COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2696-CR **Cir. Ct. No. 2001CF198**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY S. SIMS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Anthony Sims appeals from orders denying his WIS. STAT. § 974.06 (2005-06)[1] motion and his reconsideration request. We reach the merits and conclude that the circuit court did not err in denying the motion without a hearing. We affirm.

¶2 In 2001, a jury convicted Sims of possessing cocaine with intent to deliver near a park. We affirmed his conviction in a no-merit appeal pursuant to WIS. STAT. RULE 809.32 (2001-02). ***State v. Sims***, No. 2002AP1847-CRNM, unpublished slip op. (Nov. 6, 2002). In 2006, Sims filed a *pro se* WIS. STAT. § 974.06 motion. The circuit court denied the motion without a hearing because Sims should have raised his claims in his previous appeal. Sims then sought reconsideration. In denying the reconsideration request, the court briefly discussed the issues raised in Sims' § 974.06 motion and found that they lacked merit. Sims appeals.[2]

¶3 We apply the following standard of review to the decision to deny the motion without a hearing:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents

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

[2] The State urges us to apply ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and hold that Sims is barred from further challenging his conviction. We decline to do so, and we reach the merits of the appeal.

> 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. 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." We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Love, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62 (citations omitted).

¶4 Sims' WIS. STAT. § 974.06 motion alleged that his trial counsel was ineffective. In order to warrant a hearing on an ineffective assistance of counsel claim, a motion must allege a factual basis to support the claim that counsel performed deficiently and that counsel's deficient performance prejudiced the defendant. *See* ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

¶5 Sims alleged that his trial counsel was ineffective for failing to move to suppress evidence obtained as a result of a warrantless search of his garbage which was found in an alleyway behind his apartment building.[3] The circuit court concluded that this claim did not warrant an evidentiary hearing. We agree.

¶6 The Fourth Amendment does not prohibit a warrantless search of garbage bags left for collection beyond the curtilage of a residence. *See* ***California v. Greenwood***, 486 U.S. 35, 39-40 (1988). The test for determining the constitutionality of a warrantless garbage search is "(1) whether the individual by his or her conduct has exhibited an actual, subjective expectation of privacy, and (2) whether that expectation is justifiable in that it is one which society will

[3] A subsequent search of Sims' apartment yielded cocaine, marijuana, drug paraphernalia and distribution materials.

recognize as reasonable." ***State v. Sigarroa***, 2004 WI App 16, ¶19, 269 Wis. 2d 234, 674 N.W.2d 894. An analysis of Sims' curtilage claim falls within the expectation-of-privacy analysis. *See* ***id.***

¶7 Although Sims alleged in his motion that the garbage was within the curtilage, he offered no material facts in support of that claim. The extent of the curtilage is determined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." ***Oliver v. United States***, 466 U.S. 170, 180 (1984). Those factors include the proximity of the alleged curtilage area to the home, whether the area is enclosed, the owner's use of the area, and the steps the owner takes to protect the area from observation. ***United States. v. Dunn***, 480 U.S. 294, 301 (1987). Sims' motion did not allege any facts about the alleyway to illuminate these factors or to show that he had an actual, subjective expectation of privacy in his trash. Therefore, the court did not err in rejecting the claim without a hearing. *See* ***Love***, 284 Wis. 2d 111, ¶26.

¶8 Sims next claimed that his trial counsel failed to impeach a witness for the State, Tiffany Bayerl, with certain inconsistencies. Bayerl, who was present when police executed a search warrant on Sims' apartment, testified that she had been living with Sims for two and one-half weeks as of the date of the search and that she knew him approximately a year before she moved in with him. She knew Sims as "Mike," not "Big Mike."

¶9 At the time of the search, the police told Bayerl that they found a cocaine-filled peanut butter jar and marijuana.[4] Bayerl initially testified that she told police that the cocaine in the peanut butter jar was hers. But, Bayerl misunderstood the prosecutor's question and then corrected herself by stating that the cocaine in the peanut butter jar belonged to Sims, and that this is what she told the police officer at the time of the search. Before the search, she had never opened the peanut butter jar, although she had seen it in the apartment. She accompanied Sims on crack cocaine deliveries, and she made deliveries on her own at Sims' direction and turned the proceeds over to Sims. Bayerl admitted that she had agreed to testify truthfully against Sims in exchange for a lesser charge relating to her role in the drug operation. Bayerl told the jury she was convicted of two drug possession counts and received a jail sentence, fines, probation and license suspension.

