COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2615 **Cir. Ct. No. 2005CF4144**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEANTHONY A. NASH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, Fine and Kessler, JJ.

¶1 WEDEMEYER, J. DeAnthony A. Nash appeals from an order denying him postconviction relief under WIS. STAT. § 974.06 (2005-06).[1] He seeks reversal of his conviction for five reasons. He claims that: (1) the court that convicted him lacked subject-matter jurisdiction; (2) the court that convicted him failed to conduct his probable cause hearing within forty-eight hours; (3) his trial counsel provided ineffective assistance; (4) his case constituted a malicious prosecution; and (5) ***Brady v. Maryland***, 373 U.S. 83 (1963) violations occurred.

¶2 Because WIS. STAT. § 948.02(1) was properly enacted, because Nash's plea of no contest waived any deficient probable cause determination, and because the claims of ineffective assistance of trial counsel and ***Brady*** violations lacked the necessary specificity to assert these claims on appeal, we affirm.

BACKGROUND

¶3 On October 5, 2005, Nash pled no contest to one count of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1). On the same day, the trial court imposed a concurrent sentence of eight years, consisting of three years of initial confinement and five years of extended supervision.

¶4 As relevant to this appeal, on August 15, 2006, Nash filed a "Motion Memorandum and Affidavit to Dismiss for Lack of Subject Matter Jurisdiction." The bases for this motion are: (1) the statute under which he was charged had been improperly enacted, was unconstitutional, and therefore the court lacked subject matter jurisdiction, and (2) a probable cause determination was not

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

conducted within forty-eight hours of his arrest. Therefore, his rights under the Fourth Amendment of the United States Constitution and WIS. STAT. § 970.01 were violated. ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991); ***State v. Aniton***, 183 Wis. 2d 125, 128, 515 N.W.2d 302 (Ct. App. 1994). The trial court denied the motion because of waiver and because it set forth no basis for relief. Nash then filed a "Motion on Clarification of Judgment of Motion to Dismiss for a Lack of Subject-matter Jurisdiction." By order dated August 30, 2006, the trial court denied the motion because the original motion was conclusory and did not set forth a viable claim for relief, which warranted a hearing. On September 26, 2006, Nash signed a notice of appeal and a request for transcripts. The trial court denied the request for transcripts for the reason that Nash's "appellate rights have long since expired." Nash then filed a second notice of appeal, claiming that he was appealing from the trial court's August 30, 2006 order.

¶5 The State Public Defender's Office refused to provide appointed appellate counsel because Nash's appellate effort was not a direct appeal under WIS. STAT. § 809.30. In an order dated December 13, 2006, we accepted that analysis and because of the state of the record and judicial efficiency, deemed Nash's appeal to be an appeal from a WIS. STAT. § 974.06 order.

ANALYSIS

A. Subject Matter Jurisdiction

¶6 Nash's first claim of error is that the trial court lacked subject matter jurisdiction over the State's prosecution of him because the statute, WIS. STAT. § 948.02(1) was not properly enacted. Therefore, he argues, the prosecution must be dismissed. We respectfully disagree.

¶7 The statute at issue here reads as follows: "**Sexual Assault of a Child**. (1) FIRST DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of … (b) … a Class B felony."

¶8 Nash claims this specific section was not prefaced by the introductory enactment language: "The people of the State of Wisconsin, represented in Senate and assembly, do enact as follows," as required by article IV, section 17 of the Wisconsin Constitution. Thus, Nash claims the prosecution against him ought to be dismissed. Nash's contention is factually incorrect.

¶9 A review of the 1987 Wisconsin Session Laws, Vol. 2 (July 1988) reveals that WIS. STAT. § 948.02(1) was created by 1987 Wisconsin Act 332. The introductory paragraph of Act 332 describes the then existing statutory provisions that the Act would repeal, renumber, amend and create. The Act lists "s. 948," followed by this language: "*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*" Section 55 of Act 332 contains the created Chapter 948, which contains § 948.02(1). Thus, as a matter of fact, Nash's claim that the statute was created without the introductory language is not sustainable.

B. Probable Cause Hearing

¶10 As a second claim of error, Nash asserts that his constitutional and statutory rights were violated because no probable cause determination took place within forty-eight hours of his arrest. We reject this claim of error because the record demonstrates that Nash entered a plea of no contest to the allegations lodged against him. In doing so, he waived his rights to challenge any violation of WIS. STAT. § 970.01(1). *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62,

716 N.W.2d 886. When Nash entered his plea he waived this issue. Thus, this claim of error fails.

C. Ineffective Assistance of Counsel

¶11 Next, Nash claims that his trial counsel provided ineffective assistance. We reject his claim because he failed to sufficiently raise this issue in the trial court and failed to satisfy his burden of proof on appeal.

¶12 As correctly pointed out by the State: "For the first time on appeal Nash … alleges in detail that his trial counsel was … ineffective." At the postconviction level, Nash's postconviction motion and memorandum consisted of fifteen pages, which were primarily devoted to his claims of lack of subject matter jurisdiction and failure to provide a probable cause hearing within forty-eight hours of his arrest. It was only in the last sentence of the second to last paragraph of the memorandum that he baldly asserted, without explication, the issues of coerced and false statements, malicious prosecution, and ineffective assistance of counsel. The trial court denied Nash's postconviction motion in its entirety, succinctly stating: "The court has reviewed the motion and finds that it sets forth no basis for relief." Nash moved for reconsideration of the denial of his motion dated August 15, 2006. The trial court, relying upon ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972) rejected this effort, declaring the defendant's prior motion was conclusory at best and did not set forth a viable claim for relief which warranted a hearing.

¶13 A trial court, in its discretion, may deny a postconviction motion without a hearing "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations." ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The same rubrics apply to an

ineffective assistance of counsel claim. ***State v. Allen***, 2004 WI 106, ¶¶13, 15, 274 Wis. 2d 568, 682 N.W.2d 433. To meet this burden, a postconviction movant should specifically allege in factual form the five "w's" and one "h;" that is "who," "what," "where," "when," "why" and "how." Mere conclusory assertions will not suffice. ***Id.***, ¶23.

¶14 Although it is not altogether clear from a reading of Nash's written submissions, it appears that he bases his ineffective assistance of trial counsel claim on the failure to file a postconviction motion, failure to investigate, failure to file a demand for discovery, and being misled and lied to by his trial counsel. These assertions are nowhere to be found in his postconviction motion; rather, these assertions are proffered for the first time on appeal. For this reason alone, Nash's claim must be rejected. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

D. Malicious Prosecution/Brady Violations

¶15 Nash also asserts claims for malicious prosecution and ***Brady*** violations. The former claim is dependent on the validity of his lack of subject matter jurisdiction claim and failure to conduct a probable cause hearing within forty-eight hours of arrest. Because neither pre-condition could be established, this claim fails. As for the latter ***Brady*** violation claim, it was not raised before the trial court, and even if for the purposes of argument we assumed it was, it is totally lacking in the necessary specificity required by ***Allen***. Nash failed woefully to raise any factual issues in his postconviction motion with respect to ***Brady*** violations. Rather, he asserted only conclusory contentions. Accordingly, the trial court did not err in summarily denying his postconviction motion.

¶16 The trial court's orders denying Nash's postconviction motion of August 15, 2006 and motion for reconsideration of August 28, 2006 were based on the lack of necessary specificity and failure to set forth a basis for relief, warranting a hearing. Based upon our independent review, we conclude the record demonstrates that the trial court did not err. *See* ***Bentley***, 201 Wis. 2d at 310. For the forgoing reasons, we affirm the order of the trial court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.