COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP1454-CR
2009AP2277-CR

Cir. Ct. No. 2007CF54

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY L. SCHMALING,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Forest County: ROBERT A. KENNEDY, JR., and NEAL A. NIELSEN, III, Judges. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Ricky Schmaling appeals a judgment of conviction for two counts of felon in possession of a firearm and two counts of felony bail

jumping, and an order denying postconviction relief. He claims: (1) his conviction is barred by double jeopardy; and (2) the circuit court erroneously denied his request for an adjournment. He also claims the circuit court should have held an evidentiary hearing on these issues. We conclude the record before us conclusively demonstrates Schmaling is not entitled to relief. Accordingly, we hold that the circuit court appropriately exercised its discretion when denying his postconviction motion without a hearing.

BACKGROUND

¶2 On November 17, 2005, police executed a search warrant for Schmaling's cabin in Forest County. *See* ***State v. Schmaling***, No. 2008AP1397, unpublished slip op. (Wis. Ct. App. June 30, 2009). Among other things, police recovered firearms and marijuana. In that case, we affirmed Schmaling's convictions for possession of THC as a second or subsequent offense and two counts of felony bail jumping. Schmaling was acquitted of being a felon in possession of a firearm. ***Id.***, ¶5 n.1.

¶3 The State subsequently filed the present action, charging Schmaling with, among other things, two counts of felon in possession of a firearm. The first possession count was supported by statements from Daniel Leahy, Schmaling's brother-in-law, indicating that Schmaling fired a .22 caliber rifle during the summer of 2005. Others stated Schmaling was seen with a gun case the year before, which formed the basis for the second count. The State's filing included a 1991 judgment of conviction for a class C felony. Schmaling pled not guilty.

¶4 On the day of trial, Schmaling requested that attorney Joseph Norby substitute for his original counsel. Although the State questioned whether Norby was sufficiently prepared, Norby assured the court he "came prepared to do [his]

very best," and noted his client wished to go ahead with the trial. After a short break in the pretrial proceedings, Norby requested an adjournment, arguing his preliminary review of Schmaling's file caused him to question whether he could effectively try the case. The court recognized the "difficult circumstances," but elected to go ahead with the trial. Schmaling was ultimately convicted of all the charged offenses.

¶5 In a postconviction motion, Schmaling argued double jeopardy precluded his conviction for felon in possession. He also claimed the circuit court's failure to grant an adjournment denied him a fair trial and effective assistance of counsel. Schmaling did not attach relevant portions of the record from the earlier case to his motion, and instead requested a ***Machner*** hearing.[1] The circuit court did not act on the motion, and it was therefore deemed denied. *See* WIS. STAT. RULE 809.30(2)(i).[2]

DISCUSSION

¶6 We review a circuit court's decision not to hold an evidentiary hearing on a postconviction motion under a mixed standard. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***Id.*** If, however, the motion fails to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may exercise

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

[2] All references to the Wisconsin statutes are to the 2007-08 version unless otherwise indicated.

its discretion to deny the motion without a hearing. ***Id.*** (citing ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)).

¶7 The record before us conclusively demonstrates Schmaling is not entitled to relief. This is true for both Schmaling's double jeopardy claim and his claim that the circuit court erroneously denied his adjournment request. Accordingly, an evidentiary hearing was unnecessary.

I. Double Jeopardy

¶8 "The first prong in a double jeopardy inquiry is whether the multiple charges are identical in law and in fact." ***State v. Nommensen***, 2007 WI App 224, ¶6, 305 Wis. 2d 695, 741 N.W.2d 481. "If so, the charges are multiplicitous in violation of the double jeopardy clauses of the federal and state constitutions, and the inquiry ends." ***Id.*** If not, we must assess whether the legislature nonetheless intended the multiple offenses to be brought in a single count.[3] ***Id.*** Whether a multiplicity violation exists in a given case is a question of law. ***State v. Reynolds***, 206 Wis. 2d 356, 363, 557 N.W.2d 821 (Ct. App. 1996).

¶9 Our first task is to determine whether Schmaling was subject to multiple charges that were identical in law and fact. In his postconviction motion, Schmaling claims his current convictions cannot stand because he was previously acquitted of possessing a firearm. The circuit court could not, nor can this court, ascertain the circumstances surrounding the acquittal because Schmaling's postconviction motion does not include any pertinent record evidence from the

[3] Schmaling does not argue this point, and we therefore assume, without deciding, the legislature did not intend multiple violations of the felon in possession statute to be brought in a single count. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will generally not address inadequately briefed arguments).

earlier case. Although the court could have ordered an evidentiary hearing on these matters, we see no point in requiring the circuit court to do so where the pertinent evidence can be introduced through other, more efficient means.

