

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2006

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. 2005AP1169

Cir. Ct. No. 1997CF973351A

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JULIUS MAURICE COVINGTON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Julius Maurice Covington, *pro se*, appeals from an order and an amended order denying his postconviction motion brought pursuant

to WIS. STAT. § 974.06 (2003-04).¹ Because we conclude that the record conclusively demonstrates that Covington is not entitled to relief, we affirm the circuit court's orders.

Background

¶2 On July 22, 1997, Covington and three accomplices robbed the owner of Clark's Liquor Store and two of his employees at gunpoint. Police arrested Covington and his accomplices at the scene.

¶3 The State Public Defender appointed counsel to represent Covington at trial. Covington discharged the attorney. The circuit court warned Covington that only one more attorney would be provided at public expense. Subsequently, the State Public Defender appointed successor counsel. Covington's relationship with successor counsel deteriorated. Ultimately, trial counsel moved to withdraw. After conducting a hearing on the motion, the circuit court allowed successor counsel to withdraw, finding that Covington forfeited his right to counsel by his own actions, as a matter of law.

¶4 Covington proceeded to trial *pro se* with stand-by counsel appointed by the circuit court. The jury convicted Covington of six counts contained in the amended information: three counts of armed robbery, while concealing identity, party to a crime, one count of being a felon in possession of a firearm while concealing identity, one count of substantial battery while concealing identity, party to a crime, and one count of theft of moveable property while concealing

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

identity, party to a crime. The circuit court imposed consecutive sentences totaling seventy-nine years of imprisonment.

¶5 Covington appealed, claiming that the circuit court erred in permitting his second attorney to withdraw. Covington also claimed that his stand-by counsel failed to provide him constitutionally required assistance. This court issued an opinion affirming the judgment. We concluded that Covington had forfeited and waived his right to counsel by his own actions and that the circuit court did not err in granting successor trial counsel's motion to withdraw. *State v. Covington*, No. 99-0536-CR, unpublished slip op. (WI App Apr. 27, 2000).

¶6 Covington subsequently filed a motion under WIS. STAT. § 974.06(1), claiming that his postconviction counsel was ineffective for failing to contend that the circuit court erred in permitting the State to amend the information after his arraignment and by failing to re-establish Covington's waiver of counsel after the amended information was filed. The circuit court denied the motion and Covington appeals.

Discussion

¶7 When a defendant alleges ineffective assistance of counsel, an evidentiary hearing is often required to resolve issues that turn on material disputed facts. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). If the motion fails to allege sufficient facts to raise a question of fact or presents only conclusory allegations, the circuit court may in its exercise of discretion deny the motion without a hearing. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Similarly, where “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 310 (citing *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)).

¶8 Counsel is presumed to have acted properly. Therefore, Covington had the burden to demonstrate that his attorney made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). In this case, we agree with the State that postconviction counsel was not ineffective because the issues identified in Covington’s WIS. STAT. § 974.06(1) motion would not have been successful if raised on appeal.

¶9 The circuit court may permit the State to file an amended information after arraignment and before trial if the defendant’s rights to notice, a speedy trial and the opportunity to defend are not prejudiced. *Whitaker v. State*, 83 Wis. 2d 368, 374, 265 N.W.2d 575 (1978). An information may be amended to include crimes that are “transactionally related” to one or more crimes upon which the defendant has been bound over for trial. *State v. Richer*, 174 Wis. 2d 231, 253-54, 496 N.W.2d 66 (1993).

¶10 In this case, Covington was bound over following a preliminary hearing at which the owner of Clark’s Liquor Store testified that on July 22, 1997, gunmen took the store’s proceeds and a pistol and that one of them hit him in the face with a gun, fracturing his nose. The store owner testified that two employees were present when the robbery occurred.

¶11 The State’s original information charged Covington with one count of armed robbery by use of force, party to a crime and one count of being a felon in possession of a firearm. We conclude that no error of law occurred when the circuit court permitted the State to amend the information. The four additional

felony charges—two counts of armed and masked robbery by use of force, party to a crime, one count of substantial battery while concealing identity, party to a crime and one count of theft of a firearm while armed and concealing identity, party to a crime—arose from the crime spree at Clark’s Liquor Store on July 22, 1997. Furthermore, Covington’s motion did not allege any facts showing that he suffered prejudice by the circuit court’s discretionary decision to permit the amendment of the information. Accordingly, we conclude that the circuit court properly rejected the claim that postconviction counsel was ineffective for failing to challenge the circuit court’s order permitting the State to file an amended information without holding a hearing.

¶12 Covington next claims that postconviction counsel was ineffective for failing to argue that the circuit court erred in failing to secure Covington’s waiver of his right to counsel after the amended information was filed. We disagree.

¶13 In the absence of extraordinary circumstances, the waiver of counsel extends through trial and sentencing:

Here the waiver of right to counsel was clearly and unmistakably made. On his initial appearance before the magistrate, the defendant was informed of his rights, including the right to have an attorney appointed for him. He waived both the right to appointment of counsel and to a preliminary hearing. At his arraignment, he was again informed of his rights, including the right to appointment of counsel. He specifically stated that he did not wish counsel appointed to represent him. Such waivers of the right to counsel extend from the initial stages of the case through the trial and sentencing. It has been held that unusual circumstances or developments place the trial court upon notice to make further inquiry as to whether the waiver is being withdrawn. However, under the special facts and circumstances of this case, we do not find the request for change of plea and new trial indicated a desire or disposition on the part of the defendant to have an attorney

on the sentencing phase of the case in which he had been found guilty. The oral motion and statement made by the defendant fell short of the affirmative action on the part of the defendant required to reinstate the right to counsel or to require the trial court to ascertain whether such reinstatement was being requested.

State v. Mathis, 39 Wis. 2d 453, 459-60, 159 N.W.2d 729 (1968) (footnote omitted).

¶14 Extraordinary circumstances may include the filing of new charges. See *Davis v. United States*, 226 F.2d 834, 840 (8th Cir. 1955). Here the record shows that Covington waived his right to counsel after learning that the State would be adding charges based on the record developed at the preliminary hearing if he failed to enter a guilty plea to the charges contained in the original information. Specifically, at a pretrial hearing held on January 2, 1998, the assistant district attorney advised the circuit court of its communications on the matter of amending the information to include crimes transactionally connected to the crimes upon which Covington was originally bound over at trial with his previous attorneys. The assistant district attorney also noted that he had personally provided Covington with a copy of a transcript of the preliminary hearing.

¶15 Covington was present during the pretrial hearing and did not object or correct the State's representations regarding his knowledge prior to waiving counsel. Covington's motion contains no facts on which relief might be granted on his claim that postconviction counsel was ineffective for challenging his waiver after the amended information was filed. Accordingly, we hold that the circuit court did not err in rejecting this claim without holding a hearing.

By the Court.—Orders affirmed.

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

