COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2005AP1094
2005AP1095

Cir. Ct. Nos. 1999CF4466
1999CF6213

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TITUS GRAHAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed*.

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

¶1 KESSLER, J. Titus Graham appeals *pro se* from an order denying his WIS. STAT. § 974.06 motion for postconviction relief.[1] His postconviction motion alleged ineffective assistance by his trial counsel and by his appellate counsel, plus several other claims for relief. For the reasons discussed below, we reject his arguments and affirm the order.

BACKGROUND

¶2 In 1999, the State charged Graham with three counts of being a party to the crime of armed robbery, based on a series of robberies of three retail stores in July 1999. Graham was alleged to have committed the robberies with Herbert Johnson, who was charged with two additional robberies. Graham was also charged with being the sole robber of a Family Dollar Store in December 1999.

¶3 Graham ultimately entered ***Alford***[2] pleas to two robberies and guilty pleas to two other robberies. Pursuant to the plea agreement, Graham also agreed to have a fifth robbery read-in for sentencing purposes.[3] The trial court, the Hon. Laurence Gram, found Graham guilty and sentenced him to a thirty-year term of imprisonment on each of the four counts, with the sentences to be served concurrently.

¶4 Graham, represented by postconviction counsel James Lucius, filed a motion for postconviction relief that was heard by the Hon. M. Joseph Donald.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[3] Only Johnson had been formally charged with the fifth robbery, but Graham had been identified in a line-up as one of the robbers.

Graham made three arguments: (1) he alleged that the trial court had erroneously exercised its discretion at sentencing; (2) he alleged that his pleas had been involuntarily entered because his trial counsel provided ineffective assistance of counsel when he failed to inform Graham that his mere presence at the scene of a robbery would not be sufficient for the jury to find him guilty as a party to the crime; and (3) he argued that he was denied due process when the fifth robbery was read-in for sentencing purposes.

¶5 A ***Machner***[4] hearing was conducted. Graham's trial attorney, Michael Chernin, testified that he gave Graham all police reports and discovery materials, reviewed the materials with Graham, and discussed with Graham the meaning of party to a crime. Chernin said he used a jury instruction to discuss with Graham the facts in the cases that established Graham's liability under the party-to-a-crime theory. Chernin said the two also discussed the use of read-in charges.

¶6 In contrast, Graham testified that Chernin never reviewed discovery materials with him and denied Chernin told him that his mere presence would not be enough to establish that he was a party to the crime.

¶7 The trial court found that Chernin's testimony was highly credible and adopted the State's proposed findings of fact and conclusions of law as its own. In doing so, the trial court found that Chernin had provided all relevant information to Graham, and that Chernin had told Graham that being present at the

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

scene of a crime would not in and of itself establish Graham's liability as a party to a crime.

¶8 Lucius filed Graham's direct appeal to this court. Graham notes that he and Lucius disagreed about which issues to pursue on appeal. Ultimately, Lucius presented only one issue to the court of appeals: the alleged erroneous exercise of sentencing discretion. In an unpublished decision, we affirmed the sentence, with one exception: we reversed and remanded with instructions to give Graham one hundred and sixty-nine days of sentencing credit that was due. *See* ***State v. Graham***, Nos. 2003AP1915-CR, 2003AP1916-CR, unpublished slip op. (WI App Sept. 22, 2004).

¶9 On April 7, 2005, Graham, acting *pro se*, filed a WIS. STAT. § 974.06 motion for postconviction relief that is the subject of this appeal. He presented arguments relating to: (1) ineffective assistance of postconviction/appellate counsel; (2) alleged ineffective assistance of trial counsel; (3) newly discovered evidence; and (4) the State's failure to disclose exculpatory evidence. The trial court, in a written decision, denied Graham's motion without a hearing. This appeal followed.

DISCUSSION

¶10 In his postconviction motion, Graham sought to withdraw his guilty pleas and ***Alford*** pleas for a variety of reasons. A defendant seeking to withdraw a guilty plea after sentencing must show, by clear and convincing evidence, that a manifest injustice would result if the motion to withdraw is denied. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The manifest injustice test is satisfied by a showing that the defendant received ineffective assistance of counsel. ***Id.*** A defendant claiming ineffective assistance of counsel must allege

facts showing "'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" ***Id.*** at 312 (quoting ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985)). In order to show that a failure to investigate was prejudicial, a defendant must show both what the investigation would have revealed and how it would have altered the outcome of the proceedings. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994).