¶10 Schmaling's failure to include record evidence from the prior case also frustrates our ability to review the circuit court's action. We have repeatedly emphasized the importance of having all of the facts in the record for purposes of review. *See, e.g.*, ***State v. Van Meter***, 72 Wis. 2d 754, 758-59, 242 N.W.2d 206 (1976). Where, as here, the circuit court denies a defendant's postconviction motion without a hearing, and the defendant has failed to introduce pertinent record evidence through an affidavit or some other means, our review is based solely on the allegations in the defendant's motion.

¶11 There is no question the charges are identical in law; Schmaling's allegations are mostly directed to whether the charges are identical in fact. According to Schmaling's motion, his previous acquittal involved allegations that he possessed a firearm "on or about November 18, 2005," a day after his cabin was searched. In the current case, Schmaling was accused of separately possessing firearms between November 20 and 28, 2004, and again on September 3, 2005. Schmaling's motion argued the charges in the current case are multiplicitous because the State used the same 1991 judgment of conviction to prove he was a felon, and the same guns were admitted into evidence at both trials. In essence, he claims his possession of the firearms between November 20, 2004 and November 18, 2005, represented one "continuous offense" for which he could not be twice prosecuted. *See* ***State v. Anderson***, 219 Wis. 2d 739, 747, 580 N.W.2d 329 (1998).

¶12 "Charged offenses are not multiplicitous if the facts are either separate in time or of a significantly different nature." ***Nommensen***, 305 Wis. 2d 695, ¶8. Multiple offenses are significantly different in nature if each requires a "new volitional departure in the defendant's course of conduct." ***Anderson***, 219 Wis. 2d at 750 (citation omitted). In ***Nommensen***, we determined that "separate allegations against Nommensen in Washington county and Fond du Lac county are different in fact since the conduct occurred in different locations. From that, it is also self-evident that the conduct had to have occurred at different times." ***Nommensen***, 305 Wis. 2d 695, ¶9. Accordingly, we held that Nommensen's conduct in that case represented a new volitional departure whose prosecution was not barred by his acquittal in the Fond du Lac County case. ***Id.*** In another case, we determined that even a brief time separating acts may be sufficient, as long as the defendant has enough time for reflection. ***State v. Koller***, 2001 WI App 253, ¶31, 248 Wis. 2d 259, 635 N.W.2d 838.

¶13 In his prior case, the State was unable to prove Schmaling knowingly possessed the guns on the date of their seizure. In this case, the State proved that Schmaling possessed firearms on two reasonably specific dates before the search warrant was executed. We cannot conclude, on this record, that the three discrete acts of possession represent one continuing offense. Each act occurred on a different date[4] and presumably represented a "new volitional departure in the defendant's course of conduct." *See* ***Anderson***, 219 Wis. 2d at 750 (citation omitted).

[4] Though Schmaling correctly observes the date a felon possessed firearms is not an element of the offense, it, like venue, must be proven beyond a reasonable doubt. *See* ***State v. Nommensen***, 2007 WI App 224, ¶10, 305 Wis. 2d 695, 741 N.W.2d 481.

II. Denial of Schmaling's Adjournment Request

¶14 Schmaling asserts he was denied due process and effective counsel because the trial court denied his motion for a continuance. The decision to grant or deny a continuance is a matter within the circuit court's discretion. ***State v. Wollman***, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979). A circuit court properly exercises its discretion by balancing the defendant's constitutional right to adequate representation against the public interest and the prompt and efficient administration of justice. ***Id.***

¶15 However, it is not necessary for us to decide whether the circuit court erred in denying Schmaling's continuance request. "A party who appeals the denial of a motion for a continuance must demonstrate that he or she suffered prejudice from the adverse ruling." ***L.M.S. v. Atkinson***, 2006 WI App 116, ¶19, 294 Wis. 2d 553, 718 N.W.2d 118. In other words, a party alleging error in the denial of a request for discretionary pretrial relief "must demonstrate, at a minimum, what would have happened differently had a continuance been granted and why the differences create a reasonable possibility of a different outcome." ***Id.***

¶16 Schmaling asserts a continuance would have allowed him to obtain a crime lab report indicating that the guns "contained no latent prints suitable for comparison." The crime lab evidence Norby might have introduced does not create a reasonable probability of a different outcome. In his closing argument at trial, Norby noted the State had not produced fingerprint evidence connecting Schmaling to the guns. Moreover, the absence of fingerprints on the guns in November 2005 does not undermine witness testimony that Schmaling handled the weapons in November 2004 and September 2005.

¶17 Schmaling also suggests that, with more preparation time, Norby could have obtained documentary evidence supporting the testimony of Susan Ertl that she purchased one of the seized guns for herself. Ertl's ownership, however, was never disputed by the State, rendering the further ownership evidence unnecessarily duplicative. In addition, supplementary evidence that Ertl owned the gun does not prove Schmaling never used it. Accordingly, Schmaling has failed to show prejudice flowing from the circuit court's decision to promptly try the case.

By the Court.—Judgment and order affirmed.

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