COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP886-CR **Cir. Ct. No. 2002CF6632**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE RUIZ,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Jesse Ruiz appeals *pro se* from a postconviction order summarily denying his motion for plea withdrawal and resentencing. The issue is whether Ruiz is entitled to an evidentiary hearing on his postconviction motion for plea withdrawal for trial counsel's failure to file a suppression motion,

or for resentencing because the trial court intended, but failed, to impose the presumptive minimum sentence. We conclude that Ruiz's postconviction allegations are insufficient to maintain an ineffective assistance claim, or to demonstrate that the trial court's mere mention of the presumptive minimum sentence was an intention to impose that sentence. Therefore, we affirm.

¶2 According to the criminal complaint, which Ruiz agreed to let the trial court use as a factual basis for his guilty plea, Detective Robert Menzel "was investigating a complaint of drugs possibly being stored in the basement of th[e] residence [in question]." Upon arriving at that residence, Detective Menzel interviewed Ruiz's sister, Yolanda, who

> indicated that her brother Jesse Ruiz was staying in the residence because he had separated from his girlfriend. Yolanda Ruiz said that Jesse Ruiz did not pay her rent to stay in the basement. Detective Menzel reported that after consent was obtained from a Yolanda Ruiz, a search of the basement resulted in a recovery of [marijuana, cocaine, and other contraband resulting in the charge on which Ruiz was convicted].[1]

(Footnote added.)

¶3 Ruiz was charged with possession of and intent to deliver between fifteen and forty grams of cocaine and between five hundred and twenty-five hundred grams of marijuana. Incident to a plea bargain, Ruiz pled guilty to the cocaine offense, in violation of WIS. STAT. § 961.41(1m)(cm)3. (2001-02), in exchange for the State's dismissal but reading-in of the marijuana charge, and the State's sentencing recommendation of a ten-year sentence, divided into equal five-

[1] When we refer to Ruiz, we are referring to the defendant, Jesse Ruiz, not his sister Yolanda.

year periods of confinement and extended supervision. After the summary rejection of a recommendation of probation, trial counsel recommended a four-year sentence, divided into equal two-year periods of confinement and extended supervision. The trial court imposed an eight-year sentence, to run consecutive to any other sentence, comprised of four-year periods of confinement and extended supervision. Thereafter, Ruiz represented himself, and moved for postconviction plea withdrawal and resentencing.

¶4 Ruiz sought postconviction plea withdrawal predicated on his trial counsel's alleged ineffectiveness for failing to move for suppression. Ruiz claimed that suppression was warranted because his sister did not consent or have standing to consent to a search of the basement where he lived, and because the informant and complaint, which purportedly prompted the investigation, lacked legitimacy. In a postconviction affidavit, Ruiz's sister averred that she did not consent to the search, despite the police's coercive efforts to compel her to do so, and that she "only go[es] on one side of the basement to wash because [Ruiz] rented the back portion since him and his girlfriend had split."

¶5 "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) (citation omitted).

¶6 To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668,

687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. 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).

¶7 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 at 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 [defendant] 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.

¶8 Ruiz's principal claim is that his sister did not consent to the search. Ruiz never alleges much less avers, however, that he told his trial counsel about the alleged lack of consent. At the guilty plea hearing, both Ruiz and his trial counsel agreed that the allegations in the criminal complaint were "true and correct," including the allegation that Detective Menzel obtained Yolanda's consent before searching the basement. As the trial court reasoned in summarily denying the motion,

> [the problematic nature of Yolanda's consent] would have been information … possessed only by the defendant or his sister. Without knowledge of this vital information, trial counsel had no duty to file a motion to suppress. Consequently, the defendant's claim that trial counsel was ineffective for failing to file a motion to suppress the evidence on this basis is rejected.

There is no evidence that trial counsel was aware that Yolanda did not consent to the search. We independently conclude that Ruiz's postconviction showing was insufficient to establish that trial counsel performed deficiently by failing to file a suppression motion to challenge what trial counsel reasonably believed was Yolanda's valid consent to search the basement of her home.[2]

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[2] Although Ruiz does not seek to supplement his postconviction motion, the law precludes him from using an evidentiary hearing to do so.

