

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 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. 2005AP1594
2005AP1595**

**Cir. Ct. Nos. 1999CF604
2001CF82**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH WITKOWSKI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
MICHAEL S. FISHER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Joseph Witkowski appeals from a circuit court order denying his WIS. STAT. § 974.06 (2003-04)¹ motion to withdraw his plea without an evidentiary hearing. Because the circuit court did not erroneously exercise its discretion in denying the motion without a hearing, we affirm.

¶2 The criminal proceedings against Witkowski arose out of his 1999 theft of construction machinery from a construction site. The criminal complaint alleged that a police officer observed Witkowski enter the construction site in the early morning hours and load a bulldozer onto his tractor trailer. Another police officer stopped Witkowski's truck and, thereafter, Witkowski made statements that inculpated him in a total of three bulldozer thefts. After he posted bail, Witkowski failed to appear in court. Ultimately, Witkowski was charged with bail jumping, three counts of felony theft, and one misdemeanor count of obstruction, all as a repeat offender. In 2001, Witkowski accepted a plea agreement which required him to plead guilty to the three counts of felony theft and bail jumping and which required the State to dismiss the misdemeanor obstructing count and the repeat offender enhancements. The circuit court stayed Witkowski's sentences in favor of ten years of probation. Witkowski did not exercise his WIS. STAT. RULE 809.30 (2001-02) direct appeal rights.

¶3 In 2004, Witkowski filed a WIS. STAT. § 974.06 motion seeking to withdraw his guilty pleas because his trial counsel was ineffective for failing to litigate a motion to suppress evidence and inculpatory statements² allegedly given

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

² Trial counsel filed a motion to suppress, but counsel did not litigate it.

in violation of *Miranda*.³ In particular, Witkowski claimed that his trial counsel was ineffective for not challenging the police officer's description of the time during which the theft occurred. Witkowski's investigator re-enacted the theft and the re-enactment showed that the theft could not have occurred in less than twenty-five minutes, undermining the police officer's claim of a ten-minute theft and raising the possibility that the police officer was not credible. In support of his motion, Witkowski submitted the affidavit of an investigator who participated in the re-enactment. Witkowski alleged that if trial counsel had sought suppression, the circuit court would have excluded the statements and the physical evidence.

¶4 Witkowski's affidavit in support of his plea withdrawal motion alleged that his counsel did not provide him with the investigative reports of the theft until five months after sentencing and, once he reviewed the reports, he discerned an issue relating to the timing of the theft. Witkowski claims he asked counsel to challenge the arrest and that he informed counsel that he did not receive *Miranda* warnings before he made inculpatory statements.

¶5 At the hearing on the motion, the parties argued over whether an evidentiary hearing was necessary. The circuit court declined to hold an evidentiary hearing. The court stated that it had reviewed the file and the plea colloquy and concluded that Witkowski did not meet his burden to obtain an evidentiary hearing and that too much time had elapsed since the 1999 crime such that the State was prejudiced by the motion to withdraw his pleas. Witkowski appeals.

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

¶6 The circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433. We may independently review the record to determine whether it provides a basis for the circuit court’s exercise of discretion. *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). A postconviction motion must assert material facts in support of the grounds for the motion, not conclusory allegations. *Allen*, 274 Wis. 2d 568, ¶29. Specifically, the motion must allege “who, what, where, when, why, and how.” *Id.*, ¶23.

¶7 On appeal, Witkowski argues that the circuit court should have held an evidentiary hearing on his motion. We disagree. Witkowski’s motion did not cite a factually objective basis for his claim that his trial counsel was ineffective in relation to the motion to suppress. Witkowski claimed that he did not receive his *Miranda* warnings before he gave one of his custodial statements. However, Witkowski’s motion did not indicate which statement this was⁴ and why other statements and evidence, particularly the police officer’s observations, would have been suppressed. Witkowski’s motion did not allege any facts or law to support his claim that the stop, arrest and search were illegal.

¶8 Witkowski claims that the re-enactment establishes that the police officer’s report that the theft took ten minutes was erroneous. Therefore, the officer’s report might be a material misrepresentation and might support a

⁴ After he was apprehended leaving the construction site, Witkowski produced an Illinois driver’s license with a false name, and he twice misidentified the employer he claimed had directed him to remove the bulldozer from the construction site. The complaint refers to a June 1999 police interview during which Witkowski again gave a false name and during which he admitted stealing three bulldozers from the area. Witkowski’s motion does not state which of these statements was taken in violation of *Miranda*.

credibility challenge. We disagree. Questions of credibility are not a basis for suppressing evidence. Rather, they are a basis for cross-examination, which Witkowski waived when he entered guilty pleas and elected not to proceed to trial to test the officer's account.

¶9 Witkowski complains that he did not receive the investigative reports and other discovery material from his counsel until after sentencing. But, Witkowski's motion did not allege that he asked for this material from trial counsel during the proceedings and that trial counsel declined to provide it.

¶10 We conclude that Witkowski's motion did not establish grounds to withdraw his plea due to ineffective assistance of trial counsel. In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *State v. Kimbrough*, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752. Witkowski's motion did not allege sufficient facts to be able to determine whether counsel's performance was deficient or prejudicial. Therefore, the court did not err in denying the motion without an evidentiary hearing.

By the Court.—Order affirmed.

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

