COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP7 **Cir. Ct. No. 1998CF3676**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY L. HOOVER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Gregory L. Hoover, *pro se*, appeals from circuit court orders denying his WIS. STAT. § 974.06 (2011-12)[1] motion for postconviction relief and his motion for reconsideration.[2] Hoover also appeals from an order denying his WIS. STAT. § 974.07(7)(a) motion for postconviction DNA testing. We affirm the orders.

BACKGROUND

¶2 In 1999, a jury found Hoover guilty of seven felonies related to two criminal incidents that occurred on the same day, several blocks apart. The first incident involved the armed robbery of two people in an alley. According to the victims, three men robbed them. The second incident involved the armed robbery, battery, and sexual assault of a woman, as well as the battery of her mother, at the second location. The woman and her mother said that there were two assailants. Hoover and a co-defendant, Maynard Carson, were charged with committing crimes during both incidents.

¶3 While Carson pled guilty, the case against Hoover proceeded to a jury trial.[3] At trial, Hoover's defense was that he was misidentified by the three victims who testified at trial. Trial counsel also argued that there was no physical

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

[2] The Honorable John DiMotto presided over the 1999 jury trial, sentencing, and Hoover's motion for a new trial. The Honorable Richard J. Sankovitz decided the motions at issue in this appeal.

[3] It appears, from comments in the record, that Carson admitted his involvement in the crimes but did not implicate Hoover. Hoover asserts that Carson told trial counsel that he committed the crimes with Hoover's cousin, Sammy King. The record reflects that trial counsel considered calling Carson as a witness, but ultimately told the trial court that after talking with Hoover and selecting a trial strategy, he had decided not to call Carson.

evidence linking Hoover to the crimes. The jury found Hoover guilty of all counts, including: three counts of armed robbery, one count of second-degree recklessly endangering safety, one count of first-degree sexual assault, and two counts of battery. The trial court imposed a total indeterminate sentence of ninety-two years and nine months. Throughout the proceedings, Hoover maintained that he was not present at either crime scene and had been misidentified as one of the perpetrators.

¶4 Represented by new counsel, Hoover moved for a new trial on grounds that the trial court mishandled a problem with the jury during deliberations. The trial court denied the motion and Hoover appealed. On appeal, Hoover raised several issues related to the alleged problem during jury deliberations. We rejected his arguments and affirmed. *See* ***State v. Hoover***, No. 2000AP90-CR, unpublished slip op. (WI App April 10, 2001).

¶5 Ten years later, Hoover filed the WIS. STAT. § 974.06 motion that is at issue in this appeal. He argued that his postconviction counsel provided ineffective assistance by not alleging trial counsel ineffectiveness with respect to conducting a pretrial investigation and failing to call a particular witness. He also argued that his postconviction counsel was deficient for failing to conduct postconviction testing of physical evidence. The circuit court denied the motion in a written decision, without a hearing. Hoover subsequently filed a motion for reconsideration, which the circuit court also denied.

¶6 Next, Hoover filed a motion for postconviction DNA testing of several pieces of evidence, pursuant to WIS. STAT. § 974.07(7)(a). The circuit court denied the motion in a written order. This appeal follows.

DISCUSSION

¶7 At issue is whether Hoover's WIS. STAT. § 974.06 and WIS. STAT. § 974.07(7)(a) motions were properly denied. We consider each issue in turn.

I. WIS. STAT. § 974.06 motion.

A. Legal standards.

¶8 The circuit court denied Hoover's WIS. STAT. § 974.06 motion without a hearing. Whether a § 974.06 motion is sufficient on its face to entitle a defendant to an evidentiary hearing on his or her ineffective assistance of postconviction counsel claim is a question of law that appellate courts review *de novo*. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. ***Balliette*** explained:

> If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing. However, if the motion does not raise such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the grant or denial of the motion is a matter of discretion entrusted to the circuit court.

Id. (citations omitted). On appeal, we consider *de novo* whether a postconviction "motion on its face alleges sufficient material facts that, if true, would entitle the defendant" to an evidentiary hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶9 Where, as here, a defendant alleges that his *postconviction* counsel provided constitutionally deficient representation by failing to allege that the defendant's *trial* counsel performed deficiently, the defendant must first establish that the trial counsel's representation was constitutionally deficient. *See* ***State v.***

Ziebart, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. The defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not consider both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697. On appeal, the circuit court's findings of fact with respect to ineffective assistance of counsel will not be disturbed unless shown to be clearly erroneous, but whether there was ineffective assistance of counsel is a question of law that this court reviews *de novo*. *See* ***Balliette***, 336 Wis. 2d 358, ¶19.

