COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3068 **Cir. Ct. No. 1993CF931007**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHIP BRANCH,

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. Chip Branch appeals *pro se* from an order denying his November 30, 2004 postconviction WIS. STAT. § 974.06 (2003-04)[1] motion. Essentially, Branch raises two points of error. First, he claims his postconviction counsel provided him with ineffective assistance during his direct appeal for failing to address numerous deficiencies of his trial counsel. Second, he argues that the trial court judge should have recused himself from hearing his case because he demonstrated bias against Branch. Because his trial counsel did not provide ineffective assistance and the rulings of the trial court cited by Branch fail to demonstrate the degree of favoritism or antagonism required to show bias, we affirm.

BACKGROUND

¶2 On June 28, 1993, a jury convicted Branch of first-degree intentional homicide while armed, as a habitual criminal. Branch appealed from the judgment of conviction. On May 31, 1995, this court affirmed the conviction. The petition for review Branch filed was denied by the supreme court on October 17, 1995.

¶3 On November 30, 2004, Branch filed a *pro se* WIS. STAT. § 974.06 motion. As pertinent to this appeal, Branch raised the following issues: (1) trial counsel allowed the court to arraign him in his absence; (2) trial counsel failed to effectively challenge the admission of his statements to police; (3) trial counsel failed to inform him that there was a plea offer made by the State; and (4) trial counsel failed to interview and call an exculpatory eyewitness, Jonique Guy. In examining the nature of Branch's claims, the trial court relied on ***State ex rel.***

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Rothering v. McCaughtry, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). It rejected all of Branch's claims of error without a hearing except his claim that he had never been informed of a State's plea offer. On that issue, the trial court ordered an evidentiary hearing. After the hearing on November 21, 2006, at which Branch testified, the trial court denied the motion. Branch now appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANT OF POSTCONVICTION COUNSEL.

¶4 Branch first claims that he was the recipient of ineffective assistance of trial counsel, and that the failure to pursue the instances of alleged ineffectiveness in the postconviction process amounted to ineffective assistance of postconviction counsel.[2] For reasons to be stated, we do not agree that trial or postconviction counsel performed ineffectively.

STANDARDS OF REVIEW AND APPLICABLE LAW

¶5 ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 173, 181-82, 184-86, 517 N.W.2d 157 (1994), declared that a claim that was finally adjudicated, waived, or not raised, cannot be raised in a subsequent postconviction motion when it *could have been* raised in a direct appeal or prior postconviction motion,

[2] There is some confusion in the record over the use of the term "postconviction counsel." Branch filed several *pro se* postconviction motions. A public defender had previously filed Branch's direct appeal and petition for review. On page 7 of his reply brief to this court in this appeal, he asserts that his "first, direct appeal rights were violated by ineffectiveness." From this statement and for the purpose of this appeal, we assume his allegation of "ineffective assistance of postconviction counsel" is referring to his appellate counsel in his direct appeal because the record reflects no lawyer handling any postconviction motion for him.

unless the defendant provides a sufficient reason for not asserting or inadequately asserting the claim in the direct appeal or prior motions. This procedural rule applies to WIS. STAT. § 974.06 motions. ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W. 2d 756.

¶6 In ***Rothering***, 205 Wis. 2d at 682, this court stated that in some circumstances the ineffective assistance of postconviction counsel could provide the sufficient reason required by ***Escalona*** to raise an issue that was not raised in a prior appeal or postconviction motion. This failure might provide a sufficient reason for not raising issues in a prior appeal or postconviction motion when action by postconviction counsel was necessary to bring the issues before the court on the appeal or the motion. ***Rothering***, 205 Wis. 2d at 677-79.

