COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2004AP3349 **Cir. Ct. No. 2001CF544**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KYLE CORNELIUS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kyle Cornelius appeals *pro se* from the circuit court's denial of his WIS. STAT. § 974.06 (2003-04) postconviction motion.[1] In his motion, Cornelius argued that his conviction for first-degree reckless homicide and sentence should be overturned, because his postconviction attorney was ineffective for failing to challenge trial counsel's effectiveness. He argued that trial counsel was ineffective: (1) for failing to conduct an adequate investigation into the facts of his case; (2) for failing to pursue a suppression motion that had been filed in the circuit court; and, (3) for failing to obtain complete discovery materials from the State. On appeal, Cornelius argues that the circuit court erred in denying his motion. We conclude that the circuit court did not err in deciding Cornelius's motion, and we therefore affirm the circuit court's order.

¶2 We summarize the relevant facts first set forth in our decision on Cornelius's direct appeal. Cornelius, who was eighteen years old, was selling drugs for a dealer named Geon Hollingsworth. Hollingsworth became upset with Cornelius for not paying for the drugs in a timely manner and got in a fight with Cornelius. Cornelius received a black eye and claimed that Hollingsworth used a gun to force him out of Hollingsworth's house.

¶3 In the days following the fight, Hollingsworth was publicly disrespectful to Cornelius. Hollingsworth told Cornelius, however, that he hoped Cornelius would still visit him. Shortly thereafter, Cornelius went to Hollingsworth's home. Cornelius became upset because Hollingsworth "was being a snob" and "talking down to everyone there." He went home, retrieved a

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

gun, and returned to Hollingsworth's home. Cornelius waited around for a while, but after realizing that he was "sick of the threats and everything else," he walked up behind Hollingsworth, who was playing a video game, and shot him twice in the head.

¶4 After his arrest, Cornelius gave a statement to police. He was charged with first-degree intentional homicide. Pretrial, he moved to suppress any statements he gave to police, arguing that his arrest had been without probable cause and also that his statements were involuntary. He also argued that he had not been apprised of his constitutional rights by police.

¶5 Before the circuit court could hear the suppression motion, Cornelius agreed to plead guilty in exchange for the State amending the charge against him to first-degree reckless homicide. The circuit court imposed a sixty-year prison sentence, and Cornelius sought sentence modification based on his argument that the sentence was unduly harsh and excessive. When the circuit court denied the motion, Cornelius appealed. This court affirmed the judgment of conviction and the order denying sentence modification.

¶6 Cornelius then filed the motion that is the subject of this appeal. As we noted above, Cornelius argued that postconviction counsel should have pursued an ineffective-assistance-of-counsel claim against his trial counsel for failing "to properly investigate the facts and evidence surrounding the crime prior to recommending acceptance of the plea." He argued that trial counsel should have investigated potential alibi witnesses and failed to seek a person Cornelius identified as "Big Man" as the "possible shooter." He also complained that trial counsel "failed to follow through on the motion to suppress" his statement to

police prior to recommending acceptance of the plea. Finally, he claimed that trial counsel failed to obtain "complete discovery" from the State.

¶7 The circuit court denied the motion, concluding first that the motion was not procedurally barred because Cornelius's claim of ineffective assistance of counsel was sufficient to overcome the bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994) (defendant barred from raising in postconviction motion claims that could have been raised in prior postconviction and appellate proceedings, unless defendant articulates a sufficient reason justifying that failure). The court then concluded that Cornelius's guilty plea was knowing, intelligent and voluntary, and that by entering the plea, he knowingly waived potential defenses and the right to present witnesses on his own behalf. Thus, the court reasoned that further investigation into Cornelius's allegations about "Big Man" was not needed because of the knowing, intelligent, and voluntary guilty plea.

¶8 In regard to Cornelius's claim that trial counsel should have pursued the suppression motion prior to recommending acceptance of the plea, the circuit court again noted that Cornelius's plea was clearly knowing, intelligent, and voluntary and that in entering his plea, he knew that he was foregoing pursuit of the suppression motion. Finally, the circuit court held that the discovery claim was insufficiently supported to warrant relief. Cornelius appeals.

