

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 5, 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. 2005AP2965**

**Cir. Ct. No. 2001CF590**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TYESHAWN D. COHENS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Eau Claire County:  
ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Tyeshawn Cohens appeals an order denying his WIS. STAT. § 974.06<sup>1</sup> motion without a hearing. A jury convicted Cohens of possessing more than 100 grams of cocaine with intent to deliver and with delivering less than five grams of cocaine. He argues that: (1) the State provided incomplete and untimely discovery, forcing Cohens to choose between a speedy trial and a fair one; (2) the testimony of co-conspirators estimating the weight of cocaine they saw Cohens possess and photographs of Cohens with other drug dealers should not have been admitted into evidence; (3) the jury instruction on the lesser-included offense of possessing less than 100 grams of cocaine with intent to deliver confused the jury; and (4) the State presented insufficient evidence to convict Cohens on the delivery of cocaine charge.<sup>2</sup> Because Cohens' motion fails to establish a sufficient basis to require a hearing, we affirm the order.

¶2 The State introduced ninety-six grams of cocaine into evidence, relying on other witnesses to establish that Cohens possessed more than 100 grams. The State presented several witnesses, some of them co-conspirators, who testified that on separate occasions they saw Cohens possess large amounts of cocaine that they estimated to be a kilogram and a half kilogram. One of those witnesses, Hollie Peterson, entered into a plea agreement two days before the trial

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

<sup>2</sup> Cohens also argues that his trial and postconviction counsel were ineffective for failing to raise these issues. Cohens' counsel were not ineffective and he suffered no prejudice from their failure to raise these issues because the issues have no merit. See *State v. Swinson*, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12. The State also argues that these issues are barred by the successive postconviction motion rule set out in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994). We agree that Cohens has not established good cause for his failure to raise these issues in his earlier postconviction motion and appeal, but will nonetheless address the merits.

began and testified against the other defendants. Because she belatedly became a State's witness, her plea agreement and her prior criminal record were disclosed to the defense the day before trial. The court offered to postpone the trial, but Cohens elected to proceed.

¶3 The State's evidence on the delivery charge consisted of an informant who bought cocaine from Cohens. The informant wore a wire, and the transaction was tape-recorded and played for the jury. Peterson identified Cohens's voice on the tape.

¶4 The trial court can deny a postconviction motion without a hearing if the motion fails to raise a question of fact, presents only conclusory allegations, or if the record conclusively shows that the defendant is not entitled to relief. *See State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must identify who, what, when, where, why and how for the court to meaningfully assess a defendant's claims. *Id.*, ¶23.

¶5 Cohens's motion is not sufficient to require a hearing regarding the alleged discovery violations. The witnesses' plea agreements, the prosecutor's concessions and the number of the witnesses' prior convictions were presented to the jury. The motion does not identify any specific additional information that more timely disclosure would have revealed. Cohens argues that the State should have disclosed its witnesses' criminal records, not just the number of convictions. He contends that he would have been able to present other acts evidence regarding the State's witnesses because other drug convictions would be relevant to show identity and motive. The State's witnesses admitted their involvement in drug trafficking. Proving the co-conspirators' history of drug transactions with prior convictions does not exonerate Cohens.

¶6 Cohens's argument that he was forced to choose between a speedy trial and a fair trial is not supported by the record. His motion does not identify any legitimate discovery violation that affected the trial. In addition, he never requested a speedy trial and chose to proceed with the trial upon being informed of Peterson's decision to testify against him.

¶7 Cohens's motion also fails to establish that evidence against him should not have been admitted. His co-conspirators' estimates of the weight of cocaine he possessed were admissible. They participated in cocaine trafficking and saw him with as much as ten times the 100 grams he was convicted of possessing. The motion does not establish any basis for precluding their testimony. Cohens also complains that the prosecutor utilized photographs of him and other drug dealers. The prosecutor used the photos to identify parties, particularly because they used nicknames. Cohens's motion does not establish any prejudicial effect from the prosecutor's use of the photo and does not state why they would be inadmissible.

¶8 Cohens's challenge to the jury instruction has no merit because the instruction did not affect the verdict. The challenged instruction tells the jury what to do if it could not agree that he possessed more than 100 grams of cocaine with intent to deliver. The jury found that he did possess more than 100 grams. Any defect in the alternative instruction is irrelevant. Cohens's motion does not identify any statement in the instruction that might arguably confuse any juror.

¶9 Finally, Cohens's motion does not establish any basis for challenging the sufficiency of the evidence on the cocaine delivery charge. Several witnesses testified about their activities with Cohens on that date. Cohens argues that their testimony was inconsistent with police reports that were not

introduced at trial. The police reports refer to a sale that took place in a parking lot, while the witnesses testified to a transaction that occurred in the bedroom of a co-conspirator's house. Cohens's motion provides no basis for believing there were not two separate transactions on that date. The State's witnesses and the tape-recorded drug transaction constitute sufficient evidence to support the conviction. *See State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Any inconsistencies in the witnesses' testimony goes to the witnesses' credibility, a question that is resolved by the jury. *See State v. Sharp*, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993).

*By the Court.*—Order affirmed.

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