¶10 Finally, a WIS. STAT. § 974.06 motion filed after a direct appeal may be procedurally barred absent a showing of a sufficient reason why the claims were not raised in a previous motion or on direct appeal. *See* ***State v. Lo***, 2003 WI 107, ¶44 n.11, 264 Wis. 2d 1, 665 N.W.2d 756; ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). The ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise a claim on direct appeal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

B. Analysis.

¶11 Hoover argues that his postconviction counsel should have alleged that trial counsel performed ineffectively in several ways. He also argues that his postconviction counsel should have investigated the physical evidence. For reasons explained below, we conclude that Hoover has not shown that his trial counsel or postconviction counsel provided ineffective assistance or that he was entitled to a hearing on his ineffective assistance claims.

¶12 Hoover's WIS. STAT. § 974.06 motion argued that his trial counsel performed deficiently by not "conduct[ing] a proper pretrial investigation."

(Capitalization omitted.) First, Hoover noted that one of the victims said that Hoover bit her arm during a struggle at the crime scene. Hoover argued that trial counsel failed "to take the necessary steps to determine whether or not the bitemarks on [the victim's arm] … were left there by [Hoover]." Hoover contends that if trial counsel had "consulted with an expert in dental science and forensic odontology he may have been able to submit the photographed bitemark and the defendant's dental pattern for examination to determine if in fact the two were a match."

¶13 Second, Hoover argued that trial counsel should have had several items that were found on a porch near one crime scene tested for DNA or fingerprints. These items included a purse belonging to one of the victims, a $20 bill believed to have been taken in the robbery, and men's clothing and shoes. Hoover asserted: "Had counsel had the [men's] shoes and shirt examined by an expert in DNA and forensic science he would have found biological evidence that would have excluded Hoover as someone who had worn the clothing, and presented counsel with the profile of another man." Hoover said the man who wore the clothes was his cousin, Sammy King, who both Hoover and one of the defense witnesses saw wearing the clothes that same day. Hoover further argued that "[a]n investigation of the [$20] bill itself may have produced evidence that would have further excluded Hoover from the robbery." Hoover concluded: "Counsel had an affirmative duty to investigate these pieces of evidence," and was therefore deficient.

¶14 Third, Hoover's postconviction motion argued that trial counsel performed deficiently because he failed to inquire whether Hoover's fingerprints were found on the trunk lid of a car involved in one of the crimes. Hoover asserted that certain police technicians were at the crime scene and that trial

counsel failed to investigate or make discovery demands with respect to what the technicians found.

¶15 The circuit court rejected these arguments without a hearing on grounds that they were speculative. The circuit court explained:

> The defendant's … contentions concerning the testing of evidence are without factual support. It is mere speculation as to whether the bitemark would be found by a dental scientist to be his or not, or whether his DNA would or would not have been on the clothing found on a porch a block away. Fingerprints on the $20 bill? Speculation. A motion alleging the ineffective assistance of counsel may not be based on speculation. A defendant must show, based on *factual support*, that there is a reasonable probability, based on counsel's deficient performance, that the outcome of the trial would have been different. The defendant has not provided any factual basis at all for his contention that the testing of [that] evidence would have shown, to a reasonable probability, that he was not the person who committed these offenses.

We agree with this analysis. Hoover has presented only "'conclusory allegations'" that his trial counsel failed to investigate certain evidence and that the evidence would have exonerated Hoover. *See* ***Balliette***, 336 Wis. 2d 358, ¶18 (citation omitted). He is not entitled to a hearing or relief.

¶16 Hoover's WIS. STAT. § 974.06 motion also asserted that trial counsel was ineffective because he failed to call a witness who observed the beginning of the robbery in the alley and fled into her house. Hoover pointed to a police report that stated that the witness told police during an on-scene show-up that "she could not positively identify [Hoover and Carson] at this time as being involved" in the armed robbery in the alley. Hoover contends that if that witness had been called to testify, her testimony "would have tended to diminish the possibility of Hoover's involvement in the armed robberies" of the two victims in the alley.

¶17 The circuit court rejected Hoover's argument, concluding that "there is not a reasonable probability that testimony from [the woman] as a witness for the defense would have altered the outcome because of the other eyewitnesses, and because [the woman] would have been impeached with her statement to [a detective] that she recognized the defendant during the robbery due to the fact that he often came to where she worked and also frequented her neighborhood." In response, in his motion for reconsideration, Hoover asserted that the circuit court's conclusion that the witness would have been impeached is "pure speculation."