¶7 A trial court is required to hold an evidentiary hearing on a postconviction motion if the motion sets forth facts, which, if true, would entitle the movant to relief. ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. If, however, the motion fails to set forth sufficient facts to raise a question of fact or presents only conclusory allegations, or if the record conclusively demonstrates that a defendant is not entitled to relief, the court could in the exercise of its discretion deny the motion without a hearing. ***Id.***, ¶12. The facts supporting the requested relief must be alleged in the motion. The defendant cannot rely on the conclusory allegations, hoping to supplement them at a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). The motion must provide sufficient facts to allow the court to meaningfully assess the claim. To allege sufficient facts to satisfy the ***Bentley*** standard, postconviction motions should "allege the five 'w's' and the one 'h'; that is, who, what, where, when, why, and how." ***Allen***, 274 Wis. 2d 568, ¶23. A trial court may deny a motion

without a hearing "if one or more key factual allegations in the motion are conclusory." ***Id.***, ¶12 (citation omitted).

¶8 Whether a defendant's motion alleges facts that if true, would entitle him or her to relief is a question of law that we review independently. ***Id.***, ¶9. If the motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without a hearing. ***Id.*** When reviewing a trial court's discretionary act, we use the deferential exercise of discretion standard. ***Id.*** In reviewing the trial court's decision, we shall only consider the allegations contained in the four corners of the postconviction motion. ***Id.***, ¶27.

¶9 To establish a claim of failure to receive effective assistance of counsel, a defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her "counsel's errors were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "[a] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶10 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

> ¶11 The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant… [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691.

APPLICATION

¶12 Branch's first reason for asserting his original postconviction counsel was ineffective was counsel's failure to claim in the direct appeal process that Branch's trial counsel was ineffective for allowing the trial court to arraign him for first-degree homicide when he was not present in the courtroom on June 2, 1993, at the time his case was called. Because of the nature of this claim, a careful search of the record was required. The circumstance giving rise to this claim of error is a statement in the arraignment transcript dated June 2, 1993, in which Branch's trial counsel indicated his own presence on behalf of Branch and stated his belief "I think he is on his way in" the courtroom. A few lines later, however, the transcript shows his trial counsel announcing that "Mr. Johnson is now present in the courtroom." It is obvious from reading the entire record that the only Mr.

Johnson involved in the case was Lovell Johnson, the assistant district attorney representing the State. To clear up the confusion, the trial court requested the court reporter, who transcribed the arraignment to check the accuracy of her notes with respect to the June 2, 1993 proceeding relating to the identified person in the transcript. On May 3, 2006, a corrected transcript was filed reflecting a scrivener's error, that defense counsel actually stated "Mr. Branch (not Mr. Johnson) was present."

¶13 On May 25, 2006, when the trial court denied in part Branch's postconviction motion, it also entered an order determining that Branch was present at the June 2, 1993 arraignment. It made this finding based upon the corrected transcript of the arraignment, and the judgment roll. This factual determination is clearly not erroneous. Thus, there is no basis for an ineffective assistance of trial counsel claim or, sequentially, an ineffective assistance of postconviction counsel claim.

¶14 Branch's second reason for an ineffective assistance of counsel claim is the failure of his trial counsel to inform him of a plea bargain offered by the State and the failure of his postconviction counsel to raise the issue on appeal. The original source for this claim was information conveyed to Branch by another inmate who, in 2004, had read the June 2, 1993 arraignment transcript.

¶15 To advance our analysis of this claim of ineffective assistance of counsel, it is helpful to remember that we have just affirmed the trial court's finding that Branch was present at the second arraignment hearing of June 2, 2003. Prior to that court appearance, however, the record reflects Branch was present at the April 2, 1993 arraignment on the original information charging him with first-degree reckless homicide, while armed, and as a habitual criminal. On April 2,

1993, the State observed it was not positive about the status of its witnesses, but indicated that it "may at some point be amending the charge up depending upon how these matters go and how any negotiations go." Thus, at an early phase of the proceedings, negotiations were a reality.

¶16 On June 2, 1993, with Branch present in the courtroom, the State declared on the record:

> My understanding from conversations with Mr. Wilmouth is that his client, Mr. Branch, did not want to take advantage of the previous Information which I filed. In that one, I charged Mr. Branch with first-degree reckless homicide.… So his maximum exposure under those charges was 35 years.
>
> ….
>
> My understanding is that Mr. Branch does not wish to take advantage of that. Because of that, we filed an amended Information which charges Mr. Branch with a first degree intentional homicide while armed and also as a habitual criminal.…

¶17 Then, in short sequence, the trial court noted it was aware that trial counsel had had many discussions with his client concerning his intentions. Trial counsel acknowledged receipt of a copy of the amended information. The court then questioned trial counsel whether he was "satisfied that this is what he [Branch] wants to do on this case?" Counsel responded, "I am sir."

