

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 21, 2007

A. John Voelker
Acting 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. 2004AP2876-CR

Cir. Ct. No. 2003CF4052

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK LEE HOLMES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Reversed and remanded.*

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

¶1 PER CURIAM. Patrick Lee Holmes appeals from a judgment of conviction for possession of marijuana as a second or subsequent offense and from a postconviction order denying his claim that trial counsel had been ineffective for failing to call a witness at a suppression hearing. We conclude that the

postconviction motion contained allegations sufficient to require that the circuit court hold an evidentiary hearing on the ineffective-assistance-of-counsel claim. We therefore reverse the postconviction order and remand this matter to the circuit court for further proceedings.

¶2 According to the criminal complaint and testimony at the suppression hearing, police were investigating drug dealing and gambling complaints in a Milwaukee neighborhood. Two Milwaukee police officers saw Holmes standing on a street corner. The officers left, but when they returned, they observed Holmes still standing on the same corner. The officers approached Holmes and asked him whether he owned a particular automobile parked nearby. Holmes stated that he did not. One of the officers, Officer Jenkins testified that he walked to the car, where he saw a “corner cut” of marijuana in plain view in the center console of the vehicle. According to the officers, Holmes then admitted that the vehicle and the marijuana belonged to him. Holmes was arrested.

¶3 At the suppression hearing, Holmes disputed the officers’ story. He testified that when the officers approached him, they immediately patted him down and searched him. He testified that Officer Jenkins took his driver’s license and money, and then opened and entered his car. Holmes testified that the marijuana had been concealed in a closed compartment in the center console of his vehicle and that it could not have been in plain sight. Officer Jenkins, however, testified that the marijuana had been in plain sight in an “add-on” cup holder on the console.

¶4 The circuit court denied the suppression motion, finding the police testimony more credible than Holmes’s. The court noted, however, that Holmes might have made his motion more persuasive by presenting a picture of the center

console to support his testimony. It also noted that Holmes could have presented the testimony of “Sandy,” an independent witness who might have supported Holmes’ version of events.

¶5 Holmes retained new counsel, subsequently pled guilty to the charge, and was sentenced. Holmes filed a postconviction motion alleging ineffective assistance of trial counsel at the suppression hearing due to his attorney’s failure to present photographs of the automobile’s console and to interview and subpoena the witness to Holmes’s arrest and the police search of the car. In support of the motion, Holmes submitted photographs of the console that showed the console had a padded and hinged lid, which covered a compartment approximately six inches deep. They also showed views from outside the vehicle in an effort to undercut the police testimony that the marijuana was in the console and in plain view. In addition, Holmes submitted an affidavit from Sandra Jackson, who claimed that she had been speaking with Holmes when the police approached. She stated that, contrary to police testimony, the officers immediately frisked and handcuffed Holmes as they searched his pockets. She stated that one of the officers removed keys from Holmes’s pocket, walked to the rear of Holmes’s automobile, and unlocked and opened the trunk. She also stated that two other officers opened the front doors to the vehicle and began searching inside. Jackson stated that when the officers began to search the car, they had asked Holmes no questions other than whether the car belonged to him. She stated that Holmes had told the officers the car was his. Jackson stated that she had never been interviewed about what she had seen, and that she would have testified at the suppression hearing if she had been asked.

¶6 The circuit court denied the motion without a hearing, reasoning that “[b]ecause the proffered evidence[] does not indicate what the console looked like

at the time of the incident, the issue boils down to the credibility of the witnesses.” The circuit court noted that the central issue at the suppression hearing had been the appearance of the console and that Officer Jenkins had been found to be credible on that point. The court concluded: “The defendant has not put forth sufficient evidence to warrant a hearing. Although the photos and Jackson’s testimony might have added modest circumstantial weight to the defendant’s story, the court finds that there is not a reasonabl[e] probability that the result of the suppression hearing would have been different.” On that basis, the circuit court denied Holmes’s claim that trial counsel had been ineffective in seeking suppression of the evidence. Holmes appeals, arguing that the facts he presented in his motion were sufficient and sufficiently supported to require that the circuit court hold an evidentiary hearing. We agree.

“To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel’s actions or inaction constituted deficient performance and that the deficiency caused him prejudice.” *State v. Brunette*, 220 Wis. 2d 431, 445, 583 N.W.2d 174 (Ct. App. 1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prove constitutional deficiency, the defendant must establish that counsel’s conduct falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687; *State v. Thiel*, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove Constitutional prejudice, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Thiel*, 264 Wis. 2d 571, ¶20 (quoting *Strickland*, 466 U.S. at 694). The focus of the inquiry is not on the outcome of the trial, but on “the reliability of the proceedings.” *Id.* (quoting *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985)).

State v. Love, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62.

¶7 To warrant an evidentiary hearing, a postconviction motion “must contain an historical basis setting forth material facts that allows the reviewing court to meaningfully assess the defendant’s claims.” *Id.* at ¶27. A postconviction motion is sufficient if it is not simply conclusory, but instead alleges “who, what, where, when, why, and how.” *Id.* (citation omitted).

¶8 The State argues that the circuit court’s decision to deny Holmes’s postconviction motion is consistent with these principles. In regard to the “plain-sight” discovery of the marijuana, the State argues that the photographs “would not have added anything new to the credibility dispute” because they “show a vehicle without a built-in cup holder – an image fully consistent with Officer Jenkins’s testimony that he saw the marijuana in a store-bought add-on cup holder.” In regard to Jackson’s affidavit, the State argues that because Jackson says nothing in her affidavit regarding cup holders in the vehicle or whether there was marijuana in plain sight in the vehicle, she offered little that would undercut the circuit court’s original disposition of the credibility dispute. We disagree.

¶9 As Holmes argues, the statements in Jackson’s affidavit, if believed, tend to undercut “the *overall* credibility of Officer Jenkins and his testimony regarding the events leading up to and including the alleged ‘plain-view’ search of Holmes’[s] car.” (Emphasis in original.) The motion identified Jackson as the witness, stated the reasons Jackson was an important witness who would have testified at the suppression hearing, and indicated that defense counsel at the time of the suppression hearing was aware that Jackson was a witness to the police actions. If counsel had presented Jackson’s testimony at the suppression hearing and if the circuit court had found her credible, the testimony could have undermined the officer’s credibility regarding police actions, including claims that the marijuana was in plain sight.

¶10 We are satisfied that Jackson’s motion provided sufficient “objective factual assertions”¹ to warrant an evidentiary hearing on his claim that trial counsel’s performance was deficient and that there was a reasonable probability that, but for that deficient performance, the result of the suppression hearing would have been different. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (for appellate court to review claim of ineffective assistance of counsel, counsel must testify in the trial court and explain his or her representation); *see also State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996) (if motion on its face alleges facts that, if true, constitute deficient performance and prejudice entitling defendant to relief, circuit court must hold evidentiary hearing). We therefore reverse the circuit court’s order and remand this matter to the circuit court for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded to the circuit court for further proceedings.

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

¹ *See State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996).