¶10 On cross-examination, Bayerl testified that she met Sims eight or nine months before the search. She was in the kitchen when the warrant was executed; Sims was in the bathroom. The officers found cocaine in the kitchen. She testified that she did not recall if she told one of the detectives involved in the search that the cocaine was hers; she did admit to having claimed ownership of the marijuana found during the search.

¶11 Sims' WIS. STAT. § 974.06 motion alleged that trial counsel should have explored inconsistencies between Bayerl's preliminary examination testimony and her trial testimony to impeach her credibility. Sims cited the

[4] Bayerl admitted ownership of the marijuana to the police at the time of the search and at trial.

following inconsistencies: (1) the amount of time Bayerl had been living with Sims at the time of the search: two months (detective's report) or two and one-half weeks (preliminary examination and trial testimony); and (2) Sims used the name "Big Mike," but Bayerl knew him as "Mike." Counsel's failure to explore these inconsistencies did not prejudice Sims. Trial counsel was able to impeach Sims on matters directly impacting her credibility, particularly with regard to her testimony about the peanut butter jar and who owned its contents. Our review of Bayerl's trial testimony indicates that Bayerl clarified her testimony about the peanut butter jar (that it was not hers and she never opened it), and defense counsel explored that issue on cross-examination.

¶12 Sims complains that until trial, Bayerl never alleged that she delivered cocaine for Sims. However, defense counsel pursued this point and elicited an admission from Detective Shield that Bayerl never made this claim to him.

¶13 Sims' motion did not demonstrate that he was prejudiced by trial counsel's treatment of Bayerl. Because the record demonstrates that Sims was not entitled to relief on this claim, the court did not err in denying it without a hearing.

¶14 Sims alleged that trial counsel was ineffective for failing to call two witnesses at trial, Steve Harvey and Jasmine Bradford. Harvey and Bradford were present when the search warrants were executed and were friends of Sims and Bayerl. Detective Shield interviewed Harvey and Bradford and they denied any knowledge of a drug operation in the apartment. In his motion, Sims claimed that his defense counsel did not investigate whether Harvey and Bradford could testify that they knew he did not deal drugs.

¶15 The allegations in the motion were insufficient to warrant a hearing. The motion did not offer anything from these potential witnesses to indicate that such would have been their testimony. Sims also did not allege that he told defense counsel that Harvey and Bradford might be able to testify on his behalf. The reasonableness of counsel's investigation may be determined or substantially influenced by the words and actions of the client. ***State v. Leighton***, 2000 WI App 156, ¶40, 237 Wis. 2d 709, 616 N.W.2d 126. Failure to investigate is not ineffective assistance if a defendant does not tell counsel of the existence of potential witnesses. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 26-27, 496 N.W.2d 96 (Ct. App. 1992), *cert. denied*, 510 U.S. 830 (1993).[5] The issue did not warrant a hearing.

¶16 Sims next claimed that trial counsel failed to tell him about an alleged plea offer. This is pure speculation. Sims based his claim upon a record item: "Order for Pre-trial, change of plea, trial discovery." This document is nothing more than a scheduling order which sets out dates by which certain activities will occur. At an August 20, 2001 hearing attended by Sims, defense counsel noted that the parties had not reached a plea agreement. The jury trial commenced on September 25. Sims' motion did not establish that a plea agreement was reached and that he was not informed about such an agreement. The issue did not warrant a hearing.

¶17 Finally, Sims' motion complained about his sentence and argued that it was not a proper exercise of sentencing discretion. The exercise of sentencing discretion was expressly addressed in Sims' 2002 appeal. Sims may not raise this

[5] Although the police report stated that Harvey and Bradford were found in the apartment upon execution of the search warrant, their potential as witnesses was within Sims' knowledge.

issue again. *See* ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574.

¶18 Our review of Sims' WIS. STAT. § 974.06 motion confirms that he failed to allege sufficient facts in his motion or presented only conclusory allegations. In addition, the record conclusively demonstrates that he was not entitled to relief. The circuit court properly exercised its discretion when it denied the § 974.06 motion without a hearing.

By the Court.—Orders affirmed.

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