¶11 The trial court may deny a postconviction motion without an evidentiary hearing if the facts alleged in the motion, even if true, "do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief." ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 (footnote omitted). A defendant must allege more than "self-serving conclusion[s]." ***Bentley***, 201 Wis. 2d at 316. Rather, a defendant must "allege facts which allow the court to meaningfully assess his claim of prejudice." ***Id.*** at 318.

¶12 We review a trial court's decision not to hold an evidentiary hearing on a postconviction motion using a mixed standard of review. ***Id.*** at 310. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law to be reviewed *de novo*. ***Id.*** If the motion fails to allege sufficient facts, then the trial court has the discretion to deny the postconviction motion without a hearing and we review that determination under the deferential erroneous exercise of discretion standard. ***Id.*** at 310-11.

I. Ineffective assistance of appellate counsel

¶13 Graham argues that postconviction/appellate counsel Lucius was ineffective for failing to pursue on direct appeal several issues that had been raised in the postconviction motion and discussed at the ***Machner*** hearing. The trial court rejected Graham's argument on grounds that his allegations that Lucius failed to raise a properly preserved postconviction issue on appeal must be brought via a petition for *habeas corpus*. We agree.

¶14 If Graham were arguing that Lucius failed to raise issues at the trial court in order to preserve them for appeal, it would be appropriate to raise this claim in a postconviction motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 679, 556 N.W.2d 136 (Ct. App. 1996). However, where a defendant alleges that counsel should have argued in the court of appeals issues that were raised and preserved in the trial court, the proper procedure is to file a petition for *habeas corpus* to allege ineffective assistance of appellate counsel. ***State v. Knight***, 168 Wis. 2d 509, 519-20, 484 N.W.2d 540 (1992). Therefore, we will not address Graham's arguments with respect to issues he claims Lucius should have raised in his direct appeal.

II. Ineffective assistance of postconviction counsel at the *Machner* hearing

¶15 Graham argues that Lucius was ineffective at the ***Machner*** hearing. The standards for evaluating ineffective assistance of counsel claims are well-established:

> To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice. To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness. To prove

> constitutional prejudice, the 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.

State v. Love, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62 (citations and internal quotation marks omitted).

¶16 Graham explains that during the ***Machner*** hearing, one issue raised was whether trial counsel had reviewed and given Graham copies of discovery materials. Graham argues:

> For reasons unknown, post-conviction counsel did not ask trial counsel if or when a motion for discovery was filed or for verification of the date in which discovery was allegedly received. Nor did post-conviction counsel refer to the docketing record … which does not reflect a formal verbal request or written motion, by trial counsel, for discovery or exculpatory materials.
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> No written, signed or served form of disclosure, from the state, such as an affidavit or letter confirming delivery of said discovery materials can be found within the record. Nor does the record support trial counsel obtaining discovery through "open file" policy or any other means. These questions and references to the docketing sheet and the record would have shown that trial counsel's testimony "had no foundation in the record."

¶17 In response, the State asserts that Graham has failed to allege sufficient facts to show that Lucius's performance was deficient or prejudicial to the defense. The State explains:

> Graham states the conclusion that "it is a reasonable probability that if post-conviction counsel had used the record to discredit trial counsel's testimony and shown that it is unlikely that trial counsel ever obtained or read discovery materials, he would have succeeded on Graham's ineffective counsel claim." Graham, however, in his motion and his brief fails to state facts to support his conclusion. Graham only states that the record, other than

> Chernin's testimony, does not show that Chernin received and reviewed discovery materials.
>
> The absence of contradicting information in the record does not dent Chernin's credibility when he testifies that he received and reviewed discovery materials. Graham only cites information that is not in the record and he speculates that the absence of information in the record should damage Chernin's credibility. Graham failed to allege facts that would allow the court to meaningfully assess his claim that Lucius was ineffective for the manner in which he questioned Chernin.

