COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2804-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GARLAND G. BABAIAN,

DEFENDANT-APPELLANT.

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

¶1 WEDEMEYER, P.J.[1] Garland G. Babaian appeals from a judgment entered after he pled no contest to one count of disorderly conduct as a habitual criminal and pled guilty to one count of resisting or obstructing an officer,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

contrary to WIS. STAT. §§ 947.01, 946.41(1) and 939.62 (1999-2000).[2] He also appeals from an order summarily denying his postconviction motion alleging ineffective assistance of trial counsel. Babaian claims the trial court erred when it denied his postconviction motion without conducting a ***Machner*** hearing.[3] Because the postconviction motion failed to allege facts which, if true, would have entitled Babaian to relief, and because the record conclusively demonstrates that Babaian is not entitled to relief, a ***Machner*** hearing was not required, and this court affirms.

I. BACKGROUND

¶2 On March 13, 1999, just after 11:00 p.m., Lynn Curran was checking the front door of her residence to make sure that it was locked. She saw Babaian peering in through her front door from just a few feet away. Babaian looked at Curran and then turned and walked away. Curran phoned police to report the incident. Babaian was discovered walking two blocks away from the Curran residence. He was found to be carrying a large screwdriver, a small knife, razor blades, and a flashlight. He was wearing three pairs of bikini panties, two women's nightgowns, and women's stockings. Babaian originally gave police officers a false name. Curran also found fresh "pry mark-type" damage to the doorframe near where Babaian had been standing.

¶3 Babaian was arrested and charged with one count of possession of burglarious tools and one count of obstructing an officer, both as a habitual

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[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

criminal. Defense counsel requested that a competency exam be conducted. The result of the examination was that Babaian was competent to assist in his own defense.

¶4 Prior to trial, Babaian reached a plea agreement with the State, wherein he agreed to enter pleas to disorderly conduct and obstructing a police officer. After entering the pleas, the trial court sentenced Babaian to a total of three years in prison. Babaian filed a postconviction motion, alleging that he received ineffective assistance of trial counsel. The trial court ordered briefs on the motion, and ruled that the record conclusively demonstrated that Babaian received effective assistance of trial counsel. Babaian now appeals.

II. DISCUSSION

¶5 A defendant is not automatically entitled to an evidentiary hearing on an ineffective assistance of counsel claim. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). If the postconviction motion alleging ineffective assistance claim is conclusory in nature, or if the record conclusively shows the defendant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***Id.*** To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the defendant must allege, with specificity, both deficient performance and prejudice in the postconviction motion. ***Id.*** at 312.

¶6 Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether

the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶7 Babaian's postconviction motion alleges that his counsel was ineffective because the record does not support pleading to the charges. Rather, the motion asserts that the record supports taking the case to trial. The motion also alleges that there is evidence that Babaian had difficulty communicating with trial counsel. Neither allegation is sufficient to require an evidentiary hearing on the ineffective assistance claim.

¶8 First, the plea offer substantially reduced Babaian's potential prison exposure. The State indicated that if the case proceeded to trial, it intended to add an attempted burglary charge, for a total possible exposure time of twenty-two years. Babaian also had a substantial criminal history, which may have had an impact in sentencing.

¶9 Second, despite Babaian's belief, the record is sufficient to sustain a charge of possession of burglarious tools. Babaian's argument rests on his belief that possessing a screwdriver alone is insufficient to prove guilt on this charge. However, the record reflects that Babaian was not just in possession of a screwdriver. He was also carrying razor blades, a small knife, and a flashlight. He was positively identified by the victim as the man standing on her front porch. To convict on possession of burglarious tools, the State would have to prove: (1) that Babaian possessed any device or instrumentality designed and adapted for use in breaking into any building or room; (2) that he intended to use the device to break in; and (3) that he intended to steal something after he broke in. ***Hanson v. State***, 64 Wis. 2d 541, 546, 219 N.W.2d 246 (1974). The evidence in the record more than supports the charge.

¶10 Third, although there are indications early on about communication problems between Babaian and his trial counsel, the colloquy that occurred during the plea hearing demonstrates that any earlier problems did not infect the plea agreement or the knowing, voluntary, and intelligent nature of the plea. During the plea hearing, Babaian indicated that he had personally read the criminal complaint, and that he understood all of the provisions in the Guilty Plea Questionnaire and Waiver of Rights form. He stated that he discussed all of the provisions on the form with his lawyer and that he understood the plea proceeding. The transcript from the hearing demonstrates that Babaian was completely coherent, that he had the ability to follow the proceedings, and that he answered the trial court's questions appropriately. The transcript reflects that Babaian understood what he was doing and that he wanted to enter the pleas.

¶11 Moreover, as the trial court points out in its order denying the postconviction motion, it was Babaian, not his counsel, who opted to enter the pleas to the amended charges. His postconviction motion does not even allege that he did not understand the nature of the plea proceeding, but rather argues that his attorney should have talked Babaian out of pleading guilty and forced Babaian to go to trial.

¶12 Fourth, under the circumstances, counsel cannot be found deficient for encouraging a client to accept a plea agreement, where the potential prison exposure is six years, as opposed to a possible twenty-two year prison term if the case proceeds to trial.

¶13 Based on the foregoing, this court agrees that no ***Machner*** hearing was required. The record conclusively demonstrates that Babaian was not entitled

to relief, and Babaian's motion failed to allege sufficient facts which, if proven, would have entitled him to relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.