> [T]he facts must be alleged in the [mo]tion and the *[defendant] cannot stand on conclusory allegations, hoping to supplement them at a hearing*…. If there is merit in the facts, it should be an easy matter and a prime requisite to state those facts in the [mo]tion so they can be evaluated at the commencement of the proceeding. A statement of ultimate facts … *is not sufficient for a [mo]tion for postconviction relief*….

Levesque v. State, 63 Wis. 2d 412, 421-22, 217 N.W.2d 317 (1974) (emphasis added). "A conclusory allegation of ineffective assistance of counsel, unsupported by any factual assertions, is legally insufficient and does not require the trial court to conduct an evidentiary hearing." ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶9 Ruiz also challenges his sister's standing to consent to a search of that section of her basement where he resided. In her postconviction affidavit, Ruiz's sister avers that she told police that she did not know what was in the basement because "[she] only go[es] on one side of the basement to wash because [her] brother rented the back portion since him and his girlfriend had split."

> [O]ne who possesses common authority over premises or effects with another may give valid consent to the authorities to search those premises or effects, even though the other person does not consent…. "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought or inspected."

State v. West, 185 Wis. 2d 68, 93, 517 N.W.2d 482 (1994) (citation omitted). Yolanda's averment that Ruiz "rented the back portion [of the basement]," is insufficient to negate her standing to consent to a search of "the back portion" of the basement of her house.[3]

¶10 Ruiz also seeks resentencing, contending that the trial court intended to impose the three-year presumptive minimum sentence pursuant to WIS. STAT. § 961.41(1)(cm)3. (2001-02), but mistakenly imposed a longer sentence. He acknowledges the legal propriety of the eight-year sentence, but contends that the trial court intended to impose only the three-year presumptive minimum sentence,

[3] We consequently do not address the factual dispute between Yolanda's postconviction averment that "my brother rented the back portion [of the basement]," and the allegation in the criminal complaint where it was reported "Yolanda Ruiz said that Jesse Ruiz did not pay her rent to stay in the basement." Absent a sufficient challenge to the validity of Yolanda's consent, we do not address the legitimacy of the informant or the complaint. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to address non-dispositive issues).

which pursuant to ***State v. Cole***, 2003 WI 59, ¶10, 262 Wis. 2d 167, 663 N.W.2d 700, is a total sentence consisting of both a term of confinement and a term of extended supervision. To support his contention, Ruiz cites an excerpt from the sentencing transcript in which the trial court states that "[t]he legislature has determined that there are minimum mandatories here because of the amounts."[4] This is insufficient to establish an intention to impose the presumptive minimum sentence. In fact, our review of the sentencing transcript in its entirety establishes no such intention.

¶11 At the outset of his sentencing remarks, trial counsel expressly told the court "the defendant is asking me to ask you to place him on probation." The trial court immediately responded, "I'm not going to do that, so you better come up with a better choice." Trial counsel then recommended a four-year sentence. The trial court mentioned the presumptive minimum sentence to emphasize its principal concern about the large quantity of controlled substances found in Ruiz's possession. After trial counsel corrected the trial court by inquiring if it meant "[p]resumptive minimums," the trial court thanked counsel and continued, "clearly these are prison cases and violations. The question is how long." The trial court then imposed an eight-year sentence.[5] Nothing more was mentioned about the presumptive minimum sentence.

[4] Trial counsel immediately inquired to confirm that the trial court meant "presumptive minimums," as opposed to "minimum mandatories."

[5] Ironically, had the trial court intended to impose the presumptive minimum sentence, it would have imposed less than the four-year sentence recommended by trial counsel (after summarily rejecting his recommendation of probation).

¶12 Our review of the trial court's sentencing remarks does not support Ruiz's contention. Ruiz's postconviction showing (of the trial court's mere mention of the existence of a presumptive minimum sentence) is insufficient to remand for resentencing.

By the Court.—Order affirmed.

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