COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2013

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. 2011AP2942 **Cir. Ct. No. 2007CF821**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHELDON R. SCHEEL,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Sheldon R. Scheel appeals pro se from an order denying his WIS. STAT. § 974.06 (2011-12)[1] motion without an evidentiary hearing and an order denying his motion for reconsideration. Scheel's § 974.06 motion accused the prosecutor and police of engaging in misconduct. It also alleged ineffective assistance of trial counsel on several grounds.

¶2 We conclude that the circuit court properly denied Scheel's claims of prosecutorial and police misconduct without an evidentiary hearing as well as the majority of his claims of ineffective assistance of counsel. However, we also conclude that the court erred in summarily denying Scheel's claim of ineffective assistance of counsel for his attorney's failure to present favorable deoxyribonucleic acid (DNA) evidence at trial. Because we determine that Scheel is entitled to a ***Machner***[2] hearing on that allegation, we reverse in part and remand for an evidentiary hearing.

¶3 Scheel was convicted following a jury trial of possession of a firearm by a felon, felony bail jumping, pointing a firearm at another person, two counts of misdemeanor bail jumping, criminal trespass to a dwelling, and disorderly conduct. The charges stemmed from an altercation Scheel had with another man in which Scheel went to the man's apartment, yelled at him, and pointed a gun at him.

¶4 Three years after his sentencing, Scheel filed a WIS. STAT. § 974.06 motion alleging prosecutorial misconduct, police misconduct and ineffective

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

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

assistance of counsel. The circuit court denied the motion without an evidentiary hearing after concluding that the record conclusively demonstrated that Scheel was not entitled to relief. It then denied Scheel's subsequent motion for reconsideration. This appeal follows.

¶5 On appeal, Scheel contends that the circuit court erred when it denied his WIS. STAT. § 974.06 motion without an evidentiary hearing.

¶6 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 only 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.***

¶7 In his WIS. STAT. § 974.06 motion, Scheel accused the prosecutor and police of engaging in misconduct. Specifically, he accused the prosecutor of withholding exculpatory evidence from the defense. He also accused the police of losing evidence.

¶8 With respect to Scheel's allegation of prosecutorial misconduct, the evidence at issue was a crime laboratory report regarding DNA testing on the gun

that Scheel was accused of pointing at the victim. That report concluded that (1) an insufficient amount of DNA was detected from the trigger of the gun, (2) no DNA profile could be obtained from the front grip of the gun, and (3) Scheel was not a contributor to the DNA mixture detected from the left grip of the gun. Although the report is dated August 17, 2007, the prosecutor was not notified of its findings until the morning of August 20, 2007, when a detective left a voicemail message detailing the results. Scheel notes that on the afternoon of August 20, 2007, the prosecutor emailed defense counsel, informing him (incorrectly) that the crime laboratory had not yet completed the DNA testing. Accordingly, he accuses of prosecutor of intentionally withholding the evidence.

¶9 We agree with the circuit court that Scheel's claim of prosecutorial misconduct could be denied without an evidentiary hearing. The fact that the prosecutor misinformed defense counsel of the DNA test results is not indicative of misconduct, as there is no indication that the prosecutor checked his voicemail before sending his email to defense counsel. In any event, Scheel was not actually tried until February 19, 2008.[3] His motion does not allege that the prosecutor failed to disclose the DNA test results prior to that date. Indeed, at sentencing, defense counsel noted that Scheel's DNA was not found on the gun. If the DNA test results had been disclosed to defense only after trial and before sentencing, defense counsel presumably would have brought that to the court's attention.

[3] The reason for the delay is that the matter was filed twice. The original case (Winnebago county circuit case No. 2007CF307) was scheduled for jury trial on August 21, 2007. The State moved for an adjournment, which was denied. The defense then moved for dismissal, which was granted without prejudice. The State subsequently refiled its complaint, as it was lawfully permitted to do.

¶10 With respect to Scheel's allegation of police misconduct, the evidence at issue was a gun case, gun magazine and ammunition found in the same location where the gun was discovered. Because there is no indication that police sent these items to the crime laboratory, Scheel infers that the police must have lost them.