Thus, the State contends, Graham's motion for postconviction relief was properly denied.

¶18 We agree with the State's analysis. Graham has not alleged sufficient prejudice from Lucius's alleged failure to cross-examine Chernin about when and how he received discovery materials. Graham alleges that the record is devoid of proof that Chernin received discovery materials, but that ignores Chernin's unequivocal testimony. The lack of other proof that Chernin received the materials does not mean that Chernin did not receive the materials. Chernin provided, in the trial court's words, "highly credible" testimony that he reviewed the materials with Graham. Graham offers no affirmative proof that Chernin did not receive the discovery and was therefore lying or mistaken when he testified that he had received it. We are unconvinced that Graham has alleged a specific basis upon which he can claim he was prejudiced by alleged deficiencies in Lucius's cross-examination of trial counsel. Therefore, the trial court correctly denied, without a hearing, Graham's claim that Lucius provided ineffective assistance during the ***Machner*** hearing. *See* ***Bentley***, 201 Wis. 2d at 310-18.

III. Ineffectiveness with respect to testimony of Teresa Blatz

¶19 Graham claims that Chernin and Lucius both were ineffective for failing to investigate the testimony of Teresa Blatz, a clerk at one of the stores that Graham and Johnson robbed.[5] Graham contends that Blatz's testimony corroborated his claim that he was only a bystander when Johnson robbed that store. Graham states that he would not have accepted the plea agreement if he had been aware of Blatz's testimony at Johnson's preliminary hearing and trial.[6] Graham seeks to withdraw all of his pleas on this basis.

¶20 At Johnson's preliminary hearing, Blatz was asked if Johnson alone robbed the store. She testified:

> Well, I actually had indicated to the police that I [t]hought he was with another gentleman at the time, and [t]hey were talking down the aisle, and they were the only two left in the store. The other guy kept coming in and out, and then I saw was sitting [sic] out in the car seemingly waiting – I thought he was waiting for the defendant, but I wasn't absolutely sure … I just said I thought there was another person, but I didn't … have direct contact with him.

When Blatz testified at the trial, she apparently provided more information about the man police contend was Graham.[7]

¶21 The State contends that even if Lucius and Chernin

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[5] Graham entered an ***Alford*** plea to this crime.

[6] Johnson's trial was held in March 2000 and Graham did not enter his pleas until June 2001.

[7] We say "apparently" because we have been provided with only two pages of Johnson's trial transcript and it is not clear from the testimony whether Blatz is talking about Graham. However, for purposes of this opinion, we will assume that Blatz's testimony about the second man varied somewhat from her testimony at the preliminary hearing.

> were deficient for failing to investigate Blatz's testimony, Graham's motion failed to allege sufficient facts, if true, to show that he was prejudiced by the deficient performances because the facts as alleged failed to show that Chernin would have changed his recommendation as to the plea had the record shown that he was aware of Blatz's testimony.

The State contends that Graham's "mere assertion" that, had he been aware of Blatz's testimony, he would not have pleaded guilty "is not a sufficient allegation to obtain a hearing."

¶22 Given this case's current posture, the issue before us is not whether Graham might have been able to convince a jury that he was not actively involved in the robbery at the store where Blatz worked. Rather, the issue is whether there is a reasonable probability that, but for the failure of Chernin to investigate Blatz's testimony, Graham would not have pled guilty and would have insisted on going to trial. *See* ***Bentley***, 201 Wis. 2d at 312.

¶23 We agree with the State that, given Chernin's testimony, it is unlikely his advice to Graham to enter the plea agreement would have changed, even if Chernin knew that there were potential inconsistencies in Blatz's testimony. Chernin testified that one reason he recommended the plea agreement was the "spillover effect" that each charge would have on the others for the jury. Chernin was convinced that the jury would have trouble believing that Graham participated in some of the robberies but was an innocent companion for others, especially since the crimes were so similar to one another.[8] It is unlikely

[8] Graham was charged with robbing three stores with Johnson: a Payless Shoe Store on July 15, another Payless Shoe Store on July 22 and a Family Dollar store on July 26. He was charged with robbing a Family Dollar store by himself on December 2.

Chernin's recommendation would have changed even if there was one witness with inconsistent testimony.

