

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

**Appeal No. 2011AP1539-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF26

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. MADISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS and ROBERT J. KENNEDY, Judges.
Affirmed.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Robert J. Madison appeals from a judgment of conviction and an order denying postconviction relief.¹ He contends that the circuit court erred in denying his postconviction motions challenging the effectiveness of trial counsel without an evidentiary hearing. We conclude that the circuit court properly denied Madison's motions because they presented only conclusory allegations and failed to allege sufficient facts that, if proven true, would entitle Madison to relief. Therefore, we affirm the judgment and order.

¶2 Madison was convicted following a jury trial of second-degree sexual assault. The charge stemmed from an allegation that he had sexual intercourse with B.W., a child under the age of sixteen. The circuit court sentenced Madison to fourteen years of imprisonment, consisting of six years of initial confinement and eight years of extended supervision.

¶3 Following sentencing, Madison filed a postconviction motion for a new trial based on ineffective assistance of counsel. The circuit court denied the motion without an evidentiary hearing after concluding that the motion was insufficient on its face. Madison subsequently filed a motion for reconsideration, supplying the court with additional information on his claim. Again, the court denied the motion without an evidentiary hearing after concluding that it, too, was insufficient on its face. This appeal follows.

¶4 On appeal, Madison contends that the circuit court erred when it denied his postconviction motions without an evidentiary hearing.

¹ The Honorable Michael S. Gibbs presided over trial and entered the judgment of conviction. The Honorable Robert J. Kennedy entered the order denying the defendant's postconviction motion.

¶5 Whether a postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is subject to a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, we determine whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief. *Id.* This is a question of law that we review de novo. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion raises such facts, the circuit court must hold an evidentiary hearing. *Id.* However, if the motion does not raise facts sufficient to entitle the defendant to relief, “or presents conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.” *Allen*, 274 Wis. 2d 568, ¶9. We review the court’s discretionary decision “under the deferential erroneous exercise of discretion standard.” *Id.*

¶6 In his postconviction motions, Madison asserted that his trial counsel was ineffective in three respects: (1) for failing to move for admission of other acts evidence not excluded by rape shield—specifically a prior false allegation; (2) for failing to interview and call a witness named Bethany M. to testify; and (3) for failing to call an expert witness regarding DNA analysis.

¶7 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that counsel’s conduct fell below an objective standard of reasonableness. *Id.* at 687-88. To prove prejudice, a defendant must show that, but for counsel’s unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different.

Id. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

¶8 Madison first argues that he was denied effective assistance of counsel when his trial counsel failed to file a pretrial motion to admit evidence of a prior false allegation of sexual assault made by the victim, B.W. Madison submits that counsel’s failure to investigate and present evidence of a prior false allegation prejudiced him as the sole issue at trial was the credibility of B.W.

¶9 In his postconviction motions, Madison alleged that police took a statement from Dora Finley, whose son, David, dated B.W. at the time of the assault. Madison alleged that Finley stated to police that David told her that B.W. told him she was raped by a man in a trailer park. Madison then asserted that, according to Finley, B.W. “later recanted those allegations and no charges were brought.”

¶10 Madison further alleged that Finley made a subsequent statement to an investigator. According to the investigator’s report, Finley questioned B.W. about the rape allegations and that B.W. said “she exchanged alcohol for blow jobs with the guy around the corner.” Finley also told the investigator that B.W. pointed out a trailer where the guy that gave her alcohol supposedly lived. Finley reported the allegations to authorities, but “they weren’t able to prove anything.”

¶11 Reviewing the above allegations, we agree with the circuit court that Madison’s first claim of ineffective assistance did not warrant an evidentiary hearing. Madison’s motions did not set forth how he would prove at an evidentiary hearing that B.W. recanted a prior allegation of sexual assault. Instead, they relied primarily on a conclusory statement of Finley that B.W. recanted. Absent a witness with direct knowledge that B.W. recanted a prior

allegation of sexual assault, counsel cannot be faulted for failing to file a pretrial motion on the matter. In any event, because there is no reasonable probability that the circuit court would have granted such a motion, there is no reasonable probability that, but for counsel's failure to make the motion, the result of the trial would have been different.

¶12 Madison next argues that he was denied effective assistance of counsel when his trial counsel failed to interview and call a witness named Bethany M. to testify.

¶13 In his postconviction motions, Madison relied on a statement given by Bethany M. to police in which she stated that she did not believe B.W. was telling the truth about the sexual assault. Madison maintains that his counsel should have found out why Bethany M. did not believe B.W.

¶14 Reviewing the above allegations, we agree with the circuit court that Madison's second claim of ineffective assistance did not warrant an evidentiary hearing. As Madison concedes, Bethany's opinion as to whether B.W. was telling the truth about the sexual assault is not relevant and would not have been admissible in evidence. Furthermore, Madison did not allege any material evidence that would have been revealed if trial counsel had further interviewed Bethany and called her as a witness, much less how Bethany's testimony would have undermined the confidence in the outcome of the trial. Thus, Madison failed to allege sufficient facts that, if proven, would lead a court to conclude that counsel performed deficiently and that, but for counsel's performance, there is a reasonable probability that the result of the trial would have been different.

¶15 Finally, Madison argues that he was denied effective assistance of counsel when his trial counsel failed to call an expert witness regarding DNA

analysis. Specifically, he complains that counsel performed deficiently when he failed to present a DNA expert at trial to testify that DNA found on a tampon that the victim testified she used shortly after the assault could have resulted from contact other than sexual intercourse with Madison.

¶16 In his postconviction motions, Madison did not allege that trial counsel had available a DNA expert that would have challenged the DNA evidence in such a way as to exculpate him. Instead, he merely alleged that there should have been such an expert.

¶17 Reviewing the above allegations, we agree with the circuit court that Madison's final claim of ineffective assistance did not warrant an evidentiary hearing. Madison's motions failed to offer any expert who would have been available to offer an opinion that is comparable to what Madison now speculates. Accordingly, he failed to allege sufficient facts that, if proven, would lead a court to conclude that counsel performed deficiently and that, but for counsel's performance, there is a reasonable probability that the result of the trial would have been different.²

By the Court.—Judgment and order affirmed.

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

² Because Madison has failed to establish that trial counsel made one mistake, we reject his argument that the cumulative effect of counsel's alleged mistakes entitles him to relief.