¶9 In analyzing questions of effective assistance of counsel, this court uses the two-element test set forth in ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). The first element is whether counsel's performance was deficient—that is, whether counsel's performance was at a level of representation at or above an objective standard of reasonableness. *See* ***State v. Johnson***, 133 Wis. 2d 207, 217,

395 N.W.2d 176 (1986). The second element requires the defendant to demonstrate that the deficient performance prejudiced the defendant such that the result cannot be said to have been reliable. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 640-41, 369 N.W.2d 711 (1985). "Unless a defendant makes both showings, it cannot be said that the conviction … resulted from a breakdown in the adversary process that renders the result unreliable." ***Strickland***, 466 U.S. at 687. Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. ***Id.*** at 690.

¶10 To determine whether a defendant was entitled to a hearing on a postconviction motion, a reviewing court must determine "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This presents a question of law, which a reviewing court reviews under the *de novo* standard of review. ***Id.***

> If the motion raises such facts, the circuit 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 movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. [***State v.***] ***Bentley***, 201 Wis. 2d [303], 310-11, [548 N.W.2d 50 (1996)]; ***Nelson***, 54 Wis. 2d at 497-98. We require the circuit 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). We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. ***In re the Commitment of Franklin***, 2004 WI 38, ¶6, 270 Wis. 2d 271, 677 N.W.2d 276; ***Bentley***, 201 Wis. 2d at 311.

Allen, 274 Wis. 2d 568, ¶9. "[P]ostconviction motions sufficient to meet the ***Bentley*** standard allege the five "w's" and one 'h'; that is, who, what, where, when, why, and how." ***Id.*** ¶23. Motions that satisfy these criteria and contain sufficient material facts for the courts to meaningfully assess a postconviction claim will generally warrant a hearing. ***Id.*** In instances where a defendant is seeking to withdraw a guilty plea based upon a claim of ineffective assistance of counsel, it is the defendant's burden to show that he or she would not have entered the plea but for counsel's deficient performance. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶11 Cornelius maintains on appeal that his motion was sufficient to warrant a hearing and also to warrant relief. We disagree because Cornelius fails to demonstrate that counsel's performance was deficient and he also fails to demonstrate prejudice resulting from the alleged deficient performance. As to Cornelius's third claim that his counsel failed to obtain complete discovery from the State, we hold that Cornelius has failed to allege sufficient facts to warrant relief.

¶12 In regard to the deficient-performance element of Cornelius's ineffective-assistance claim, the record demonstrates that at the time Cornelius entered his plea, he was aware that a suppression motion had been filed on his behalf. Nothing in the record or in the materials before this court indicates that Cornelius asked counsel to litigate the motion before he would enter a guilty plea to the amended charge. In addition, Cornelius submitted a plea questionnaire by which he indicated that he understood that by pleading guilty he was waiving the right to present a defense to the charge, and he acknowledged the same in his plea colloquy with the circuit court. In light of Cornelius's knowledge of the pending suppression motion, Cornelius has not overcome the strong presumption that the

decision not to litigate the suppression motion was the product of counsel's reasonable professional judgment.

¶13 Similarly, Cornelius's vague claims that his counsel should have further investigated a potential alibi and that a person known to him only as "Big Man" was the shooter are insufficient to demonstrate that counsel's investigation was deficient. Again, Cornelius knowingly, intelligently, and voluntarily chose to enter a guilty plea instead of finding "Big Man" and calling his girlfriend to the stand as his alibi witness. Finally, Cornelius does not identify the evidence the State allegedly did not provide in response to counsel's discovery demand. The record demonstrates that counsel filed a detailed discovery demand and received everything requested from the State. Cornelius made no showing that there was additional information counsel requested and should have received.

¶14 Moreover, even if the court were to assume that counsel's performance was deficient—and we agree with the circuit court that it was not—Cornelius provided nothing in his motion to indicate that if trial counsel had performed as Cornelius now wishes, his decision to accept the plea bargain and the amended charge would have changed. As the State cogently argues, at the time Cornelius entered his plea, he was aware of counsel's actions, including the filing of the suppression motion, the status of the defense investigation, and the level of the State's compliance with defense discovery requests. If Cornelius was dissatisfied with counsel's representation, it was his responsibility to make his concerns known to counsel. Instead, Cornelius pled guilty, specifically affirming in open court that he was satisfied with counsel's representation and that he was not being pressured to enter a plea.

By the Court.—Order affirmed.

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