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

**June 13, 2007**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2006AP1324** **Cir. Ct. No. 2001CF269**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MATTHEW W. BUSS,**

**DEFENDANT-APPELLANT.**

---

APPEAL from an order of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Matthew Buss appeals pro se from an order denying his WIS. STAT. § 974.06 (2005-06),[1] postconviction motion without a hearing. Buss argues that trial counsel was ineffective for failing to question his competency to enter a guilty plea, failing to assert a defense of not guilty by reason of mental disease or defect (NGI), and failing to seek the suppression of evidence procured under a search warrant based on a false statement. We affirm the order denying the postconviction motion.

¶2 A claim of ineffective assistance of counsel requires the defendant to show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). A claim of ineffective assistance of counsel requires an evidentiary hearing at which counsel testifies regarding the challenged conduct. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, a hearing is not required in every case. A hearing is required only if the postconviction motion alleges facts, which, if proved true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Thus, the motion itself must allege more than conclusory allegations; the motion must allege sufficient facts to raise a question of fact. ***Id.*** at 309-10, 313. The defendant's motion can be denied without a hearing if the record conclusively shows that the defendant is not entitled to relief. ***Id.*** at 310-11.

¶3 Whether the motion compels a hearing is a question of law this court reviews *de novo*. ***Id.*** If the motion is deficient, the circuit court's decision to deny

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

it without a hearing is reviewed for erroneous exercise of discretion. ***Id.*** at 310-11.

¶4 Buss asserts that because he was admitted to a mental health center more than three times in the months preceding the arson, trial counsel should have questioned his competency to enter a guilty plea. Buss lists the medication he was taking for mental health treatment before his arrest. He suggests that he was dependent on such medications and the interruption in treatment would have rendered him incompetent to proceed with a plea. Buss acknowledges that trial counsel had all this information but suggests counsel failed to appreciate its impact on competency and responsibility for the crime.

¶5 Our review is limited to the appellate record. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). The record establishes that Buss was diagnosed with attention deficit hyperactivity disorder at an early age. A psychological report attached to the presentence investigation indicates that Buss may also suffer from a "conduct disorder." However, nothing in the postconviction motion or the record demonstrates that these diagnoses rendered Buss incompetent to proceed or unable to know right from wrong or conform his conduct to the law (the NGI standard).

¶6 From the record, the circuit court found that the defense team "was acutely aware of at least the possibility of incompetence or mental disease and how that might impact the case." It also found that the defense team thoroughly explored that potential impact and had no basis to advance either claim. These findings are not clearly erroneous.

¶7 In a written statement to police, Buss indicated that he had been stressed and depressed and that he had made previous attempts to hurt himself. At

sentencing, trial counsel utilized Buss's mental health problems as an explanation for the crime and history of aggressive behavior. At the initial appearance, Buss represented himself demonstrating an understanding of the proceeding and making an argument for release on a signature bond. Buss directed trial counsel to withdraw motions to suppress evidence even in face of counsel's desire to go forward with the motions. At the plea hearing, Buss denied that he had any condition or was taking any medication that impaired his ability to make a decision about whether to plead guilty. There is no suggestion in the record that trial counsel had reason to doubt Buss's competency to proceed. *See* ***State v. Johnson***, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986).

¶8 In his postconviction motion, Buss challenged the validity of a search warrant executed on his apartment to search for accelerants and implements of arson. He argued the officer's affidavit in support of the warrant used false information that Buss was seen watching firefighters fight the fire from a cornfield. *See* ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978). The circuit court construed the claim as alleging that trial counsel was ineffective for not challenging the warrant.

¶9 Trial counsel filed a motion to suppress evidence based on a lack of probable cause for the search warrant. An evidentiary hearing was conducted and the officer acknowledged that his affidavit included one statement of misidentification of the person seen standing in the cornfield. Buss elected to withdraw the motion and enter a guilty plea. Although the motion to suppress did not specifically allege a ***Franks*** issue, Buss's decision to withdraw the motion foreclosed the possibility of arguing that issue. Buss does not assert any reason to relieve him from his decision to not pursue the motion. *Cf.* ***State v. McDonald***, 50 Wis. 2d 534, 537, 184 N.W.2d 886 (1971) (the deliberate abandonment of a

suppression motion before trial constituted waiver). The claim is waived by entry of a valid plea. *See* ***State v. Dietzen***, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991) (a knowing and voluntary guilty plea waives all nonjurisdictional defects and defenses).

¶10 Even absent waiver, Buss failed to make the requisite substantial preliminary showing that the officer's false statement was knowingly and intentionally made, or with reckless disregard for the truth. *See* ***State v. Anderson***, 138 Wis. 2d 451, 462-63, 406 N.W.2d 398 (1987). Further, the record does not suggest that the officer deliberately asserted a falsehood. The officer testified he believed the statement to be true when made but only later learned that it was a misidentification. Additionally, the circuit court found that even if the false information was excised from the affidavit in support of the warrant, there was still sufficient probable case for issuance of the warrant. Not only was it proper to deny Buss's challenge to the warrant without a hearing, Buss was not prejudiced by trial counsel's failure to challenge the false statement made in application for the warrant.

*By the Court.*—Order affirmed.

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