COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2675 **Cir. Ct. No. 1994CF940943**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS S. COLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Nicholas S. Cole appeals from a postconviction order summarily denying his plea withdrawal motion.[1] The issue is whether Cole's guilty pleas were invalid because his trial counsel was ineffective. We conclude that Cole's failure to order a transcript of the hearing at which he entered his guilty pleas rendered his postconviction allegations wholly conclusory and the trial court's summary denial a proper exercise of discretion. Therefore, we affirm.

¶2 On April 29, 1994, Cole pled guilty to possessing cocaine with intent to deliver, and to a drug tax stamp violation. The trial court imposed a two-year sentence for the possession conviction, and imposed and stayed a five-year sentence in favor of a three-year term of consecutive probation for the tax stamp violation. On September 17, 2004, Cole moved *pro se* to withdraw his guilty pleas, which the trial court summarily denied.

¶3 The essence of Cole's plea withdrawal motion was that his guilty pleas were entered unknowingly, involuntarily and unintelligently because his trial counsel was ineffective. The trial court summarily denied the motion because "[n]o transcript of the plea hearing was ordered or prepared, and therefore, the court [wa]s unable to intelligently evaluate the defendant's claims. This renders the defendant's motion wholly conclusory on this issue because it lacks the necessary support that a transcript would have offered." Cole had averred, however, that "[t]he Court never conducted an open court plea colloquy."

[1] The original order was signed by the Honorable Timothy G. Dugan for the Honorable Charles F. Kahn, Jr. It is unclear (and inconsequential to our decision) who actually decided the motion, however, the case has been reassigned to Judge Dugan.

¶4 A defendant claiming that his or her guilty plea was entered unknowingly, involuntarily and unintelligently bears the initial *prima facie* burden to show that the trial court, in accepting the guilty plea, did not comply with WIS. STAT. § 971.08 (1993-94) and ***State v. Bangert***, 131 Wis. 2d 246, 267-74, 389 N.W.2d 12 (1986). *See also* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (a completed plea questionnaire and waiver of rights form is competent evidence of a knowing, voluntary and intelligent plea). Once the defendant meets that burden, "the burden will then shift to the state to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance." ***Bangert***, 131 Wis. 2d at 274 (citations omitted).

¶5 The record contains Cole's signed guilty plea questionnaire and waiver of rights form, but no transcript of the hearing at which Cole pled guilty. Contrary to Cole's averment, a guilty plea hearing was held, it simply was not transcribed.[2] Cole cannot meet his *prima facie* burden to establish that his guilty pleas were invalidly entered without that transcript, particularly when his signed

[2] Cole never pursued his postconviction or appellate rights pursuant to WIS. STAT. RULE 809.30(2) (1995-96), and thus, no one had requested preparation of the transcript of the guilty plea hearing. Cole moved for postconviction plea withdrawal; when he finally attempted to request preparation of the transcript, the trial court had already summarily denied his motion, and this appeal was pending. We consequently refused to allow preparation of that transcript because we would then be considering a transcript that was not in the record when the trial court denied Cole's postconviction motion. We will not allow supplementation of the appellate record with materials that were not part of the trial court record. *See, e.g.*, ***Howard v. Duersten***, 81 Wis. 2d 301, 307 n.4, 260 N.W.2d 274 (1977).

Although it is not in the record, Cole includes in his appendix correspondence from the circuit court staff attorney telling Cole whom to contact to prepare the transcript. Contrary to his assertion in his reply brief that he "has done every step a pro-se litigant can possibly take in obtain[ing] these ghost transcripts," he did not follow the staff attorney's advice.

guilty plea waiver of rights form belies his contention. *See* ***Moederndorfer***, 141 Wis. 2d at 827-28. Consequently, the burden does not shift to the State.

¶6 As the appellant, it is Cole's obligation to ensure the sufficiency of the record for appellate review of the issues he raises. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). The appellate court may not consider materials that were not part of the trial court record. *See, e.g.*, ***Howard v. Duersten***, 81 Wis. 2d 301, 307 n.4, 260 N.W.2d 274 (1977). The appellate court assumes that the record sustains every fact essential to the trial court's decision. *See* ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988). The absence of the guilty plea hearing transcript, coupled with a signed and seemingly valid guilty plea waiver of rights form belies Cole's allegations.

¶7 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria.

> 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. [*State v.*] *Bentley*, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. 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 Without any record support for his contention, Cole's postconviction averments are wholly conclusory. Consequently, the trial court properly exercised its discretion when it refused to conduct an evidentiary hearing simply to confirm that Cole had not established his plea withdrawal claims.[3]

By the Court.—Order affirmed.

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

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[3] Cole alternatively seeks an evidentiary hearing "to further develop the record." This is not permissible.

> [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).