COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1224-CR **Cir. Ct. No. 2008CF3449**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY LEVELL ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Corey Levell Anderson, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion, which alleged

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

ineffective assistance of counsel, and from an order denying his motion for a declaration of eligibility for the Earned Release Program (ERP). We conclude Anderson's allegations in his § 974.06 motion are conclusory and the circuit court properly exercised its discretion with regard to Anderson's ERP eligibility. Therefore, we affirm.

BACKGROUND

¶2 Pursuant to a plea agreement, Anderson pled guilty to one count of possession with intent to deliver cocaine, as a repeater. In October 2008, he was sentenced to five years' initial confinement and five years' extended supervision, concurrent to a revocation sentence. Anderson did not appeal the judgment of conviction that resulted from his guilty plea.

¶3 On April 20, 2009, Anderson filed a *pro se* petition in the circuit court, asking to be considered for the ERP. The circuit court, which had denied his eligibility in its original sentencing decision, denied the petition. Anderson appealed.

¶4 While that appeal was pending, Anderson filed a WIS. STAT. § 974.06 motion for postconviction relief. He alleged trial counsel had been ineffective for failing to bring a suppression motion. The circuit court denied the motion on the grounds that because the record had already been transmitted to this court, the circuit court lacked jurisdiction. Anderson filed an additional appeal.

DISCUSSION

I. ERP Eligibility

¶5 On June 22, 2005, Anderson was convicted of possession with intent to deliver cocaine in another case. His sentence of four years' initial confinement and four years' extended supervision was imposed and stayed in favor of five years' probation, which was revoked as a result of the current case. As part of the 2005 sentence, the court ordered that Anderson would be eligible for the ERP after serving three years of his initial confinement. When sentencing Anderson on the present offense, the court deemed him ineligible for the ERP, commenting that permitting his participation in the program would unduly depreciate the seriousness of his offense. Anderson contends the court's decision is erroneous because he was previously determined eligible and the court has to consider the factors in WIS. STAT. § 302.05—that is, it cannot deny ERP participation solely on the seriousness of the offense. Johnson is mistaken.

¶6 The ERP is a substance abuse program, administered by the Department of Corrections. *See* WIS. STAT. § 302.05; ***State v. Owens***, 2006 WI App 75, ¶5, 291 Wis. 2d 229, 713 N.W.2d 187. When the circuit court imposes a bifurcated sentence under WIS. STAT. § 973.01, "the court shall, as part of the exercise of its sentencing discretion," determine whether the defendant can participate in the program. *See* § 973.01(3g).

¶7 Separate findings explaining program eligibility decisions are not necessary if the overall sentence justifies the ERP determination, *see* ***Owens***, 291 Wis. 2d 229, ¶9, although here the court specifically denied eligibility based on the seriousness of the offense. That is an appropriate consideration, *see* ***id.***, ¶8, particularly in light of the court's general observation that Anderson had "done it

[possession with intent to deliver cocaine] before and now you're doing it again[.]" The denial of eligibility was a proper exercise of sentencing discretion.[2]

II. WISCONSIN STAT. § 974.06

¶8 Anderson also argued that trial counsel was ineffective for failing to bring a motion to suppress.[3] Anderson appears to believe the motion could have been brought based on a warrantless arrest, a ***Riverside*** violation, a ***Miranda*** violation, and a WIS. STAT. § 968.28 violation.[4]

¶9 A postconviction ***Machner***[5] hearing is a prerequisite to a claim of ineffective assistance of counsel. To be entitled to the evidentiary hearing, Anderson's motion had to allege sufficient facts which, if true, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996); ***State v. Curtis***, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). A circuit court may deny a postconviction motion without a hearing if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory

[2] Anderson asserts that under ***State v. Johnson***, 2007 WI App 41, 299 Wis. 2d 785, 730 N.W.2d 661, the court was obligated to consider the factors in WIS. STAT. § 302.05. We reversed and remanded that case after the circuit court deemed Johnson ineligible for the ERP due to the Department of Corrections' failure to approve her § 302.05(3)(e) petition to the court. Section 302.05(3)(e) is inapplicable here because Anderson's sentence was imposed after July 26, 2003.

[3] It is unclear what Anderson sought to suppress, but it appears to be incriminating statements.

[4] *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44(1991) (requiring probable cause determination within forty-eight hours of a warrantless arrest); ***Miranda v. Arizona***, 384 U.S. 436 (1966). WISCONSIN STAT. § 968.28 is entitled, "Application for court order to intercept communications."

[5] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

allegations, or if the record conclusively demonstrates the defendant is not entitled to relief. ***Bentley***, 201 Wis. 2d at 310-11.

¶10 If a motion raises sufficient facts, a hearing must be held. ***Id.*** at 310. If the motion does not raise sufficient facts, the circuit court may, in an exercise of discretion, deny the hearing. ***Id.*** at 310-11. Here, the circuit court denied the motion on jurisdictional grounds. Nevertheless, we note that the question of whether a postconviction motion alleges sufficient facts entitling a defendant to relief is a question of law. ***Id.*** at 310. Further, we may search the record to determine whether it would support a proper exercise of discretion. *See* ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1995). Also, we may affirm on different grounds than those relied upon by the circuit court. *See* ***State v. Robert K.***, 2005 WI 152, ¶4 n.6, 286 Wis. 2d 143, 706 N.W.2d 257.[6]

¶11 We agree with the State that Anderson's motion contains only conclusory, unsupported allegations about counsel's performance. These allegations are insufficient to show Anderson is entitled to a hearing or to relief. Additionally, Anderson fails to allege or document any prejudice from counsel's allegedly deficient performance in failing to file a suppression motion. *See*

[6] We may also affirm if the circuit court reached the right result for the wrong reason. *See* ***State v. Alles***, 106 Wis. 2d 368, 391, 316 N.W.2d 378 (1982).

Strickland v. Washington, 466 U.S. 668, 687 (1984). Accordingly, the circuit court properly denied Anderson's motion without a hearing.[7]

By the Court.—Orders affirmed.

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

[7] We note that Anderson, relying on ***State v. Mikkelson***, 2002 WI App 152, 256 Wis. 2d 132, 647 N.W.2d 421, repeatedly claims the State is barred from challenging his arguments because it did not dispute them in the circuit court. The State is generally not required to file a response to postconviction motions unless so directed by the circuit court. *See* WIS. STAT. § 974.06(3)(a).