COURT OF APPEALS
DECISION
DATED AND RELEASED

July 18, 1995

No. 94-2763-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JERMAINE JONES,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE and PATRICIA D. McMAHON, Judges. *Affirmed.*

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

WEDEMEYER, P.J. Jermaine Jones appeals from a judgment of conviction, after a jury trial, for two counts of first-degree recklessly endangering safety, while armed, contrary to §§ 941.30(1) and 939.63, STATS. He also appeals from an order denying his postconviction motion, which sought a new trial based on ineffective assistance of counsel. Specifically, Jones claimed that his trial counsel provided ineffective assistance because: (1) she did not

request a bill of particulars on two counts of intimidating a witness; (2) she did not investigate allegations that Jones apologized to the victim and threatened the victim; and (3) she did not pursue a suggestion by the trial court[1] that a hearing be conducted with respect to the statements reciting the apology and threat. Jones raises one issue for our consideration: whether the trial court erred in denying his postconviction motion without holding a ***Machner*** hearing.[2] Because trial counsel is not obligated to request a bill of particulars on counts that are dismissed, and because Jones's postconviction motion did not allege sufficient facts to show that any investigation would have been helpful to his defense or that a hearing would have been helpful to his defense, we affirm.

I. BACKGROUND

On June 16, 1993, Jones, while driving an auto, fired a gun into a second auto driven by Tacuma Deans. An infant, Alexis Johnson, was a passenger in Deans's auto. Jones was charged by criminal complaint, dated June 16, 1993, with two counts of first-degree recklessly endangering another's safety while armed. Jones was arrested on July 12, and a preliminary hearing was held on July 26. Deans testified at the preliminary hearing that while he was at his girlfriend's home two weeks earlier, Jones arrived with another individual, Dimitrius Summons. Deans said that Jones apologized for shooting at him (Deans) with the infant in the car and that Jones asked Deans to drop the charges. Deans also testified that Jones threatened to "shoot up" Deans's girlfriend's home if Deans refused to drop the charges. Deans further testified that Jones renewed his request to drop the charges, by telephone, three or four days before the preliminary hearing.

Jones was bound over for trial. On October 8, his first attorney withdrew as counsel and new counsel was appointed. On November 15, the State filed an amended information adding two counts of intimidation of a witness, contrary to § 940.43(3), STATS. Jones pled not guilty to all four counts

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[1] The Honorable Michael D. Guolee presided over the trial. References to the "trial court" within the text of this opinion which refer to actual trial proceedings refer to Judge Guolee. The Honorable Patricia D. McMahon presided over the postconviction motion. Therefore, any references to the "trial court" with respect to the postconviction motion refer to Judge McMahon.

[2] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

and a jury trial was set for November 22, 1993. Prior to commencement of trial, Jones's counsel filed a motion to dismiss the intimidation counts, arguing that the new counts were not supported by evidence presented at the preliminary examination. The trial court agreed and dismissed the intimidation counts. The trial court determined, however, that the State could introduce the testimony about the apology and threat during the trial on the reckless endangerment counts.

The case was tried on November 22-24, 1993. A jury convicted Jones on both reckless endangerment counts. Jones filed a motion for a new trial alleging ineffective assistance of trial counsel, and the trial court denied the motion without holding a ***Machner*** hearing. Jones now appeals.

II. DISCUSSION

In order to establish ineffective assistance of counsel, a defendant must prove that counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

> Before a trial court must grant an evidentiary hearing on ineffective assistance of counsel claims, defendants must allege sufficient facts in their motion to raise a question of fact for the court. A conclusory allegation of ineffective assistance of counsel, unsupported by any factual assertions, is legally insufficient and does not require the trial court to conduct an evidentiary hearing. We further note that if the motion does not allege sufficient facts to raise a question of fact, the trial court may still, within its discretion, grant a *Machner* hearing.
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> Upon appeal, we review the defendant's motion to determine whether it alleges facts sufficient to raise a question of fact necessitating a *Machner* hearing. This review is *de novo*.

