COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP66-CR **Cir. Ct. No. 2002CF6435**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANNY L. PETERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RUSSELL W. STAMPER and JOHN SEIFERT, Judges. *Affirmed.*

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

¶1 PER CURIAM. Danny L. Peterson appeals from a judgment of conviction for possessing cocaine with intent to deliver, and from a postconviction

order summarily denying his plea-withdrawal motion.[1] The issues are whether Peterson is entitled to an evidentiary hearing on his ineffective assistance of trial counsel claims for failing to subpoena a confidential informant, whom Peterson contends "set him up" as a drug dealer, and for (mis)advising him to enter a no-contest plea and then appeal from the adverse ruling on the informant. We conclude that an evidentiary hearing was unnecessary because the confidential informant's testimony at an *in camera* hearing provided no arguable corroboration for Peterson's claimed defense, and the postconviction allegations were insufficient to warrant an evidentiary hearing, rendering inconsequential any advice regarding appellate review of that issue. Therefore, we affirm.

¶2 A confidential informant told police that Peterson would be delivering narcotics at a specified location. As Peterson was driving to that location, police stopped him, knowing that he was driving without a valid driver's license. Incident to Peterson's arrest, police seized a bag of cocaine base in plain view on the vehicle's front seat. Police claimed that Peterson then said, "[t]hat ain't all mine." Police then went to Peterson's residence where they found a large quantity of cocaine base. Peterson allegedly told police that he had not realized how much cocaine base his girlfriend had in the house. Peterson's girlfriend told police that she generally conducted about twenty "smaller" sales daily, and that Peterson sold the larger amounts.

¶3 Peterson moved to suppress the evidence, and to compel disclosure of the confidential informant, who he claimed had planted the cocaine in the

[1] The Honorable Russell W. Stamper presided over proceedings culminating in the entry of the judgment of conviction. The Honorable John Siefert presided over postconviction proceedings.

vehicle Peterson was driving, arranged a drug deal, and then implicated Peterson to police. The trial court denied Peterson's suppression motion, ruling that the evidence was seized incident to a lawful arrest, and conducted an *in camera* evidentiary hearing with the confidential informant.[2] Following that hearing, the trial court denied Peterson's motion to compel disclosure, ruling that the confidential informant offered "no support whatsoever" for the defense theory.

¶4 Peterson then entered a no-contest plea to possessing more than one hundred grams of cocaine with intent to deliver, as a subsequent drug offense, and as a party to the crime, contrary to WIS. STAT. §§ 961.41(1m)(cm)5, 961.48 and 939.05 (2001-02).[3] The trial court imposed a twenty-year sentence to run concurrently to any other sentence, comprised of eight- and twelve-year respective periods of confinement and extended supervision.

¶5 Peterson sought postconviction plea-withdrawal for trial counsel's ineffectiveness for: (1) failing to investigate and subpoena the confidential informant for trial preparation or testimony; and (2) misadvising Peterson to enter a no-contest plea to the charges and then appeal to challenge the trial court's denial of his motion to compel disclosure of the confidential informant's identity. The trial court summarily denied the motion because it had previously found that the *in camera* testimony of the confidential informant did not support Peterson's

[2] Peterson claimed to know this "confidential" informant's identity.

[3] A defendant does not claim innocence by entering a no-contest plea, but implicitly acknowledges the sufficiency of the State's evidence to establish guilt beyond a reasonable doubt. *See* WIS. STAT. § 971.06(1)(c) (2001-02); *see also* ***Cross v. State***, 45 Wis. 2d 593, 598-99, 173 N.W.2d 589 (1970).

defense theory, obviating his ineffective assistance claims, and that Peterson failed to allege sufficient facts for an evidentiary hearing.

¶6 "To withdraw his plea after sentencing, [the defendant] need[s] to establish by clear and convincing evidence, that failure to allow a withdrawal would result in a manifest injustice." ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891. "[T]he 'manifest injustice' test is met if the defendant was denied the effective assistance of counsel." ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (citations omitted).

¶7 To maintain an ineffective assistance claim, the defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant must allege "factual-objective" rather than "opinion-subjective" information. *See* ***State v. Saunders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one if there is insufficient proof of the other. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). "[A] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted).

¶8 The supreme court reiterated the well-established standards for a postconviction evidentiary hearing.

> 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. *Bentley*, 201 Wis. 2d 309-10. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. *Id.* at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). 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 [trial] court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Nelson*, 54 Wis. 2d at 498. *See Bentley*, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶9 Peterson told his trial counsel that he believed that the confidential informant who "set [him] up" was Melvin Williams. Defense counsel moved to compel disclosure of the identity and location of the confidential informant to enable Peterson to prove that the informant planted cocaine in the vehicle he knew Peterson would use to consummate the drug transaction engineered by the informant. As defense counsel explained,

> this is a case where we will be showing that the person, this informant that they do not want to disclose, is the person that was driving the car fifteen minutes before [Peterson]. Our contention is the informant put the drugs in the car, went to the bar, called [Peterson] to come. As he approached a bar, he was swooped down by nine cop cars, practically saying we've been waiting for you, so it was a setup.

¶10 After an *in camera* evidentiary hearing with the confidential informant, and with the police detective who searched Peterson's vehicle, the trial court denied the motion because: (1) the informant offered "no corroboration … no support whatsoever" for Peterson's defense theory; and (2) the informant, who had been identified by the defense, was not under the State's control. Implicit in

the latter ruling, is the proposition that the defense could attempt to subpoena the informant to testify at trial; the trial court did not preclude the informant from testifying.

¶11 The linchpin of Peterson's postconviction claims is the necessity of the confidential informant's testimony. We have reviewed the sealed transcript of the *in camera* hearing of that testimony.[4] Peterson asserted that the informant had access to Peterson's vehicle shortly before the meeting, planted the cocaine base, alerted police to his meeting with Peterson, and "set [Peterson] up."[5] The informant testified, however, that Peterson "had several vehicles, but [] d[id]n't know which one [Peterson] was driving that night." The informant also testified that he did not have keys to Peterson's vehicles, that he drove his own vehicle to and from Peterson's home, and to their various meeting places on the date of Peterson's arrest.

¶12 The only postconviction affidavit is from Peterson's postconviction counsel reiterating her conversations with Peterson and trial counsel. It principally relates to the second ineffective assistance claim regarding how to best obtain review of the trial court's denial of the motion to compel disclosure. The only averment relating to the first claim is that "[trial counsel] told [postconviction counsel] that she did not hire an investigator to locate, interview or subpoena Melvin Williams even though she had a week to[] do so before the trial date."

[4] This court *sua sponte* ordered supplementation of the record with the sealed transcript of that hearing.

[5] According to police however, when they found the cocaine base, Peterson claimed, "[t]hat ain't all mine." Consequently, Peterson's claim is actually that Melvin Williams planted some of the cocaine base in Peterson's car.

Peterson has not shown that the trial court erred in its determination that the confidential informant had "no corroboration … no support whatsoever" for his defense theory, nor has he proffered adequate testimony by postconviction affidavit to support his defense theory. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶13 We consequently do not address whether trial counsel's failure to attempt to subpoena Williams and her challenged advice on entering a no-contest plea to the charge to then appeal from the denial of Peterson's motion constituted ineffective assistance because the trial court interviewed Williams *in camera* and determined that his testimony did not support Peterson's defense theory. Without establishing prejudice on either ineffective assistance claim, Peterson cannot maintain that trial counsel was ineffective for failing to subpoena the confidential informant, or for misadvising him on how best to obtain appellate review of a ruling, which, on this record, would have been an exercise in futility.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).