COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 00-2998
01-0093

Cir. Ct. No. 93-CF-1378

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH L. CHAMPION,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Kenneth Champion appeals from an order denying his WIS. STAT. § 974.06 (1999-2000)[1] motion for postconviction relief. He also raises issues concerning appellate counsel's performance on a prior direct appeal from the underlying criminal conviction. We affirm the trial court's order, and deny Champion relief on his claim of ineffective counsel on his appeal.

¶2 The State charged Champion with multiple felony counts in connection with two incidents where Champion broke into apartments and beat and robbed the inhabitants. Near the close of his jury trial, Champion jumped up, grabbed defense counsel, and yelled at the prosecutor. At the time of the outburst, Champion was just preparing to testify. When the proceedings later reconvened, Champion waived his right to testify, and chose to remain out of the courtroom for the remainder of the trial. The jury convicted him on all charges and he received lengthy prison sentences. Before sentencing Champion, the court ordered a competency examination, and the examining psychiatrist concluded that Champion was a malingerer, and not suffering from any mental disease or defect affecting his competency to stand trial or be sentenced.

¶3 Appellate counsel was appointed for Champion and commenced an appeal on his behalf. The sole issue on appeal was whether the trial court erred by refusing to sever the trial on the two criminal incidents. In 1996 this court affirmed and the supreme court denied review.

¶4 In 2000, Champion filed a WIS. STAT. § 974.06 motion alleging that his appointed counsel ineffectively failed to pursue postconviction relief on a

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

claim of ineffective assistance of trial counsel. That alleged ineffectiveness included the failure to request a competency examination after Champion's outburst at trial; the failure to identify and discover certain of Champion's psychiatric records relevant to sentencing; and the failure to adequately pursue the suppression of a witness's identification of him as the invader of her home. The trial court denied relief without a hearing, however, upon concluding that Champion's motion was untimely and failed to sufficiently set forth his claims.

¶5 During this appeal Champion has also contended that counsel ineffectively prosecuted the appeal by failing to raise an issue concerning the trial court's alleged error in not ordering a competency examination on its own motion after the outburst, and by not challenging the sufficiency of the evidence on the charges related to one of the two home invasions. Although these issues are not part of the appeal, we review them as if Champion had filed a ***Knight*** petition in addition to his notice of appeal. *See* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992) (holding that issue of ineffective appellate counsel is raised by habeas petition in the court hearing the appeal.).

THE APPEAL

¶6 If a motion alleging ineffective assistance of counsel fails to allege sufficient facts, the trial court may, in its discretion, deny it without a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). A motion fails to allege sufficient facts if it fails to raise a question of fact, presents only conclusory allegations, or the record conclusively demonstrates that the defendant is not entitled to relief. ***Id.*** at 309-10. Whether the pleading meets this test is a question of law that we review de novo. ***Id.*** at 310.

¶7 Neither Champion's allegations, nor any facts of record, support the claim that counsel should have requested a competency examination for him. Champion's motion cites only his trial outburst as evidence of his alleged incompetence. The trial court considered that outburst to be a deliberate attempt at a mistrial. His attorney attributed it to frustration. Nothing in the trial record before the outburst indicated Champion's incompetency, and after he returned to the courtroom he was articulate, composed and rational in explaining his decision not to participate further in the trial. Counsel had no cause to reasonably believe that Champion could no longer comprehend the proceeding.

¶8 Champion's motion fails to state a case that trial counsel should have used certain psychiatric reports at his sentencing hearing. Champion cited two reports from a prison psychiatrist recording his recent complaints of hallucinations and delusions, and noting that there was some evidence "possibly" suggesting schizoaffective schizophrenia. However, the reports also noted that Champion was oriented to time, place and person, had no noticeable impairments of memory, knowledge or intelligence, and had no inappropriate affect. The psychiatrist concluded that Champion was "fully competent." Consequently, it is not clear how the reports would have benefited Champion at sentencing. Even if they were of some significance, Champion cannot reasonably claim prejudice from their absence because very similar observations were reported in another psychiatric report that was introduced at the sentencing hearing.

¶9 The record conclusively establishes that trial counsel did not unreasonably abandon a suppression issue. The question is whether police used unduly suggestive means to obtain the victim's identification of Champion as their attacker. Although there was no suppression hearing, that issue was fully explored during Champion's trial. At the conclusion of the trial, the court stated "I am

satisfied that had there been a hearing on the motion to suppress … the court would have found … that this record lacks any evidence that [the victims'] identifications were unduly suggestive or improper under the circumstances. Or that the identifications were so inherently unreliable as to require, as a matter of law, that they be suppressed." Champion therefore suffered no prejudice by the failure to obtain a pretrial suppression hearing on the issue.

THE KNIGHT ISSUES

¶10 Champion's allegations against appellate counsel's performance on his appeal are also without merit. Champion had no chance to succeed on appeal by challenging the trial court's failure to order a competency examination on its own motion, after his trial outburst. As noted previously in this opinion, the record provides no reason for the trial court to doubt his competency. Additionally, by the time counsel filed the appeal, he was aware of the subsequent competency examination done in connection with Champion's sentencing, and the fact that the examining psychiatrist deemed Champion a malingerer without any competency issues.

¶11 Champion also had no chance to succeed had counsel raised a sufficiency of the evidence issue on appeal. The jury found Champion guilty on charges that he confined Cyril and Bernita Fahltersac during his invasion of their home. Champion contends that even though the perpetrator ordered the Fahltersacs into their basement, he did not act in any way to prevent them from leaving that place of confinement. However, the victims were both elderly, and Champion had already physically assaulted and threatened them. The jury could reasonably infer that Champion intentionally confined them to the basement by means of intimidation. Although Champion also contends that there was

insufficient evidence to identify him as the Fahltersac home invader, Bernita Fahltersac identified him at trial. Although counsel for Champion introduced evidence questioning the validity of that identification, the jury is the ultimate arbiter of credibility and was entitled to believe Bernita. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990).

By the Court.—Order affirmed.

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