COURT OF APPEALS
DECISION
DATED AND RELEASED

March 25, 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. 96-0869-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Michael W. Jones,

Defendant-Appellant.

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

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Michael W. Jones appeals from a judgment of conviction for possession of cocaine with intent to deliver within 1000 feet of a school. *See* §§ 161.16(2)(b)1, 161.41(1m)(cm) and 161.49, STATS. He also appeals from an order denying his postconviction motion. Jones raises two issues for review: whether the trial court erred in denying his postconviction motion

without a hearing; and whether the trial court erred in denying him his right to self-representation. We affirm.

Jones was charged with one count of possession of cocaine with intent to deliver within 1000 feet of a school. *See* §§ 161.16(2)(b)1, 161.41(1m)(cm), and 161.49, STATS. On the eve of trial, defense counsel filed a motion to withdraw. The motion was denied by the trial court. During trial, defense counsel stipulated that the crime had occurred within 1000 feet of the Grand Avenue Middle School. Further, defense counsel did not challenge the chain-of-custody of the cocaine found at the scene. Jones was found guilty as charged.

Jones filed a postconviction motion alleging that defense counsel was ineffective for entering into a stipulation that the crime occurred within 1000 feet of a school, and that defense counsel was ineffective for failing to challenge the chain-of-custody of the cocaine found at the crime scene. He further alleged that the trial court erred in refusing to allow him to represent himself at trial while denying defense counsel's motion to withdraw. The trial court denied the motion without an evidentiary hearing.

Jones first argues that the trial court erred when it denied his postconviction motion without an evidentiary hearing.[1] In order to warrant an evidentiary hearing on a postconviction motion, a defendant must allege facts, which if true, warrant the relief sought. ***State v. Bentley***, 201 Wis.2d 303, 309, 548 N.W.2d 50, 53 (1996). If a 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 discretion, deny the motion without a hearing. ***Id.***, 201 Wis.2d at 309-310, 548 N.W.2d at 53. Here, the postconviction motion must raise an issue of fact regarding whether trial counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant in order to warrant a hearing. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prevail, Jones must show both that his attorney's performance was deficient and that such performance prejudiced his defense. ***Id.***

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

In his postconviction motion, Jones contends that defense counsel was ineffective for stipulating with the prosecution that the crime took place within 1000 feet of a school. Jones, however, provides nothing in his motion to indicate that the crime did *not* occur within 1000 feet of a school. Jones's motion, therefore, fails to raise a factual question of whether he was prejudiced by the performance of defense counsel because Jones failed to show a reasonable probability that, but for defense counsel's alleged deficiency, it could have been proven that the crime did *not* occur within 1000 feet of the school. *See* ***Strickland***, 466 U.S. at 694.

Jones also contends that defense counsel was ineffective for failing to challenge the chain-of-custody of the cocaine found at the scene. Two officers testified at the trial, Officer Mark Walton, the policeman who had Jones under surveillance, and Officer Kevin Armbruster, a policeman who was working in an unmarked squad car in the area. Officer Walton testified that he saw Jones negotiate what Officer Walton perceived to be a drug deal in the 900 block of North 24th Street. Officer Walton was in a building across the street from Jones with binoculars observing drug activity in the area. Officer Walton further testified that he radioed Officer Armbruster with a description of Jones and his location in order for Officer Armbruster to arrest Jones. As Officer Armbruster arrived at the scene, Officer Walton continued to watch Jones with the binoculars. He saw Jones toss a baggy onto the ground. Officer Walton testified that he radioed Officer Armbruster and told him about the dropped baggy. According to Officer Walton, Officer Armbruster immediately retrieved the "exact baggy that the defendant threw down."

Officer Armbruster testified that he gave the baggy to the Milwaukee Police Department Vice Control Division who tested the contents of the baggy for cocaine in his presence. Officer Armbruster then testified that he personally sealed the cocaine in a plastic baggy, placed it in a manila envelope and labeled the envelope with an identification number.

A Wisconsin state crime lab chemist testified that when she examined the package during her analysis of its contents, it was sealed and contained the same inventory number used by Officer Armbruster in labeling it. The chemist then testified that after she tested its contents, she put the evidence into an envelope, sealed it, labeled it, and gave it to Officer Fred Rehorst, the officer who conveyed the evidence to and from the crime laboratory.

Jones argues that the above did not establish a sufficient chain-of-custody regarding the cocaine because Officer Rehorst did not testify at trial and that defense counsel, therefore, should have objected to admission of the cocaine at the trial. The above noted testimony, however, demonstrates a sufficient chain-of-custody as to the cocaine. *See* RULE 909.01, STATS.[2] It is not fatal to the chain-of-custody to not call one of the custodians of evidence submitted at trial. ***State v. McCarty***, 47 Wis.2d 781, 788, 177 N.W.2d 819, 823 (1970). In ***McCarty***, as in this case, there was nothing to indicate that the evidence was tampered with or altered. Evidence should not be suppressed if it is improbable that it was altered. *See* ***United States v. Aviles***, 623 F.2d 1192, 1198 (7th Cir. 1980). Here, it is clear that the government took reasonable precautions to preserve the evidence. It was still intact when the envelope was opened by the state chemist. The trial court, therefore, could have reasonably found that the evidence was in substantially the same condition as it was when Jones was arrested. *See* ***State v. Simmons***, 57 Wis.2d 285, 295-296, 203 N.W.2d 887, 894 (1973) (government need only show that it took reasonable precautions to preserve the original condition of the evidence). Jones, therefore, was not prejudiced by defense counsel's failure to challenge the chain-of-custody because any such challenge would have failed.

Finally, Jones contends that he was denied the right to represent himself. *See* ***Faretta v. California***, 422 U.S. 806 (1975). Based on the record summarized below, we find that Jones did not request to proceed *pro se*. Because the right was not asserted, it was not infringed.

Jones, on his initiative, filed a motion to dismiss the charges against him before trial. This prompted defense counsel to seek withdrawal. During the hearing on defense counsel's motion, Jones never asked to proceed *pro se*, he merely complained about some of the work defense counsel had done on his case. When defense counsel later renewed her motion, there was no statement from Jones that he wished to proceed on his own.

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[2] RULE 909.01, STATS., provides:

> **General provision.** The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Unlike the right to counsel, the ***Faretta*** right does not arise until asserted. ***Brown v. Wainwright***, 665 F.2d 607, 610 (5th Cir. 1982). To properly assert the right, the defendant must "clearly and unequivocally" request self-representation. ***Faretta***, 422 U.S. at 835. Jones never asked to defend himself.

By the Court.—Judgment and order affirmed.

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