¶18 As noted earlier, the postconviction court prudently ordered an evidentiary hearing to consider Branch's claim that his trial counsel was ineffective because he failed to advise him of the plea offer. At the hearing, both trial counsel and Branch testified.

¶19 Trial counsel testified that he had met with Branch six times between the dates of April 2nd and June 2nd, 1993, but because of the passage of time, he

was unable to recount the subject of the meetings. He did remember, however, that Branch indicated to him that he was not guilty. He had a desire to go to trial and he was "eager to proceed to trial."

¶20 Trial counsel testified it was his normal practice to discuss with criminal clients, when the threat of life imprisonment was present, that if the client should consider pleading as the option to plead to a lesser charge with shorter prison-time exposure, the client should consider pleading as anything was better than a term of life imprisonment. He did remember explaining to Branch's family that the case "would be amended if there was not some acceptance of the first-degree reckless homicide charge."

¶21 Branch, for his part could not remember being in court on April 2nd or June 2nd, 1993. He stated his trial counsel never discussed a plea bargain prior to June 2, 1993, because "we was going under first-degree reckless homicide." He further stated he never saw the amended information until an institution paralegal showed it to him in 2000 or 2004. He thus asserts that it was only in 2004 that he first learned of the opportunity to plead to a lesser charge. He thought he had gone to trial on the reckless homicide charge. It was when he read the arraignment transcript in 2004 that he learned that the State had said in open court that he had refused to accept the lesser charge.

¶22 In arriving at its postconviction motion decision, the trial court noted that it had considered the entire record, not just the testimony it had heard. The June 2, 1993 arraignment transcript provides support for the trial court's analysis. Branch had to hear the comments of the State's attorney as he explained the reason for filing the amended information. Yet, Branch stood silent when the State announced it was filing the amended information. Furthermore, Branch did not

object when his counsel affirmatively responded to the trial court that "this is what he wanted to do on the case."

¶23 The trial court found that reasonable inferences could be drawn militating against Branch's version of what did not happen. It found inconsistencies in Branch's testimony and concluded his version of events was not credible based on his earlier contacts with law enforcement personnel and prior plea bargain negotiations he had in other types of criminal cases. It noted that his trial counsel's time logs indicated that he had talked to Branch's family members and the district attorney a number of times about the case.

¶24 Having considered all of these factors, the trial court found as a matter of fact that it was "unfathomable" that Branch first found out about the first-degree intentional homicide charge in 2004. Rather, Branch had been informed of the plea offer but "it was his intent right from the beginning to go to trial."

¶25 Based upon a reasonable reading of the record, the findings made by the trial court are not clearly erroneous. The quantitative and qualitative nature of the record forces this conclusion. Branch has not met his burden of proof in presenting this claim of error. Consequently, there is no basis in the record to support a conclusion that trial counsel was ineffective. Thus, his postconviction counsel also could not be ineffective.

¶26 Branch's third claim of ineffective assistance of trial counsel consists of three parts: (1) his deficient challenge to the admission of his incriminating statements to police; (2) the failure to call a certain eyewitness to testify as an exculpatory witness; and (3) other isolated instances of alleged

deficiencies during the procedural and trial process. We shall consider each in turn.

¶27 The alleged deficient challenge to the statements given to the police relates to two separate incidents: the first involves statements given to Milwaukee Police Detectives Leslie Barber and Paul Stuhmer; the second involves statements given to Shelby County, Tennessee Deputy Sheriff Brenda Williams. After the homicide that gave rise to this case, Branch left Wisconsin. He was subsequently apprehended in Memphis, Tennessee. Both statements were made while he was in the process of being returned to Wisconsin. Williams and her partner participated in handing Branch over to the Milwaukee police detectives.

