**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 15, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP551** **Cir. Ct. No. 2000CF1640**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WILLIE J. HICKLES,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Willie J. Hickles entered no-contest pleas to charges of arson of a building with intent to defraud, and second-degree recklessly endangering safety. Hickles received a total of ten years in prison. Hickles sought

postconviction plea withdrawal under WIS. STAT. § 974.06 (2003-04),[1] but the circuit court denied the motion and a supplemental motion. Hickles appeals *pro se*, arguing that the circuit court erred when it held that a witness's recantation of an incriminating statement and information regarding operation of a fire alarm were not newly discovered evidence warranting plea withdrawal. He also argues that trial counsel had been ineffective for, among other things, erroneously predicting his likely sentence, a prediction upon which Hickles claimed he relied in entering his pleas. On appeal, Hickles raises these same issues except that he also argues the circuit court erroneously exercised sentencing discretion. Based upon our review of the briefs and record, we conclude that Hickles' arguments are without merit. We therefore affirm the postconviction orders.

¶2 Hickles ran a Milwaukee clothing store in leased space. The building held at least one other business and some apartments. On the evening of March 11, 1999, firefighters were dispatched to Hickles' business. A fire occurred in a southwest corner of the store and apparently "snuffed itself out," after burning for some time. Clothing was damaged, but was not entirely destroyed. Inspectors found no electrical or mechanical cause for the fire, but determined an accelerant had been used to start the fire.

¶3 Hickles ultimately submitted an insurance claim for approximately $47,000, of which approximately $39,000 was for clothing. Hickles was able to present receipts for only about $2,500 worth of clothing. Other evidence in the record suggests that clothing in the store at the time of the fire did not approach

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

the value claimed by Hickles. Hickles' nephew Barry told police that Hickles had once solicited him for help in burning the clothing store.

¶4 Although Hickles maintained that he had not been involved in the arson, he entered no-contest pleas to the charges.[2] After sentencing, he sought sentence modification, which the circuit court denied. He then filed the postconviction motion and supplement that are the subjects of this appeal.

¶5 On appeal, Hickles maintains that the circuit court improperly denied his motion for plea withdrawal based on newly discovered evidence. He argues that an affidavit in which his nephew, Barry Hickles, recants his statement to police is newly discovered evidence that warrants plea withdrawal. We disagree.

¶6 The circuit court correctly noted that a defendant seeking to withdraw a guilty or no-contest plea must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). This court reviews the circuit court's decision on post-sentence plea withdrawal for an erroneous exercise of discretion. ***Id.*** For plea withdrawal based on a claim of newly-discovered evidence, the defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence;

[2] It appears that Hickles never pursued direct postconviction and appellate remedies under WIS. STAT. RULE 809.30, a path that would have likely resulted in production of the plea-hearing transcript. It does not appear that transcript was ever produced, however, so Hickles' stated reasons for entering his plea are not in the record before us.

We also note that the sentencing transcript was apparently produced pursuant to WIS. STAT. § 973.08(2). That transcript is not included in the record, although excerpts are attached to various filings by Hickles.

(3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. ***Id.*** If these four are proved, the trial court must determine whether there exists a reasonable probability of acquittal if the evidence were to be presented to a jury. ***Id.*** at 473. When the newly discovered evidence is a witness's claimed recantation, that recantation must be corroborated by other newly discovered evidence. ***Id.*** at 473-74.

¶7 We agree with the circuit court that Barry Hickles' recantation does not satisfy the criteria for newly-discovered evidence and, moreover, if it did, it still would not warrant plea withdrawal. As the circuit court noted in denying this portion of the postconviction motion, the affidavit is "dubious" and conclusory, at best. More importantly, however, Hickles argued in his postconviction supplement that, at the time he entered his pleas, Barry Hickles was lying and that Hickles believed, prior to his pleas, that Barry would recant if forced to testify at trial. Thus, the recantation was not "newly discovered" and, in addition, Hickles entered his pleas in spite of his stated belief in the likelihood of Barry Hickles' recantation at trial.

¶8 In addition, we agree with the circuit court that "Barry Hickles' testimony was hardly the most substantial evidence in the case."

