

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 29, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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

No. 96-0521-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEONARD MCDOWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Leonard McDowell appeals from a judgment of conviction for first-degree intentional homicide while armed. He also appeals from two orders denying his motions for postconviction relief. He raises essentially two issues for review: (1) whether the trial court erred in denying his postconviction motion premised on an ineffective assistance of counsel claim

without holding an evidentiary hearing; and (2) whether the trial court erroneously exercised its discretion when it denied his postconviction motion for a hearing to contest the findings of doctors on his competency to assist his counsel during his postconviction proceedings. We reject his arguments on these issues and affirm.

I. BACKGROUND.

McDowell was charged with first-degree intentional homicide while armed arising out of the shooting of a local high school vice-principal. McDowell pleaded not guilty and not guilty by reason of mental disease or defect. He received a bifurcated jury trial. The jury found him guilty in the first phase of the trial, and then found him responsible in the second phase. The trial court sentenced McDowell to life imprisonment.

McDowell filed postconviction motions alleging, among other things, that he received ineffective assistance of trial counsel because of his trial counsel's failure to continue to challenge his competency to stand trial for the homicide. The trial court denied the motion without an evidentiary hearing, concluding that McDowell's motion contained only conclusory allegations concerning his counsel's representation and that it had not satisfied the prejudice prong in the *Strickland v. Washington*, 466 U.S. 668 (1984), test for ineffective assistance of counsel claims. McDowell then filed a motion with this court seeking an order requiring the trial court to make a competency evaluation pursuant to *State v. Debra A. E.*, 188 Wis.2d 111, 523 N.W.2d 727 (1994). We granted this motion and ordered the trial court to make a competency evaluation. See *State v. McDowell*, No. XX-5949-CR, unpublished order (Wis. Ct. App. Oct. 6, 1995). The trial court appointed three doctors to evaluate McDowell's competency to assist his counsel in the postconviction matters. The three court-

appointed doctors found that McDowell was competent to proceed. Another doctor who evaluated McDowell, however, concluded that he was not competent.

The trial court then declined McDowell's request to hold a competency hearing and, based on the evaluations of the doctors, concluded that McDowell was competent to proceed in his postconviction proceedings. The trial court denied McDowell's postconviction motion and McDowell commenced this appeal. Further facts relevant to McDowell's arguments are discussed with each issue.

II. ANALYSIS.

A. Ineffective Assistance of Counsel Claim.

McDowell argues that he received ineffective assistance of counsel and that the trial court erroneously exercised its discretion when it rejected his claim without holding an evidentiary hearing. We disagree.

McDowell argues that his counsel was ineffective for failing "to make a record of her concerns about his competency contemporaneous with and during the actual trial." Although he acknowledges that the trial court previously raised the issue of his competency before trial, and ruled twice that he was competent, he argues that his counsel's failure to continue to express her concerns about his competency and challenge the findings of competency denied him his right to effective assistance of counsel.

The standard for reviewing this issue was recently stated in *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50 (1996):

If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion

and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.

However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing.

Id. at 310-11, 548 N.W.2d at 53 (citations omitted). Further, “if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.” *Id.* at 309-10, 548 N.W.2d at 53 (citation omitted).

For a defendant to succeed in an ineffective assistance of counsel claim, the two-pronged test set forth in *Strickland* must be satisfied. A defendant “must show that counsel’s performance was both deficient and prejudicial.” *Bentley*, 201 Wis.2d at 312, 548 N.W.2d at 54. Further, if a defendant fails to show the prejudice prong, this court need not address the deficient performance prong. *See State v. Sanchez*, 201 Wis.2d 219, 236, 538 N.W.2d 69, 76 (1996).

“In order to show prejudice, [t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (citation omitted).

The trial court determined that McDowell had not made a sufficient showing to require an evidentiary hearing. The court concluded that McDowell’s

assertions in his postconviction motion and attached affidavit were conclusory allegations that did not meet the necessary showing of prejudice under *Strickland*.