¶28 In support of this claim, Branch argues that his trial counsel should have called him to testify about the circumstances under which he gave his statements to police and how he felt when he gave them. In essence, Branch claims that Barber and Stuhmer threatened him and beat him with a belt when they stopped at an Illinois weigh station. Because of the threats and beating, he confessed to the crime of homicide to prevent "being beaten or killed."

¶29 As for the Williams incident, Deputy Sheriff Williams testified that she and her partner, David Carter, transported Branch from the U.S. Marshal's office to the county jail in Tennessee. When Carter left their patrol car to go into the Criminal Justice Center to pick up some paper work, Branch initiated a conversation with Williams by inquiring why he was being charged. During the conversation, Branch stated he had shot and killed someone in a gang fight. Branch denied making any statement to Williams.

¶30 Branch argues that trial counsel did absolutely nothing to support his claim of coercion, nor to challenge the credibility of Williams' testimony about his voluntary confession.

¶31 For several reasons, we hold that the trial court was correct in denying Branch's postconviction claim without an evidentiary hearing. First, although in his direct appeal Branch challenged the voluntary nature of his incriminating statements because of the coercive effect of the long automobile trip from Memphis to Milwaukee, he has not offered any reason why he did not claim in his original appeal that the police employed threats and used force to obtain his statements.

¶32 Second, at the evidentiary hearing held on November 21, 2006, trial counsel stated Branch denied making any statements to anybody. Trial counsel even hired a handwriting expert on the strength of Branch's insistence that he did not execute a statement, which the State alleged he had. Because of Branch's persistent denial he had made any statements to police, it was not unreasonable that trial counsel did not pursue a strategy of demonstrating that the statements were coerced by threats and the use of force. ***Strickland***, 466 U.S. at 691.

¶33 Third, to circumvent the "sufficient reason" test of ***Escalona***, yet fulfill the requirements of ***Rothering***, Branch attempts to show he had sufficient reason for not raising this issue on direct appeal by claiming his postconviction counsel was ineffective for not raising the issue on direct appeal. This stratagem is of no avail. For postconviction counsel's performance to be deficient, counsel has to be made aware of the particular facts of coercion; i.e., "threats and use of force." ***Strickland***, 466 U.S. at 691. Branch's postconviction counsel would have had no knowledge of such a claim unless Branch had informed him of such

conduct. There is no allegation in Branch's 2004 motion that postconviction counsel was ever so informed. The same analysis applies to Branch's claim relating to the statement given to Williams. Thus, the postconviction motion failed to state facts that would show postconviction counsel was deficient for not raising the issues.

¶34 In denying this portion of Branch's postconviction motion without a hearing (relating to trial counsel's deficiencies) the trial court concluded there was not a reasonable probability that the suppression hearing court would have found Branch's version more credible over the testimony of the police officers, and there was not a reasonable probability that Branch's statements would have been suppressed. Thus, there was not a reasonable probability of a different outcome.

¶35 Next, Branch claims ineffective assistance of trial counsel for his counsel's failure to interview and call as a witness, Jonique M. Guy. Branch argues that a copy of a police report attached to his motion shows that Guy told police she saw "Red D" striking an individual with a gun, and she saw "Red D" shoot toward the person when the person was fifteen to twenty feet from "Red D." Trial testimony indicated that "Red D" was a person identified as Gregory Sharp. Thus, Branch claims Guy's testimony would have been exculpatory.

¶36 In response, the State pointed to admissions by Branch to police on two separate occasions that he admitted doing the shooting. In addition, Branch's clothing was identified as that matching the clothing of the person who did the shooting and who was seen standing over the victim with a handgun. Furthermore, as part of the State's case, Dr. John Teggatz, who was involved with the autopsy of the victim, opined that particles consistent with unburned gun

powder were found on the victim's t-shirt. This circumstance was consistent with the firing of a gun within three feet or less of the victim.

¶37 As noted above, in order for Branch to prove he received ineffective assistance of trial counsel, he had to prove his counsel was not only deficient in his performance, but also that such deficiency was prejudicial to the defense. ***Id.*** at 687. With the state of the record being such as it is in regard to this claim of error, the trial court's conclusion that there was no reasonable probability that Guy's testimony would have altered the outcome was correct. Failure to call Guy was not sufficient to undermine confidence in the outcome of the trial.

