearly, the court's sentencing comments reflect "a process of reasoning based on legally relevant factors." ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984) (appellate court has duty to affirm sentencing decision if trial court "engaged in a process of reasoning based on legally relevant factors").

¶15 Thus, no basis existed to challenge the sentence on these grounds. Further, we do not conclude that the "sentence imposed is so excessive and unusual and so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Given the gravity of the offenses, the imposed sentence is neither unduly harsh nor excessive. Consequently, counsel was not deficient for failing to seek sentence modification.

By the Court.—Order affirmed.

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