McDowell's trial counsel filed an affidavit with McDowell's postconviction motion, making the following allegations:

"I raised my concerns that the defendant was incompetent before the trial court in the pretrial stages of the case. A number of hearings were held where a number of doctors testified that they believed that the defendant was not competent."

"The trial court rejected the contentions of those doctors who found that my client was not competent to proceed. The trial court adopted the findings of doctors who opined that my client was competent to proceed."

"Throughout the entire proceedings, including both the guilt phase and the NGI phase of the trial, I believed that my client was not competent to proceed, despite the ruling of the trial court and findings of doctors to the contrary. It is my opinion that he was unable to consult with counsel effectively and rationally, assist in the preparation of his defense, and understand the proceedings against him."

"Subsequent to the court's pretrial ruling finding the defendant competent, I did not raise the issue during the trial because I felt that to do so would be futile because the court had already ruled on the issue."

The State argues that even with these allegations by McDowell's trial counsel, McDowell's postconviction moving papers were insufficient to require an evidentiary hearing because they "did not set forth facts which if true, would entitle the defendant to relief." We agree with the State.

Nothing in McDowell's motion or affidavit shows that his counsel's alleged deficiencies created a reasonable probability that the result of his bifurcated trial would have been different. The trial court had ruled twice on

McDowell's competency and had sought the advice of mental health experts. Further, nothing in trial counsel's affidavit points to any additional evidence other than her own conclusory allegations that McDowell was not competent to proceed. Moreover, her allegations in the affidavit do not claim that her opinion on McDowell's competency was premised on any significant or dispositive information that had not been available to the doctors who evaluated him. In short, the trial court could deny McDowell's ineffective assistance of counsel claim without a hearing because it was clear from the materials presented in the postconviction motion that he was not entitled to the relief he sought—that is, he was not entitled to a new trial.

B. Postconviction competency hearing.

McDowell next argues that the trial court erred in denying him a hearing on his postconviction competency hearing. We conclude that the trial court properly exercised its discretion in rejecting McDowell's call for such a hearing.

After sentencing, if the State or defense counsel “has a good faith doubt about a defendant's competency to seek postconviction relief,” that party should move for a ruling on competency. *Debra A. E.*, 188 Wis.2d at 131, 523 N.W.2d at 734. “If the court determines that a reason to doubt a defendant's competency exists, it shall, as an exercise of its discretion, determine the method for evaluating a defendant's competency, considering the facts before it and the goals of a competency ruling.” *Id.* at 131-32, 523 N.W.2d at 734.

“A court may rely on the affidavits of counsel, a stipulation or the court's observance of the defendant, or may order an examination of the defendant by a person with specialized knowledge. A circuit court may also, in its

discretion, hold a hearing before determining a defendant's competency." *Id.* at 132, 523 N.W.2d at 734.

We will only reverse a trial court's discretionary ruling if the trial court erroneously exercises its discretion. *See State v. Evans*, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). "A trial court properly exercises its discretion if its determination is made according to accepted legal standards and if it is in accordance with the facts on record." *Id.*

Here, the trial court sought the evaluation of three court-appointed doctors. All three concluded that McDowell was competent. The trial court could properly base its competency determination on the basis of these evaluations. The court did not have to hold an evidentiary hearing. *Debra A. E.*, 188 Wis.2d at 132, 523 N.W.2d at 734. Further, contrary to McDowell's contentions, the mandates of § 971.14, STATS., do not apply when a defendant's competency is questioned after sentencing. *Id.* at 128-29 n.14, 523 N.W.2d at 733 n.14. In sum, the trial court properly exercised its discretion when it concluded that McDowell was competent to assist in his postconviction proceedings.

Based upon the foregoing reasons, we affirm the judgment of conviction and the orders denying McDowell's postconviction motions.

By the Court.—Judgment and orders affirmed.

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

