

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 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 Nos. 2005AP2666
2005AP2667
2005AP2668**

**Cir. Ct. Nos. 2001CF19
2003CF8
2004CF20**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD SAMUEL KERR, JR.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Iron County:
DOUGLAS T. FOX, Judge. *Affirmed.*

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

¶1 PER CURIAM. Richard Kerr appeals the orders denying his motion to vacate judgment and motion for reconsideration. Kerr argues the circuit court erroneously exercised its discretion when it denied his ineffective assistance

of counsel claim without conducting an evidentiary hearing. Kerr additionally contends his judgment and sentence should be vacated on grounds of judicial “influence peddling.” We reject Kerr’s arguments and affirm the orders.

BACKGROUND

¶2 In Iron County Circuit Court case no. 2001CF19, Kerr was convicted upon his guilty plea of felony possession with intent to deliver more than 2,500 grams of marijuana. The court withheld sentence and imposed four years’ probation with one year in jail as a condition of probation. Kerr’s probation was later revoked and the trial court imposed a six-year sentence consisting of three years’ initial confinement followed by three years’ extended supervision. In Iron County Circuit Court case no. 2003CF8, Kerr was convicted upon his no contest plea of felon in possession of a firearm. The court imposed a five-year sentence consisting of two years’ initial confinement followed by three years’ extended supervision, with the prison term to run concurrent with Kerr’s sentence in case no. 2001CF19. Finally, in Iron County Circuit Court case no. 2004CF20, Kerr was convicted upon his no contest plea of felony bail jumping. The court imposed a concurrent six-year sentence consisting of three years’ initial confinement and three years’ extended supervision.

¶3 Kerr filed motions to vacate the judgments in all three cases, alleging his attorney, Jodie L. Bednar-Clemens, had a conflict of interest while representing him because she simultaneously served as “the Corporation Counsel or Assistant District Attorney for Iron County and the State of Wisconsin.” Claiming that the Hon. Patrick J. Madden and the Iron County District Attorney had “personal knowledge” of the asserted conflict of interest, Kerr additionally

advances a claim of misconduct in public office. The circuit court denied Kerr's motion without an evidentiary hearing. Kerr then moved for reconsideration, on grounds of "judicial influence peddling." The reconsideration motion was likewise denied and this appeal follows.

DISCUSSION

¶4 The crux of Kerr's arguments is that Bednar-Clemens had a conflict of interest while representing him because she simultaneously served as "the Corporation Counsel or Assistant District Attorney for Iron County and the State of Wisconsin." In criminal cases, conflict of interest claims involving attorneys are treated analytically as a subspecies of ineffective assistance of counsel. *State v. Love*, 227 Wis. 2d 60, ¶13, 594 N.W.2d 806 (1999). To establish ineffective assistance of counsel by reason of a conflict of interest, "[t]he defendant must show by clear and convincing evidence that an actual conflict of interest existed; it is not sufficient that he show a mere possibility or suspicion that a conflict could arise under hypothetical circumstances." *State v. Franklin*, 111 Wis. 2d 681, 686, 331 N.W.2d 633 (Ct. App. 1983). If a defendant meets this burden, however, "then it is not necessary to prove actual prejudice or resulting adverse effect." *Id.* at 686-87.

¶5 A conflict of interest exists if there is intolerable risk that an attorney "might sacrifice the goals of his client to serve selfish ends or the interests of another." *Id.* at 687. Stated differently, "[a]n actual conflict of interest exists when the defendant's attorney was actively representing a conflicting interest, so that the attorney's performance was adversely affected." *Love*, 227 Wis. 2d at 71.

¶6 A defendant who alleges ineffective assistance of counsel, however, is not automatically entitled to an evidentiary hearing. 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, the trial court may in its discretion deny the motion without a hearing. *State v. Carter*, 131 Wis. 2d 69, 78, 389 N.W.2d 1 (1986). When reviewing a court's discretionary act, this court utilizes the deferential erroneous exercise of discretion standard. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

¶7 Here, Kerr's claims are merely conclusory and otherwise unsupported by the record. First, Kerr cannot show that Bednar-Clemens represented him during any of the proceedings in case no. 2001CF19. He therefore fails to establish any conflict of interest in that case. With respect to case nos. 2003CF8 and 2004CF20, it is undisputed that Bednar-Clemens represented Kerr during various proceedings leading up to his no contest pleas.¹ It is likewise undisputed that Bednar-Clemens served as Iron County's corporation counsel during the time she represented Kerr. In her capacity as corporation counsel, however, Bednar-Clemens would represent the county, not the State—that does not create a conflict with her representation of Kerr's criminal matters.

¶8 Turning to Kerr's claim that Bednar-Clemens was simultaneously serving as an assistant district attorney, the record does not support this

¹ At the plea and sentencing hearings, Kerr was represented by attorney Sam Filippo.

allegation. In fact, we take judicial notice of the Iron County Clerk's certification of pages from the Iron County directories for the periods from 2000 through 2006. *See* WIS. STAT. § 902.01 (2003-04)²; *see also City of Milwaukee v. Burnette*, 2001 WI App 258, ¶12, 248 Wis. 2d 820, 637 N.W.2d 447. Those directories identify the district attorney, but do not list any assistant district attorneys. Because Kerr's conflict of interest claim fails, his attendant allegations of misconduct in public office for "covering up" the claimed conflict likewise fail.

¶9 Finally, Kerr contends that Judge Madden engaged in "influence peddling" when he sent Judge Douglas T. Fox a letter asking whether he would consider appointing attorney Sam Filippo to represent Kerr. Judge Madden, who was initially presiding over Kerr's cases, recused himself after Kerr's "misconduct in public office" allegations. Judge Madden had not yet acted on Kerr's previously filed motion for appointment of counsel before his recusal, and the record shows that Filippo had previously represented Kerr. Ultimately, Kerr fails to establish that Judge Madden sought "partisan advantage" through Filippo's appointment.

¶10 Because Kerr's motions presented merely conclusory allegations that are unsupported by the facts of record, he was not entitled to an evidentiary hearing and the circuit court properly denied the motions.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

By the Court.—Orders affirmed.

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

