

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

March 11, 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. 96-1081**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**CASEY M. FISHER,**

**Defendant-Appellant.**

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

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

PER CURIAM. Casey M. Fisher, *pro se*, appeals from a judgment of conviction after a jury convicted him of one count of first-degree intentional homicide, while armed, and one count of armed robbery – threat of force. He also appeals from an order denying his motion for postconviction relief. He raises essentially two issues for review: (1) whether the trial court erroneously exercised its discretion when it failed “to grant a continuance to locate favorable

defense witnesses”; and (2) whether the trial court erroneously rejected his ineffective assistance of counsel claim without holding an evidentiary hearing. We reject his arguments on these issues and affirm.

## I. BACKGROUND.

On October 26, 1993, police found the body of a Milwaukee grocer slumped over the steering wheel of his truck. He had been shot several times in the head. On November 11, 1993, the State charged Fisher with one count of first-degree intentional homicide, while armed, and with one count of armed robbery – threat of force, in connection with this shooting. The case proceeded to a jury trial.

The State offered evidence from five witnesses who, among other things, saw Fisher get in a truck and drive away with the victim. In addition, two witnesses testified that they heard Fisher state that he was going to rob the store and that he later admitted to shooting the victim. Fisher subpoenaed three witnesses. When none of these witnesses showed up at trial, the trial court issued a bench warrant for their arrest. The State argued that only the testimony of one of the subpoenaed witnesses, Adam Booker, was relevant. Fisher never requested a continuance. After waiting for the witnesses, who never appeared, Fisher and the State reached a stipulation that would allow a police report containing Booker’s statements to police to be read into evidence. In these statements, Booker told police that he saw a person running shortly after the shooting and that this person pointed a gun at him. He also stated that during a photo identification, a photo of Fisher “looks something similar to the person that ran by him in his yard.” Finally, after a lineup was held that included Fisher, Booker circled that he was unable to identify anyone in the lineup as the person he saw the night of the shooting. After all the evidence was submitted, the jury convicted Fisher of both charges.

Fisher then filed a motion for postconviction relief. He argued that: (1) the trial court should have granted him a continuance to locate favorable witnesses; and (2) he was denied effective assistance of counsel because his counsel failed to obtain the appearance of the three witnesses and stipulated to a police report that allegedly misstated Booker’s testimony. In support of his motion, Fisher produced an affidavit from Booker alleging,

among other things, that: (1) Fisher's counsel never interviewed him about the shooting; (2) that he had told police that the person who ran past him on the night of the shooting did not look like Fisher, who he had known for twelve years; and (3) had he "been interviewed by trial counsel or testified at trial, I would have offered favorable testimony for Fisher's defense to the criminal charges." The trial court denied the postconviction motion without a hearing, concluding that Fisher had not shown the necessary prejudice under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The court found that nothing presented in Booker's affidavit was different than that presented to the jury in the stipulated police report and that "[t]here [was] nothing in Booker's affidavit which suggest[ed] he had anything further to add, other than telling the jurors in person that it just didn't look like Casey Fisher who ran past him that night." In sum, the trial court concluded that "[t]he evidence was overwhelming in this case that the defendant had committed murder and armed robbery. He has not raised any issue of fact that would establish the probability of a different result."

## II. ANALYSIS.

Fisher claims that the trial court erroneously exercised its discretion by failing to postpone the jury trial so that a favorable witness could be located for the defense. The State responds that Fisher never requested a continuance and, thus, the issue is waived. We agree with the State. *See, e.g. Simpson v. State*, 83 Wis.2d 494, 509-10, 266 N.W.2d 270, 276-78 (1978) (issue must be raised in trial court to be reviewable on appeal).

Fisher next argues that the trial court erroneously exercised its discretion in denying him an evidentiary hearing to determine whether he received ineffective assistance of trial counsel. We disagree.

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 on an ineffective assistance of counsel claim, the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), 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, 548 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).

Here, Fisher did not present anything that required an evidentiary hearing. The trial court correctly concluded that nothing in Fisher’s postconviction motion or attached affidavits established the necessary prejudice under *Strickland*. Booker’s affidavit did not present anything substantially new from the stipulation that was read to the jury. Further, the trial court could correctly conclude, that given what the court characterized as “overwhelming evidence” of Fisher’s guilt in the shooting, the mere difference of Booker testifying in person rather than through the police report would have made no difference. Accordingly, we agree that the record conclusively establishes that Fisher was not entitled to the relief he sought. The trial court properly denied his motion without an evidentiary hearing.

*By the Court.* – Judgment and order affirmed.

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