COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1889 **Cir. Ct. No. 2000CF5575**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT E. TUCKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Robert E. Tucker appeals from an order summarily denying his motion for postconviction relief. The issues are whether Tucker's appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness in pursuing suppression, and in failing to move for plea withdrawal. We conclude

that our decision on direct appeal bars the former claim, and that the record belies the latter. Therefore, we affirm.

¶2 Tucker pled guilty to first-degree intentional homicide, as a party to the crime, in violation of WIS. STAT. §§ 940.01(1)(a) (1999-2000) and 939.05 (1999-2000).[1] In exchange for Tucker's guilty plea, the State dismissed the penalty enhancer for using a dangerous weapon, in violation of WIS. STAT. § 939.63(1)(a)2, and did not recommend a specific eligibility date for extended supervision from the life sentence mandated by the offense. *See* WIS. STAT. §§ 940.01(1)(a); 939.50(3)(a). The trial court imposed a life sentence and declared that Tucker would be eligible for extended supervision in thirty-four years. On direct appeal, we affirmed the denial of Tucker's suppression motion on its merits. Tucker then sought postconviction relief, pursuant to WIS. STAT. § 974.06 (2003-04), renewing his challenge to the trial court's denial of his suppression motion, and challenging the validity of his guilty plea. The trial court summarily denied the motion as insufficient, ruling that "[t]here [wa]s no factual support for his claims."

¶3 Tucker characterizes both issues as postconviction counsel's ineffectiveness for failing to challenge trial counsel's effectiveness pursuant to ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(Ct. App. 1996).[2] 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).

¶4 On direct appeal, Tucker raised the trial court's denial of his suppression motion, challenging the alleged: (1) lack of probable cause for his arrest, thereby tainting his statements; (2) failure to advise him of his ***Miranda*** rights before his second statement to police; and (3) involuntariness of his statements.[3] We extensively addressed and decided each of these issues adversely to Tucker. *See* ***State v. Tucker***, No. 01-3444-CR, unpublished slip op. ¶¶5-27 (WI App Jan. 14, 2003). We will not revisit our decision specifically rejecting Tucker's claims on each of these issues. *See* ***Peterson v. State***, 54 Wis. 2d 370, 381, 195 N.W.2d 837 (1972).

¶5 Although it is questionable whether Tucker preserved this issue for appeal, he mentions in his lead brief and develops the argument in his reply brief, that he was not competent and thus, did not understand the ramifications of his guilty plea. 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,

[2] Counsel did not file a postconviction motion pursuant to WIS. STAT. RULE 809.30(2) (amended Sep. 1, 2001) before appealing from the judgment of conviction. Tucker characterized his claims in the context of dual-layered ineffective assistance to establish a sufficient reason for not raising these claims on direct appeal pursuant to ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), however, our decision is not predicated on ***Escalona***'s procedural bar. It is therefore inconsequential to our decision how these ineffective assistance claims are characterized.

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> 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.

¶6 Insofar as Tucker contends that his lack of understanding was based on his incompetence to stand trial, neither the record nor his allegations are even arguably sufficient to demonstrate that the trial court should have held a competency hearing before accepting his guilty plea.[4] Insofar as Tucker contends that he did not understand the ramifications of his guilty plea, his contention is belied by the record. The transcript of the hearing at which he pled guilty, demonstrates that the trial court, in accepting his guilty plea, complied with WIS. STAT. § 971.08 (2001-02) and ***State v. Bangert***, 131 Wis. 2d 246, 267-74, 389 N.W.2d 12 (1986). Similarly, Tucker's signed guilty plea questionnaire and

[4] In the appendix to his reply brief, Tucker includes his educational data and learning style profiles and a one-line result of a "TABE" test apparently administered by the Wisconsin Department of Corrections. Neither was attached to his postconviction motion as required, nor does either seemingly prove that he was mentally incompetent to proceed. Tucker does not rely on anything from the record to indicate that a competency hearing was warranted.

waiver of rights form indicates that he understood the ramifications of his guilty plea. *See* ***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).

¶7 Tucker's postconviction allegations are wholly conclusory. Consequently, the trial court properly exercised its discretion when it declined to conduct an evidentiary hearing simply to confirm that Tucker had not established that his guilty plea was invalid.[5]

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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[5] An evidentiary hearing to further develop the record 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).