COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1760-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

AURELIO MAGDARIAGA,

DEFENDANT-APPELLANT.

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

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Aurelio Magdariaga appeals *pro se* from a judgment of conviction entered after a jury found him guilty of delivery of controlled substance (cocaine) second or subsequent offense, in violation of §§ 161.16(2)(b)(1), 161.41(1)(cm)(1), & 161.48, STATS. (1993-94). He also appeals from an order denying his motion for postconviction relief. Magdariaga

contends that the trial court: (1) erroneously exercised discretion by denying his request for a new lawyer; (2) improperly required him to stand trial in his county jail garb, which rendered his trial fundamentally unfair; and (3) improperly denied his ineffective assistance of counsel claim without a hearing. We reject his contentions and affirm.

I. BACKGROUND

On August 1, 1995, Magdariaga was charged with delivery of a controlled substance (cocaine). On September 23, 1995, Magdariaga wrote a letter to the trial court in which he claimed that "[his] attorney seem[ed] to be preventing [him] from entering into court to submit proof of documents for [his] sums of money." Magdariaga explained that the substantial sum of money found on him following his arrest was not "drug money" but, rather, was cash from an insurance settlement. Accordingly, he requested that the money be returned to him and that the charges against him be dismissed. He also asked that his attorney be removed from his case.

On the October 11, 1995 trial date, the assistant district attorney informed the trial court that she had received a letter from Magdariaga in which he requested a new attorney.[1] Following an inquiry into the matter, the trial court concluded that substitution of counsel was unnecessary and denied Magdariaga's request. Magdariaga's case then proceeded to trial.

[1] It is unclear whether the assistant district attorney was referring to the September 23, 1995 letter, which was addressed to the trial court, or to some other letter the prosecutor may have received. The record on appeal contains only the September 23 letter.

On October 12, 1995, the jury convicted Magdariaga. The trial court sentenced him to thirteen years' imprisonment, consecutive to the sentence he was currently serving on his parole revocation. On May 31, 1996, Magdariaga filed a *pro se* motion for postconviction relief, which the trial court denied without a hearing.

II. ANALYSIS

Magdariaga claims that the trial court erroneously exercised discretion in denying his request for new counsel. He alleges that the trial court failed to "ascertain[ ] a meaningful inquiry and learn[ ] of the actual failure of counsel to consult with the defendant in preparation for the jury trial …." Further, he contends that if the trial court had made such an inquiry, "it would have found *just cause* to relieve [defense counsel] and appoint another counsel …." (Emphasis in original.) We disagree.

On a request for substitution of counsel, the trial court must exercise discretion to determine whether substitution of counsel is warranted. *See* ***State v. Lomax***, 146 Wis.2d 356, 359, 432 N.W.2d 89, 90 (1988). "A discretionary determination 'must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Id.*** (citation omitted). We will uphold a trial court's discretionary determination unless we conclude that there was an erroneous exercise of discretion. ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

In evaluating whether a trial court's denial of a motion for substitution of counsel is an erroneous exercise of discretion, we must consider: (1) whether the trial court's inquiry into the defendant's complaint was adequate;

(2) whether the motion was timely; and (3) "whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." ***Lomax***, 146 Wis.2d at 359, 432 N.W.2d at 90; *see also* ***Phifer v. State***, 64 Wis.2d 24, 31, 218 N.W.2d 354, 358 (1974) (citing factors to assist the trial court in balancing the defendant's constitutional right to counsel against societal interest in the prompt and efficient administration of justice).

The reasons asserted in Magdariaga's letter and those which he stated prior to trial do not indicate a conflict necessitating substitution of counsel. Although Magdariaga stated that his attorney had lied to him five times, he presented nothing to the trial court to substantiate his accusation. When the court posed questions to him, Magdariaga evaded them and repeatedly stated that he did not want to go to trial because he was not ready. He also told the court that he did not believe his attorney had done anything for him. He contended that counsel had made him obtain proof of his insurance payment, and that his attorney's failure to seek this information signified indifference about the case. Responding to these allegations, defense counsel stated that he was ready for trial and claimed no knowledge of his client's complaints. After hearing from Magdariaga and defense counsel, the trial court concluded that no conflict appeared so great as to result in a lack of communication that would prevent Magdariaga from receiving adequate representation from his attorney. We agree.

Magdariaga failed to establish "good cause" within the meaning of ***Lomax*** to require substitution of counsel. Despite Magdariaga's attempt to portray conflict, none appeared so great as to result in total lack of communication that would prevent an adequate defense and frustrate a fair presentation of the case. *See* ***Lomax***, 146 Wis.2d at 359, 432 N.W.2d at 90. Although Magdariaga makes

much of his personal effort to supply counsel with the receipt for his insurance proceeds, this assistance in preparing his case does not establish good cause requiring substitution of counsel. Accordingly, we conclude that the trial court's decision to deny the request for substitution was a reasonable exercise of discretion.

Magdariaga next claims that his "right to [an] impartial jury was denied by the court's forcing [him] to stand trial in prison garb." Magdariaga contorts the law and the facts.