¶24 We also reject Graham's argument because he has provided only mere assertions that he would not have pleaded guilty if he had known of Blatz's testimony. For instance, he states: "Graham contends that this testimony would have had a tremendous effect on his defense and he would not have pleaded guilty had he been aware of this testimony." He also asserts: "Had Graham been aware of this witness testimony[,] it would have provided crucial input towards his proclamation of not being a partaker, aiding or in compliance with this event. Therefore this testimony would also have had a dramatic effect on Graham's defense and plea decision." These statements do not provide a sufficient factual basis for relief. Missing is the detailed explanation of why Graham entered the pleas he entered, and precisely how his decision would have been affected by knowledge of Blatz's testimony. Without more, Graham's assertions are merely self-serving. Graham's assertions do not meet the ***Bentley*** standards for relief. Therefore, the trial court was correct when it denied Graham's motion on this basis.

IV. Whether Blatz's testimony is newly discovered evidence

¶25 In a related issue, Graham argues that Blatz's testimony is newly discovered evidence that constitutes a manifest injustice that justifies his post-sentencing plea withdrawal. "Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred." *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "This is so because of the requirement that all pleas be supported by evidence establishing a factual basis to support the plea, and because newly discovered facts 'could establish that conduct originally

admitted by the defendant did not constitute the offense charged.'" ***State v. Fosnow***, 2001 WI App 2, ¶8, 240 Wis. 2d 699, 624 N.W.2d 883 (citation omitted).

¶26 ***McCallum*** set forth the criteria for newly discovered evidence:

> First, the defendant must prove, by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.

Id., 208 Wis. 2d at 473. The defendant is not entitled to a trial if the defendant fails to meet any of the above elements. ***State v. Sarinske***, 91 Wis. 2d 14, 38, 280 N.W.2d 725 (1979).

¶27 The State argues that Blatz's testimony, which was given over a year before Graham entered his pleas, cannot qualify as newly discovered evidence "because, except for defense negligence or deficient performance of counsel, it would have been discovered before Graham's conviction." The State contends that "[i]f the failure to discover the testimony was due to negligence, the evidence does not qualify as newly discovered evidence." In other words, the State contends that Graham has failed to establish the second prong: that the defendant was not negligent in seeking evidence. *See* ***McCallum***, 208 Wis. 2d at 473.

¶28 We agree with the State and the trial court that the transcripts are not newly discovered evidence. Graham or his trial counsel could have accessed the

information prior to entering a plea.[9] Graham is not entitled to withdraw his pleas. *See* ***Sarinske***, 91 Wis. 2d at 38.

V. Provision of transcript of Blatz's testimony

¶29 Graham argues that the State's "failure to disclose material exculpatory impeachment evidence violated state reciprocal discovery statute [sic]." Specifically, Graham contends that the State was required to provide him with transcripts of Blatz's testimony pursuant to WIS. STAT. § 971.23(1)(h)[10] because it was exculpatory. The State counters that the transcripts were public record. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 254, 409 N.W.2d 432 (Ct. App. 1987) (trial transcripts are public record). Therefore, the State argues, it was not required to provide the transcripts because they were not "within the possession, custody or control of the state." *See* § 971.23(1)(h).

¶30 We decline to address this issue on its merits. WISCONSIN STAT. § 974.06(4) and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 185, 517 N.W.2d 157 (1994), preclude a defendant from pursuing claims in a subsequent

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[9] We have already rejected Graham's argument that trial counsel provided ineffective assistance by failing to do so.

[10] WISCONSIN STAT. § 971.23(1) provides in relevant part:

> **(1)** WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
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> ….
>
> (h) Any exculpatory evidence.

appeal that could have been raised in his or her direct appeal, unless the defendant provides sufficient reason for failure to raise the claims in the first instance. Graham offers no reason why this issue was not raised previously. He is barred from raising it now.

VI. Interest of justice

¶31 Graham's final argument is that he should be granted a "hearing in the 'interest of justice' to determine whether or not post-conviction counsel was ineffective for failing to use the record" at the ***Machner*** hearing on trial counsel's performance. We are unconvinced that Graham is entitled to a ***Machner*** hearing in the interest of justice.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.