¶11 Again, we agree with the circuit court that Scheel's claim of police misconduct could be denied without an evidentiary hearing. The mere fact that police elected not to send certain items to the crime laboratory does not prove that they lost them. As a result, we are satisfied that the circuit court properly denied Scheel's claim.

¶12 Scheel's WIS. STAT. § 974.06 motion also alleged ineffective assistance of trial counsel on several grounds. 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.***

¶13 Scheel first argues that he was denied effective assistance of counsel when his trial counsel failed to present a written statement at trial that he had previously obtained from the victim recanting the allegation that Scheel had a gun during the incident in question.

¶14 We agree with the circuit court that Scheel's first allegation of ineffective assistance of counsel could be denied without an evidentiary hearing. To begin, Scheel's motion does not explain the circumstances surrounding the victim's written statement. Likewise, it does not allege that the victim would admit at an evidentiary hearing that the written statement was true and that his subsequent trial testimony was false. In addition, there are objectively valid reasons why counsel could have elected not to present the statement (assuming that the statement was even admissible). At trial, counsel focused the jury's attention on the victim's prior sworn statements, which equivocated on whether Scheel had a gun,[4] and argued that his prior unsworn statements to police on that issue were not credible. This strategy would have been undermined with the introduction of the victim's unsworn written statement.

¶15 Scheel next argues that he was denied effective assistance of counsel when his trial counsel failed to move to suppress two statements Scheel volunteered to the police because Scheel had not been given his ***Miranda***[5] warnings.

¶16 Again, we agree with the circuit court that this allegation of ineffective assistance of counsel could be denied without an evidentiary hearing. Here, Scheel was in a parking lot in police custody when he blurted out the unsolicited statement, "I just pointed it in his face and boy was he scared." Shortly thereafter, Scheel volunteered to an officer at the police station, "I pointed

[4] For example, the victim had acknowledged at the preliminary hearing that his recollection as to whether there was a gun in Scheel's hand was "doubtful." Counsel confronted the victim with that prior testimony at trial during cross-examination.

[5] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

my finger in his face and boy was he scared." Scheel was not undergoing custodial interrogation when these statements were made. Unsolicited, volunteered statements are not subject to suppression on the ground that the defendant was not given his ***Miranda*** warnings before he made them. Consequently, there was no basis for counsel to move to suppress Scheel's statements.

¶17 Scheel next argues that he was denied effective assistance of counsel when his trial counsel failed to object to a statement made at trial on the ground of hearsay. The statement was Nancy Brummer's testimony that Shelly Slagel, Scheel's girlfriend, told her that after she and Scheel returned from the victim's apartment following the incident, she saw Scheel put something in the closet and realized it was a gun.

¶18 Again, we agree with the circuit court that this allegation of ineffective assistance of counsel could be denied without an evidentiary hearing. At trial, Slagel testified that she never saw Scheel with a gun on the night of the incident. Accordingly, her statement to Brummer was admissible as a prior inconsistent statement under WIS. STAT. § 908.01(4)(a)1. Section 908.01(4)(a)1. provides that a prior inconsistent statement is not hearsay. As a result, it was not objectively unreasonable for counsel to decline to raise a hearsay objection to Brummer's testimony.

¶19 Finally, Scheel argues that he was denied effective assistance of counsel when his trial counsel failed to present favorable DNA evidence at trial (i.e., the laboratory report described above). The circuit court summarily denied this claim on the ground that the information was already known to the jury.

¶20 Upon review of the record, we conclude that the circuit court erred in denying this allegation of ineffective assistance of counsel without an evidentiary hearing. Contrary to the circuit court's belief, the DNA test results were not known to the jury, as they were neither introduced nor admitted as evidence.[6] Because the circuit court proceeded on a mistake of what happened at trial and because Scheel's motion alleges sufficient facts that, if true, would entitle him to relief on his claim of ineffective assistance of counsel, we conclude that Scheel is entitled to a ***Machner*** hearing on this final allegation. Accordingly, we reverse in part and remand for an evidentiary hearing.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

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

[6] The circuit court may have confused the DNA test results with the fingerprint analysis introduced by the defense at trial.