

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 1, 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. 96-0821-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DENNIS J. PORTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: J. RICHARD LONG, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Dennis J. Porter appeals from a judgment of conviction for robbery and a postconviction order summarily denying a motion for a new trial claiming two instances of ineffective assistance of trial counsel. The issues are whether Porter alleged sufficient facts which, if true, would entitle him to an evidentiary hearing, and whether the postconviction court erroneously

exercised its discretion in denying Porter's motion without an evidentiary hearing (summary denial). We conclude that Porter did not allege sufficient facts to warrant relief and that the postconviction court properly exercised its discretion in summarily denying the motion. Therefore, we affirm.

A jury found Porter guilty of robbery by the use of force. The victim told the investigating officer that she would not be able to identify the person who robbed her because she had not looked at his face. Despite that statement, the victim identified Porter at the preliminary hearing. However, Porter was the only black male seated at the defense table and he was wearing an orange jail jacket. Porter claims that his trial counsel was ineffective for failing to suppress that identification.

Porter's second ineffective assistance claim is that his counsel failed to further investigate an out-of-court conversation between a juror and one of the State's witnesses. That conversation occurred in the courthouse corridor during the luncheon recess where a juror and a witness conversed about the road construction and resulting traffic problems in the Janesville area.

Porter moved for a new trial based on the ineffective assistance of trial counsel. The postconviction court summarily denied the motion because it concluded that Porter had not alleged sufficient facts to raise a question of fact, to warrant an evidentiary hearing.

A postconviction court considering an ineffective assistance claim initially decides whether the defendant has made sufficient factual allegations to warrant an evidentiary (*Machner*) hearing. See *State v. Washington*, 176 Wis.2d 205, 216, 500 N.W.2d 331, 336 (Ct. App. 1993); *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979). To establish an ineffective

assistance claim, a defendant must show that: (1) counsel's performance was deficient, and (2) that deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The postconviction court has the discretion to summarily deny a motion "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" *State v. Bentley*, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996). "Whether a motion alleges sufficient facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." *Id.* at 310, 548 N.W.2d at 53.

In his postconviction motion, Porter alleged that trial counsel was ineffective because he failed to suppress the victim's identification of him at the preliminary hearing. Porter alleged that "[t]his omission constituted ineffective assistance" because the victim "had stated in the police report that she 'never looked at the suspect's face and would not be able to identify him.'" The postconviction court summarily denied that claim because: (1) the victim was competent to testify about the accused's identity, without necessarily having seen his face, and any challenge to that identification addresses the weight, not the admissibility of the victim's testimony; and (2) Porter's friend, who drove the getaway car, independently identified Porter at the preliminary hearing.

To maintain an ineffective assistance claim Porter must be able to demonstrate how the victim's identification at the preliminary hearing prejudiced his defense. He has not alleged sufficient facts to do so. First, there was independent identification evidence to support bindover from Porter's friend who drove the getaway car. Second, trial counsel unsuccessfully moved to suppress the

victim's identification after the preliminary hearing. The trial court recognized the discrepancy between the victim's testimony at the suppression hearing and the statements attributed to her by the officer. The trial court also concluded that the victim's statements to the investigating officer may have been affected by her Japanese origins and her lack of fluency in English. The trial court reasoned that the victim had "ample opportunity" to observe the man who snatched her purse and that she had provided a "rather [detailed and] accurate" description of him. Moreover, the trial court ruled that the victim's identification should be submitted to the jury. Because the trial court properly denied the suppression motion, we conclude that Porter cannot establish the prejudice component of his ineffective assistance claim. *See State v. Simpson*, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994).

Porter's second postconviction allegation of ineffective assistance was that trial counsel waived Porter's right, without his knowledge or consent, to *voir dire* the witness and juror about their out-of-court conversation. Specifically, Porter alleged that trial counsel was ineffective for "fail[ing] to inquire enough about [that] conversation," "which may or may not have been about the pending case" The postconviction court summarily denied that claim because Porter failed to allege any "intrusion into the sanctity of the jury deliberations." *See* § 906.06(2), STATS.

Trial counsel overheard some of this conversation and questioned the State's witness about what was said. Trial counsel was satisfied that their conversation had been innocuous and that they had not discussed the case. When this conversation was brought to the trial court's attention, it offered counsel the opportunity to *voir dire* the witness and the juror. However, neither counsel believed that anything improper occurred and declined the trial court's offer. We

conclude that Porter has not alleged any facts which, if true, would establish that trial counsel's failure to *voir dire* the witness or juror prejudiced his defense.

We agree with the postconviction court that Porter failed to allege sufficient facts which, if true, would entitle him to relief. Therefore, we conclude that the postconviction court properly exercised its discretion in summarily denying Porter's postconviction motion.

By the Court.—Judgment and order affirmed.

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