¶38 There now remains for our consideration several isolated claims for ineffective assistance of trial counsel. At the first arraignment hearing of April 2, 1993, trial counsel, when asked what motions he intended to bring, stated he had no idea. This response provoked a claim of ineffectiveness for improper preparation. A review of the record, however, clearly shows that at the same hearing, trial counsel had just been given a packet of discovery materials amounting to between 150-200 pages. Little need to be said except that common sense defeats this claim.

¶39 Branch raises subsidiary claims of ineffective assistance of trial counsel relating to the testimony of Barber and Stuhmer. Branch asserts that drastic discrepancies exist in the police reports that trial counsel did not exploit. This claim relates to one police report stating that Branch signed the statement on March 19, 1993, at 2:10 p.m. Stuhmer, in testifying, stated that the same statement was given on March 18, 1993. Stuhmer's assignment of the date was consistent with other testimony. The relevancy of this discrepancy is not shown

and when considering the entire record, is of no significance. At very best, this is a scrivener's error and serves no basis for deficient performance.

¶40 Branch next claims trial counsel's performance was deficient because he asked irrelevant questions at the suppression hearing and failed to lay a proper foundation for other questions. There is a strong presumption that trial counsel's performance fell within the wide range of reasonable professional assistance. Monday morning quarterbacking has never been deemed sufficient to overcome this strong presumption. Here, in the absence of a sufficient showing, the strong presumption has not been overcome.

¶41 Last, Branch claims trial counsel ineffectiveness because he neglected to call as witnesses two attendants from the weigh station in Illinois where Barber and Stuhmer had stopped with Branch, and had failed to admit into evidence a jail log sheet from Memphis.

¶42 Our review of Branch's motion reveals that Branch failed to allege what the attendants would have stated if called, and what the log sheet would have shown to assist in his defense. "When a defendant claims that trial counsel was deficient for failing to present testimony, the defendant must allege with specificity what the particular witness would have said if called to testify." ***State v. Arredondo***, 2004 WI App 7, ¶40, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted). Because the motion lacked the necessary showing, the motion failed to allege sufficient facts to entitle Branch to relief. The trial court did not erroneously exercise its discretion.

¶43 To fulfill the requirements of ***Escalona*** to allege a sufficient reason for not having raised a claim on direct appeal, Branch has attempted to fault his postconviction counsel for failing to raise a specific instance of trial counsel's

ineffectiveness in his direct appeal. This methodology presumes an act of ineffectiveness on the part of his trial counsel. As we have explained above, we are not convinced that any of Branch's alleged instances of trial counsel's performance constituted ineffective assistance. Accordingly, because trial counsel provided effective assistance, postconviction counsel cannot be ineffective for failing to raise the assertions Branch raises herein.

II. RECUSAL.

¶44 Next, Branch claims that Judge Jeffrey A. Wagner, who presided over the second postconviction motions, should have recused himself from hearing his case because the judge demonstrated bias against him by: (1) granting the State an extension of time to file its brief in chief in response to his motion; (2) requesting that the court reporter check the accuracy of the arraignment transcript of June 2, 1993; and (3) denying a part of his 2004 postconviction motion without a hearing. For reasons to be stated, we reject each part of this claim of error.

STANDARDS OF REVIEW AND APPLICABLE LAW

¶45 When an appellate court reviews a claim of judicial bias, we commence our analysis with "a presumption that the judge is free of bias and prejudice and the burden is on the party asserting judicial bias to show by a preponderance of the evidence that the judge is biased or prejudiced." ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298 (citation omitted).

¶46 "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion… [Judicial rulings] only in the rarest circumstances evidence the degree of favoritism or antagonism required … when no extrajudicial

source is involved." ***Liteky v. United States***, 510 U.S. 540, 555 (1994) (citation omitted).

¶47 "[A]n order granting or refusing to grant an extension of time in which to comply with a procedural requirement will not be reversed unless there is a clear showing of an [erroneous exercise] of discretion." ***Hyslop v. Maxwell***, 65 Wis. 2d 658, 664, 223 N.W.2d 516 (1974) (citing ***Wagner v. Springaire Corp.***, 50 Wis. 2d 212, 184 N.W.2d 88 (1971)).