State v. Toliver, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994) (citations omitted).

A. Bill of Particulars.

Jones's motion claimed first that he received ineffective assistance because trial counsel failed to obtain a bill of particulars specifying the intimidation of witness charges. With respect to this allegation, the trial court concluded that "it was not deficient representation, and defendant was not prejudiced by this failure, because counsel had no reason to demand a bill of particulars for charges which were dismissed." We agree. This allegation does not raise facts sufficient to raise a question of fact necessitating an evidentiary hearing.

B. Investigation and Mini-hearing.

Jones next claimed that he received ineffective assistance because trial counsel should have requested an adjournment to investigate the statements regarding an apology to and threat against Deans. Jones also claimed that trial counsel should have pursued the suggestion by the trial court that a mini-hearing be conducted prior to the witnesses testifying regarding the apology and threat. The State argues that neither assertion alleged facts sufficient to show that an investigation would have revealed helpful information. The trial court determined that the record did not support the latter allegation and that it was the trial court's decision to hold or not to hold a mini-hearing.

Our review of Jones's contentions demonstrates that he has failed to allege facts sufficient to raise a question of fact which would require a hearing. We acknowledge that Jones's motion appears to allege specific facts. The motion papers claim that trial counsel's performance was deficient in the investigation stage because she: (1) did not interview Tacuma Deans with respect to Deans's testimony that Jones apologized for the shooting and threatened Deans; (2) did not interview Deans's girlfriend, who allegedly was present during the apology and threat; (3) did not locate the individual who allegedly accompanied Jones when Jones apologized and threatened Deans;

and (4) did not obtain phone records to prove or disprove the phone call threat. Jones further alleged that trial counsel: (1) could have moved for discovery; (2) could have deposed the witnesses who testified regarding the apology and threat; and (3) could have pursued the mini-hearing option suggested by the trial court.

His motion did not, however, allege specific facts to show that this further investigation would have resulted in the discovery of further and beneficial information. "A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." ***United States v. Green***, 882 F.2d 999, 1003 (5th Cir. 1989). *See also* ***Jandrt v. State***, 43 Wis.2d 497, 505-06, 168 N.W.2d 602, 606 (1969); ***State v. Carter***, 131 Wis.2d 69, 78, 389 N.W.2d 1, 4, *cert. denied*, 479 U.S. 989 (1986). In short, Jones alleged that his trial counsel did not perform certain tasks, but did not allege what information would have resulted if counsel had performed these tasks. The facts he alleged, therefore, are analogous to the conclusory allegations in ***State v. Washington***, 176 Wis.2d 205, 214-16, 500 N.W.2d 331, 335-36 (Ct. App. 1993). In ***Washington***, we held that assertions that an attorney "failed to keep [the defendant] fully apprised of the events,""failed to completely review all of the necessary discovery material," and "failed to completely and fully investigate any and all matters" were merely conclusory allegations insufficient to require an evidentiary hearing. ***Id.*** Jones's assertions are similar: his trial counsel failed to properly investigate, his trial counsel failed to pursue a mini-hearing suggested by the trial court, his attorney failed to interview witnesses, and his attorney failed to conduct additional discovery.

Nonetheless, Jones did not allege specific facts to show that some investigation would have turned up advantageous information. He did not allege what information would be discovered if trial counsel had engaged in further investigation. He did not allege that the trial court would have held a mini-hearing if trial counsel requested it or that the mini-hearing would have resulted in information propitious to the defense. We conclude that such factual assertions are necessary to require an evidentiary hearing. Without these additional facts, Jones's motion is legally insufficient. *See* ***Washington***, 176 Wis.2d at 214-16, 500 N.W.2d at 335-36 (conclusory allegations alone do not entitle defendant to an evidentiary hearing); ***Toliver***, 187 Wis.2d at 360, 523 N.W.2d at 118 (factual allegations to support assertion required).

Based on the foregoing, we conclude that the trial court did not err in denying Jones's postconviction motion without holding an evidentiary hearing. Accordingly, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.