> The evidence from the scene showed that there was no forced entry into the premises, that one of the four doors to the premises was painted shut, that two of the others were dead-bolted from the inside and that the only other door was locked. [The defendant] testified in a deposition he gave to his insurer's attorney that there were only three keys to the store, one for Mr. Hickles, one for his brother who was in jail at the time and one for the 87-year old landlord whom no one is accusing of setting the fire. Thus, it appears that Mr. Hickles was the only person who could have gotten inside the store to set the fire. Further, Mr. Hickles submitted an inflated insurance claim [and] gave preposterous testimony about the value of the inventory in

> the store at the time of the fire, which demonstrates quite convincingly that he had a motive for insurance fraud. And the fire marshal was prepared to opine at trial that the fire appeared to have been set deliberately. In light of this evidence, the claim that some intruder, not Mr. Hickles, set fire to the store doesn't fit the facts. Barry Hickles' statements about Mr. Hickles soliciting him to commit the crime … might have clinched the case, but the case was quite powerful without them.

¶9 Similarly, Hickles' analysis of the way his alarm system operated at the store and his contention that the State misunderstood that operation does not qualify as new evidence. In his motion, Hickles did not demonstrate that, at the time of his pleas, this evidence was unknown to him and he discovered it only after he entered his pleas. In addition, even if his analysis of the system was accurate and the State's inaccurate, it does not undercut the State's evidence pointing to him as the probable suspect.

¶10 We turn next to Hickles' contention that his trial counsel was ineffective by recommending to him that he plead no contest rather than proceed to trial. Hickles argued in his postconviction motion that his attorney failed to investigate his alibi defense, failed to investigate Barry Hickles' statements, and failed to "go over [his] paper work." He also argued that his lawyer was ineffective by predicting a lesser sentence than the one that was imposed and that his reliance on that prediction led to his no-contest pleas. Hickles argues on appeal that, at the very least, he should have received an evidentiary hearing on his claim of ineffective counsel. We disagree.

¶11 A circuit court has discretion to summarily deny a postconviction motion "'if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" ***State v.***

***Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). Matters of reasonably sound trial strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland v. Washington***, 466 U.S. 668, 690-91 (1984).

¶12 "Whether a motion alleges fact which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Bentley***, 201 Wis. 2d at 310. Once we independently confirm the trial court's determination of the motion's insufficiency, however, we apply the erroneous exercise of discretion standard to review the decision to deny the motion summarily. ***Id.*** at 310-11.

¶13 In regard to Hickles' contention that counsel should have conducted a more thorough investigation of his alibi and other elements of his defense, the circuit court correctly noted that "'[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted; alteration by ***Flynn***). The record shows that Hickles' claimed alibi – that Ernest Hickles and John Sprewer could have established that he was home at 9:30 on the evening of the fire – did not constitute a true alibi. While it may have established that Hickles was home by the time the fire started, evidence demonstrated that the fire had been "rigged" to start after the store was closed. Hickles admitted that on the night of the fire, he left the store between 9:15 and 9:20, and that he locked the doors. As the State notes, the evidence demonstrates that Hickles had adequate opportunity to prepare the arson, lock the store, and return home before the fire was discovered.

¶14 Similarly, Hickles' claim that his attorney failed to review his paperwork is meritless because he failed to specify the paperwork his attorney failed to review and, if counsel had reviewed the paperwork, how that would have affected Hickles' decision to enter his no-contest pleas. Similarly, Hickles' claim that counsel was ineffective in advising him that he would receive a less severe sentence than he did, and that he relied on that advice in deciding to enter his plea is equally meritless. Although the plea-hearing transcript is not in the record, Hickles' plea questionnaire and waiver-of-rights form is. In signing that form, Hickles personally acknowledged that the circuit court was not bound by any sentencing recommendation.

¶15 Finally, we turn to Hickles' claim that the circuit court ordered him incarcerated because he refused to admit responsibility for the arson. Hickles argues that the circuit court punished him for declining to incriminate himself. This argument, too, is without merit.

¶16 We note again that the sentencing transcript is not in the record. It was Hickles' responsibility as the appellant to ensure its inclusion.[3] It is the appellant's responsibility to assure that the record is complete, and if necessary record materials are missing, a reviewing court assumes that the missing materials support the circuit court's ruling. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

[3] We recognize that Hickles sought production of transcripts at public expense, but the circuit court denied the request. Nonetheless, the sentencing transcript was produced, and Hickles has provided the court with excerpts. Nothing prevented Hickles from seeking inclusion of the entire sentencing transcript in the record.

¶17 Nothing in the record indicates that the circuit court ordered Hickles incarcerated solely because he declined to assume responsibility for the crime. Given the absence of the sentencing transcript, we must, under ***Fiumefreddo***, assume that the circuit court considered all relevant sentencing factors. In addition, we must assume that the circuit court properly exercised discretion when it imposed sentence.

*By the Court.*—Orders affirmed.

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