"The right to a fair trial is guaranteed to a criminal defendant by the sixth and fourteenth amendments to the United States Constitution." ***Holbrook v. Flynn***, 475 U.S. 560, 567 (1986). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial." ***Estelle v. Williams***, 425 U.S. 501, 503 (1976). "[A] state violates a defendant's right to due process, and therefore the presumption of innocence, when it requires him to appear at trial in identifiable prison clothing." ***State v. Clifton***, 150 Wis.2d 673, 679, 443 N.W.2d 26, 28 (1989). If a defendant chooses to wear prison apparel, however, there is no compulsion, and the defendant may not later claim entitlement to reversal as a result of attire. *See* ***Duarte v. United States***, 81 F.3d 75, 77 (7th Cir. 1996); *see also* ***United States v. Albritton***, 75 F.3d 709, 711 (D.C. Cir. 1996) (Where the record demonstrates that the defendant would have been permitted to wear any clothes supplied, no violation occurs because no state compulsion occurred.)

The record clearly establishes that Magdariaga refused to wear anything other than his county jail jumpsuit. After the jury was brought to the courtroom and was in the hall, the trial court asked Magdariaga:

> THE COURT: … [A]re you going to be sitting in the jail clothes or do you want to be in your street clothes during this trial?
>
> THE DEFENDANT: I'm not going to get dressed ....

The court then explained, "Mr. Magdariaga, do you understand the jury might draw an unfavorable impression of you if you're sitting there in jail garb as opposed to street clothes?" After defense counsel and the court then commented on another subject, the court further inquired:

> THE COURT: … The question right now Mr. Magdariaga is do you intend to appear in the jail uniform you have on or in the street clothes that you have in the back?
>
> THE DEFENDANT: I don't think I'm going to get dressed….
>
> THE COURT: … The jury is in the hall. I'm going to bring the jury in here in a minute or so, so you have to decide right now.
>
> THE DEFENDANT: I'm not getting dressed. I'm going to appear as I am dressed.
>
> THE COURT: All right, bring the jury panel in. Could I see counsel for a minute please.
>
> [DEFENSE COUNSEL]: Judge, Mr. Magdariaga asks permission to go back and get dressed.

The court then recessed to permit Magdariaga to change his clothing. After a short time, Magdariaga and the deputy returned to the court, and the following exchange took place:

> THE COURT: Back on the record. What's the problem, Deputy Thorn?

> THE DEPUTY: He was refusing to change clothes once he got in the back. He refused to come back out, he said he's not going to jury trial.
>
> [DEFENSE COUNSEL]: Your Honor—
>
> THE COURT: Wait, one at a time.
>
> THE DEFENDANT: I told the bailiff I didn't want to go to jury trial today then the bailiffs decided to grab me and just brought me back into court.
>
> THE COURT: Mr. Magdariaga, we are going to do a trial today. At this point I'm going to find you've made the decision you want to appear in jail clothes you have on. You had an opportunity, you've had several opportunities to change your clothes, the last one apparently was a ruse to get into the back. So you could say you weren't coming back out.
>
> You are in the courtroom. You will stay in the courtroom now and we'll proceed with the jury selection. Bring the jury in please.

Magdariaga had ample opportunity to change into street clothes; he simply chose not to do so. Magdariaga was not compelled to be tried in the county jail attire and, therefore, his constitutional rights were not violated.

Magdariaga next claims that the trial court erred by denying his ineffective assistance of counsel claim without a ***Machner*** hearing.[2] Magdariaga alleges that his trial counsel was ineffective because he failed: (1) to advise him of potential defenses and the benefits of testifying; (2) to consult with him about his case while he was in jail; (3) to protect his right to an impartial jury; (4) to object to the chain of custody of the cocaine and authenticity of the toxicology report;

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

and (5) to object to an alleged misstatement by the prosecution concerning the distance of the officers' observation of the drug transaction.

Whether the trial court correctly denied a defendant's motion for an evidentiary hearing for ineffective-assistance-of-counsel claims is a question of law, which we review *de novo.* *See* ***State v. Bentley***, 201 Wis.2d 303, 308, 548 N.W.2d 50, 53 (1996). In order to receive an evidentiary hearing on an ineffective assistance of counsel claim, the defendant must raise factual allegations to support the claim that defense counsel rendered deficient performance and that the deficient performance was prejudicial. *See* ***id***. "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 (citations omitted).

Here, the record conclusively demonstrates that Magdariaga is not entitled to relief. As the trial court noted in its decision denying the request for a ***Machner*** hearing:

> Defendant has not met the ***Strickland*** criteria. His allegations are conclusory and he has failed to establish that any of the alleged errors had an impact on the end result. Consequently, he is not entitled to a ***Machner*** hearing and is not entitled to a new trial.

We agree. As the State argues on appeal, "[t]he [trial] court was justified in denying [the defendant's] postconviction motion for ineffective assistance of counsel, both because the defendant did not allege sufficient facts to warrant a hearing and because [the] defendant has not demonstrated that he was

prejudiced by any alleged deficient performance by his trial counsel." Magdariaga offers no reply. *See* ***Clark***, 179 Wis.2d at 492, 507 N.W.2d at 175 (arguments that are not refuted are deemed to be admitted). Accordingly, we conclude that the trial court properly denied his motion without a hearing.

By the Court.–Judgment and order affirmed.

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