¶18 We agree with the circuit court that Hoover has failed to show that he was entitled to a hearing on his postconviction motion. The burden was on Hoover to "raise[] sufficient facts that, if true, show that" he is entitled to relief. *See* ***Balliette***, 336 Wis. 2d 358, ¶18. Hoover asserts that if the witness had been called, she would have testified that she could not identify Hoover. Even assuming that would have been her testimony, we are unconvinced that but for the failure to call her as a witness, "there is a reasonable probability that … the result of the proceeding would have been different." *See* ***Strickland***, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Specifically, three victims identified Hoover at trial, including one who said he knew Hoover prior to the armed robbery. Hoover has not shown there is a "reasonable probability" that having a witness testify that she could not positively identify Hoover (or Carson, who later pled guilty) would have led to a different result. Thus, Hoover has not shown that he was prejudiced by his trial counsel's alleged deficiencies. *See* ***id.***

¶19 In summary, we agree with the circuit court that Hoover has not shown that trial counsel provided ineffective assistance. It follows that Hoover has not demonstrated that he was prejudiced by the fact that postconviction

counsel did not allege trial counsel ineffectiveness with respect to the evidentiary issues. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

¶20 Finally, Hoover argues that his postconviction counsel was ineffective for not conducting postconviction testing of the physical evidence. Once again, we conclude that Hoover has presented only conclusory allegations and that he is not entitled to a hearing or relief. Whether the evidence still exists, whether physical testing of any evidence would yield results, and whether those results would exonerate Hoover is speculative. Because Hoover has presented only conclusory allegations, it was within the trial court's discretion to grant or deny a hearing. *See* ***Balliette***, 336 Wis. 2d 358, ¶18. We discern no erroneous exercise of discretion.

II. Denial of motion for DNA testing.

A. Legal standards.

¶21 Requests for postconviction DNA testing are governed by WIS. STAT. § 974.07. Our supreme court has recognized that "the plain language of § 974.07(6) gives a movant the right to conduct DNA testing of physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material, *if* the movant meets several statutory prerequisites." ***State v. Moran***, 2005 WI 115, ¶3, 284 Wis. 2d 24, 700 N.W.2d 884. The first prerequisite is that "the movant must show that the evidence meets the conditions under … § 974.07(2)." ***Moran***, 284 Wis. 2d 24, ¶3. The conditions mandated by § 974.07(2) are:

> (a) The evidence is relevant to the investigation or prosecution that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect.
>
> (b) The evidence is in the actual or constructive possession of a government agency.

> (c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

Id.

¶22 The second prerequisite for DNA testing is that "the movant must comply with all reasonable conditions imposed by the court to protect the integrity of the evidence." ***Moran***, 284 Wis. 2d 24, ¶3. The third prerequisite is that "the movant must conduct any testing of the evidence at his or her own expense" or, "[i]f a movant seeks DNA testing at public expense, the movant must proceed under § 974.07(7)(a) or (b), and satisfy the heightened requirements in subsection (7)." ***Moran***, 284 Wis. 2d 24, ¶3.

¶23 Whether Hoover had a right to obtain and test certain biological materials pursuant to WIS. STAT. § 974.07(7)(a)—the statute under which Hoover chose to proceed—requires us to interpret and apply the statute to the allegations in Hoover's motion, which is a question of law we review *de novo*. *See* ***Moran***, 284 Wis. 2d 24, ¶26.

B. Analysis.

¶24 Hoover's motion sought DNA testing of swabs from a victim's arm, the clothing from the porch, and the $20 bill. The motion indicated that Hoover was seeking testing pursuant to WIS. STAT. § 974.07(7)(a), which is testing at public expense. Therefore, he was required to satisfy the requirements of both § 974.07(2) and § 974.07(7)(a). We conclude that Hoover's motion fails to meet at least two requirements of § 974.07(2) and, therefore, his motion was properly denied.

¶25 Specifically, Hoover was required to show that the evidence he seeks to have tested is in the State's actual or constructive possession. *See* WIS. STAT. § 974.06(2)(b). Hoover's motion contains a single sentence addressing this requirement, which states: "[T]he [S]tate has always possessed and controlled the evidence to be tested." This allegation is insufficient to satisfy § 974.06(2)(b). Over ten years have passed since Hoover's conviction was affirmed on appeal. Whether the items are still within the State's control is unknown. Further, the State notes that Hoover has not provided evidence that swabs were ever taken from the victim's arm; the exhibits he attached to his motion indicate only that the victim received a tetanus shot because of a bite mark on her arm. Thus, swabs from the victim may not have ever existed.

¶26 Hoover's motion also fails to satisfy WIS. STAT. § 974.07(2)(c), which requires that he show that the evidence was not previously subjected to DNA testing "or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results." *See* ***id.*** Hoover has not provided any information concerning what tests were previously conducted on each of the items he seeks to test.

¶27 Because Hoover has failed to satisfy WIS. STAT. § 974.07(2)(b) and (c), we need not consider whether he also failed to satisfy WIS. STAT. § 974.07(7)(a), which was the basis for the circuit court's decision. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) ("[W]e may affirm on grounds different than those relied on by the trial court."); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989)

("[C]ases should be decided on the narrowest possible ground."). We affirm the order denying Hoover's motion for DNA testing of evidence.

By the Court.—Orders affirmed.

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