¶48 The proper administration of our court system is the *sine qua non* of dispensing justice under our form of government. A necessary element of this process is that conflicts be resolved on the basis of accurately reported evidence. To insure the fulfillment of this requirement, parties are empowered by WIS. STAT. RULE 809.15(3) to seek correction of a transcript if errors are suspected. Although not statutory, when the presiding judge has reason to believe that an error may exist in a transcript, by virtue of common sense and its inherent administrative powers, the judge has the discretionary authority to seek resolution of the accuracy of the transcript.

APPLICATION

1. EXTENDING TIME TO FILE A BRIEF.

¶49 In response to Branch's 2004 WIS. STAT. § 974.06 postconviction motion, the trial court issued an order setting the briefing schedule by which the State's brief was due, "on or before April 3, 2006." On March 31, 2006, the State moved to extend the time to file its brief to April 24, 2006, for the reason that it had not received the briefing schedule until March 23, 2006, and needed additional time to conduct research and respond. The court granted the motion. In the

absence of a showing of how Branch was prejudiced by the extension, or how the extension was an erroneous use of discretion by the trial court, we are unconvinced that such action constituted bias against Branch.

2. CORRECTION OF THE TRANSCRIPT.

¶50 The circumstance giving rise to this claim of error is a statement in the arraignment transcript dated June 2, 1993, in which Branch's trial counsel indicated his own presence on behalf of Branch and his belief that Branch was about to be brought into the courtroom. A few lines later in the transcript however, Branch's counsel announced that "Mr. Johnson is now present in the courtroom." As noted earlier in this opinion, it is obvious to this court based on its review of the entire record, that the only Mr. Johnson involved in this case was Lovell Johnson, the assistant district attorney representing the State. It is also clear from the context of the record that Branch's counsel would have no reason to announce that the ADA was now present, but rather, would have reason to announce that Branch was now present. Because Branch was asserting a claim based on that statement and to clear up any confusion, the trial court requested the court reporter who transcribed the arraignment to check the accuracy of her notes of the June 2, 1993 proceeding relating to the identified person in the transcript. On May 3, 2006, a corrected transcript was filed reflecting a scrivener's error, that defense counsel actually stated "Mr. Branch (not Mr. Johnson) was present." In correcting the record, the court ruled it "was not obliged to rely upon an erroneous record in reviewing the defendant's postconviction claims. Nor did the court become a party or material witness to these proceedings by having the record corrected." We agree with the trial court's decision in this regard. No showing has been made that the discretionary administrative act of correcting the record in any way demonstrated bias on the part of the trial court. Rather, such conduct by

the trial court in the context of this case was judicially appropriate conduct in order to fairly dispense justice. Accordingly, this claim fails.

3. DENIAL OF A HEARING.

¶51 Branch's third reason for claiming trial court bias warranting recusal is its partial denial of his 2004 postconviction motion without any hearing. Since we have decided earlier in this opinion that no error was committed for partially denying a hearing on claims of ineffective trial and postconviction counsel, we refrain from any further discussion on this claim for recusal. As this court has ruled that Branch's claims are without merit, the trial court's failure to conduct an evidentiary hearing on such meritless claims cannot possibly constitute bias.

CONCLUSION

¶52 In sum, our review demonstrates that none of Branch's alleged specific instances of trial counsel ineffective assistance have any merit. Because we have rejected Branch's contention that his trial counsel provided ineffective assistance, it logically follows that postconviction counsel was not ineffective for failing to challenge trial counsel's conduct. Thus, any contention that postconviction counsel was ineffective is hereby rejected.

¶53 We further reject Branch's contention that the trial court's decision: (1) to grant the State's motion for an extension of time to file a brief; (2) to have the court reporter check her notes to determine the accuracy of the transcript from the arraignment; and (3) to summarily deny some of Branch's postconviction claims, constituted bias. Accordingly, we affirm the order denying Branch's postconviction motion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.