

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 28, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

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

**Appeal No. 2004AP1838**

Cir. Ct. No. 1993CF930758A

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JEFFREY BLAND,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
JOHN A. FRANKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jeffrey Bland appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 (2003-04)<sup>1</sup> motion. He repeats on appeal the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

twelve claims of error, which were summarily rejected by the trial court: the trial court erroneously exercised its discretion (1) in allowing Bland to be tried together with his co-defendant; (2) in allowing hearsay testimony; (3) in allowing the State to vouch for the credibility of a witness; (4) in handling co-defendant's counsel's closing argument comment regarding Bland not testifying; (5) in failing to give a curative instruction after co-defendant's counsel's comment; (6) in allowing the jury panel to remain after dismissing Bland's parole agent as a potential juror; (7) by allowing co-defendant's counsel to make closing argument not based in evidence; his trial counsel provided ineffective assistance by (8) failing to seek severance of his case from his co-defendant's; (9) failing to impeach a witness; (10) failing to object to the State vouching for the credibility of a witness; (11) failing to object when co-defendant's counsel stated during closing argument that Bland did not testify; and (12) failing to object to use of allegedly non-existent evidence. Bland also argues that his postconviction counsel provided ineffective assistance by failing to raise these twelve claims of error. Because we reject all of Bland's claims, we affirm the order.

## BACKGROUND

¶2 On February 26, 1993, Bland and co-defendant James Holloway were charged with three counts of first-degree intentional homicide for killing three men on February 21, 1993. The three victims were shot execution-style with the muzzle of the gun pressed up against their heads. Holloway was convicted of these crimes with the additional element, while possessing a dangerous weapon. Holloway and Bland were tried together. Bland did not testify on his own behalf; Holloway did testify.

¶3 After a four-day trial in June 1993, the jury found Bland guilty of all three charges. He was sentenced to three concurrent life terms, with parole eligibility in 2059. Bland filed a postconviction motion with the assistance of counsel. The basis of the motion was that the evidence was insufficient to support the verdict. Bland filed a second postconviction motion alleging: the trial court erred in refusing to submit a lesser-included instruction on felony murder and second-degree homicide; that Bland's rights were violated by Holloway's counsel's comment during closing argument that Bland did not testify at trial; ineffective assistance of trial counsel; and insufficiency of the evidence. The trial court denied the motion by written order dated April 12, 1994. Bland then appealed to this court.

¶4 Bland raised two issues in his direct appeal—whether the trial court erred in rejecting his lesser-included instruction request and whether Holloway's counsel's reference to Bland not testifying violated his Fifth Amendment rights. On March 7, 1995, we affirmed his conviction and the order denying his postconviction motion. We also noted that Bland abandoned his claim that trial counsel provided ineffective assistance by failing to raise it in his direct appeal.

¶5 Nine years later, Bland filed a *pro se* motion pursuant to WIS. STAT. § 974.06. He included in his motion the twelve issues set forth in the first paragraph of this opinion, and claimed that these issues were not raised earlier due to the ineffective assistance of his postconviction counsel. The trial court summarily rejected all of Bland's claims. Bland now appeals.

## DISCUSSION

¶6 Bland raises twelve claims—the first seven allege errors by the trial court and the last five allege specific instances of trial counsel ineffectiveness.

Normally, both WIS. STAT. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), require a defendant to raise all issues in the original postconviction motion or appeal. Bland argues that none of these claims are procedurally barred because his postconviction counsel provided ineffective assistance in failing to raise these twelve issues.

¶7 We conclude that all five claims alleging ineffective assistance of trial counsel are without merit. The record reflects that postconviction counsel did allege ineffective assistance of trial counsel in the postconviction motion. The trial court summarily denied the claim. On Bland's direct appeal, he abandoned this claim by failing to raise the issue.<sup>2</sup> In reviewing Bland's assertions that trial counsel provided ineffective assistance, we conclude that postconviction counsel was not ineffective in failing to pursue a claim of trial counsel ineffectiveness because there was no merit to the claim. Trial counsel's failure to bring a meritless claim does not constitute deficient performance. *State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. The five instances of ineffective assistance alleged by Bland are all either refuted by the record or fail to state a legally sufficient claim. He cannot now fault his trial counsel for failing to raise an issue without any legal merit.

¶8 It logically follows then that if there was no merit to Bland's assertion that trial counsel provided ineffective assistance, then postconviction counsel cannot be ineffective for failing to challenge the effectiveness of trial

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<sup>2</sup> Bland's abandonment of the claim provides another reason for this court to reject his assertions of ineffective assistance of trial counsel.

counsel. Accordingly, we conclude, as did the trial court, that Bland's ineffective assistance of counsel claims fail.

¶9 The remaining seven claims all assert error on the part of the trial court. The trial court summarily denied all of Bland's claims without conducting an evidentiary hearing. We do the same. In reviewing Bland's claims, we are guided by the appellate review principles set forth in *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433:

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

*Id.*, ¶9 (citations omitted). Here, Bland alleged that the trial court erroneously exercised its discretion when it failed to sever Bland's case from that of co-defendant Holloway's, allowed hearsay testimony, allowed the State to vouch for the credibility of a witness, improperly handled Holloway's counsel's closing argument comment about Bland not testifying, failed to give a curative instruction in that regard, failed to dismiss the entire jury panel after Bland's parole agent was dismissed as a potential juror, and allowed Holloway's counsel to make a closing argument not based in evidence. All of Bland's claims, however, constitute conclusory allegations or are refuted by the record.

¶10 First, as to the severance claim, the record reflects that both co-defendants agreed to be tried together for tactical reasons. Moreover, Bland fails to allege with any specificity how the failure to sever the cases prejudiced his case. Holloway could have been brought in by the State to testify against Bland. It was undisputed that both Bland and Holloway were present during the shootings. Accordingly, the trial court's failure to sever the cases was not an erroneous exercise of discretion.

¶11 Second, Bland's allegations regarding the hearsay testimony are wholly undeveloped and conclusory. Third, the trial court rejected Bland's claim that the State "vouched" for the credibility of a witness, indicating that it could not find anything in the record supporting Bland's suggestion. This court, similarly, cannot find anything to conclude that the State improperly vouched for the credibility of a witness.

¶12 The fourth and fifth claims of trial court error relate to Holloway's counsel's comment about Bland not testifying during the trial. Bland fails woefully to allege sufficient facts with respect to these claims. He does not allege any fact which, if true, would entitle him to relief. His claim is wholly conclusory and fails to supply any basis justifying action by the trial court to intervene during the closing argument or *sue sponte* give a curative instruction.

¶13 The sixth claim, that the entire jury panel should have been dismissed after Bland's parole agent was dismissed as a prospective juror, is baseless. Rather, Bland's assertions that the parole agent may have made comments to other members on the prospective panel, which could have prejudiced Bland, is wholly speculative. There is no evidence to support his claim

that the parole agent tainted the entire panel. Accordingly, the trial court did not err by failing to dismiss the entire panel.

¶14 Finally, Bland's last claim that Holloway's counsel's closing was not based on record evidence is refuted by the record. The trial court's written order cites to the evidentiary bases for the comments made during the co-defendant's closing. Accordingly, there was an evidentiary basis for the co-defendant's closing argument and Bland's claim to the contrary is non-meritorious.

¶15 Based on the foregoing, we conclude the trial court did not err in summarily denying Bland's WIS. STAT. § 974.06 motion. Accordingly, we affirm the order.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

