

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 21, 2010**

A. John Voelker  
Acting Clerk of Court of Appeals

**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.

**Appeal No. 2009AP3121**

**Cir. Ct. No. 2007CF460**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CASEY L. WALKER,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dodge County:  
JOHN R. STORCK, Judge. *Affirmed.*

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Casey L. Walker appeals from an order denying his postconviction motion, contending that the circuit court erred in denying his motion without a hearing. We conclude that Walker's motion was not sufficient to entitle him to a hearing, and we affirm.

## BACKGROUND

¶2 In December 2007, Walker was charged with three counts of delivery of cocaine, contrary to WIS. STAT. § 961.41(1) (2007-08).<sup>1</sup> The supporting police reports indicate that police officers conducted three controlled buys of cocaine from Walker, while equipped with audio recording devices.

¶3 The State Public Defender's Office appointed Attorney David Westrick to represent Walker after Walker's prior public defender moved to withdraw on Walker's request. On March 26, 2009, Walker and the State submitted a stipulation to the circuit court, stating that Walker would plead no contest to one count of delivery of cocaine as a subsequent offense, and the other counts would be dismissed and read in. The stipulation also stated that Walker and the State jointly recommended ten and one-half years of incarceration, with five and one-half years of initial confinement and five years of extended supervision, to be served consecutively to any other sentence Walker was then serving. The State, Walker, and Attorney Westrick all signed the form. Walker attested that he read the stipulation and discussed it with his attorney, and understood its terms. Attorney Westrick attested that he explained the stipulation to Walker and believed he understood it. Walker pled no contest to one count of delivery of cocaine as a subsequent offense, and the court entered a judgment of conviction. The court sentenced Walker according to the terms of the stipulation and joint recommendation.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 On November 5, 2009, Walker filed a pro se WIS. STAT. § 974.06 motion for postconviction relief. Walker asserted that he was denied his constitutional right to the effective assistance of counsel during the plea proceedings and at sentencing. He alleged that both of his attorneys were ineffective for failing to allow him to listen to the audio recordings of the drug transactions that both attorneys had obtained. He alleged that Attorney Westrick informed Walker that the voice on the recording did not sound like Walker, and that if Attorney Westrick had allowed him to listen to the tapes he would have pursued trial rather than pleading no-contest. Walker also alleged that Attorney Westrick pressured him into entering the plea by agreeing to a plea hearing court date without his knowledge, after he informed Westrick he would not enter a plea if it involved a recommendation for a sentence to run consecutive to the sentence he was serving. Finally, he alleged that Attorney Westrick did not provide him effective assistance of counsel at sentencing because Westrick did not argue for the sentence in this case to run concurrently with the sentence he was then serving. The circuit court denied Walker's motion without a hearing. Walker appeals.<sup>2</sup>

## DISCUSSION

¶5 A defendant is entitled to an evidentiary hearing on a postconviction motion only if the motion alleges facts that, if true, would entitle the defendant to relief. *See State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (quoting *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). A

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<sup>2</sup> Walker filed a motion for reconsideration in the circuit court on November 25, 2009, and filed his notice of appeal from the order denying his postconviction motion on December 4, 2009. In his brief, Walker states that the circuit court never ruled on his motion for reconsideration. However, the record contains the circuit court's order denying Walker's motion for reconsideration dated December 15, 2009.

circuit court may, in its discretion, deny a postconviction motion without a hearing if the motion does not raise a question of fact or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See Bentley*, 201 Wis. 2d at 309-10. Thus, a defendant must demonstrate in a postconviction motion that there is a sufficient reason to conduct an evidentiary hearing. *See State v. Washington*, 176 Wis. 2d 205, 216, 500 N.W.2d 331 (Ct. App. 1993) (“[T]he motion must contain at least enough facts to lead the trial court to conclude that an evidentiary hearing is necessary.”). When the claim is ineffective assistance of counsel, the motion must allege facts that show counsel’s performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶6 Whether a postconviction motion sufficiently alleges facts to entitle a defendant to a hearing is a question of law, which we review independently. *See Bentley*, 201 Wis. 2d at 310.

¶7 Walker contends that his postconviction motion alleged facts that entitled him to a hearing.<sup>3</sup> The State responds that Walker has not sufficiently alleged ineffective assistance of counsel to entitle him to a hearing because he

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<sup>3</sup> Walker also argues that the circuit court erred in relying on *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), to hold that Walker’s arguments were procedurally barred. The State agrees that Walker’s arguments are not procedurally barred, as this is Walker’s first appeal in this case. We therefore conclude that the circuit court erred in finding that Walker’s claims are procedurally barred under *Escalona*. However, as we explain, we conclude that the circuit court nevertheless properly denied Walker’s motion without a hearing because Walker’s motion did not sufficiently allege facts entitling him to relief. We decline to reach Walker’s argument that we should certify the issue of the constitutionality of *Escalona* to the supreme court.

Walker also argues in his brief-in-chief that the circuit court erred in failing to consider sentencing guidelines on the record at the sentencing hearing. In his reply brief, he withdraws this argument. We therefore will not address it further.

merely alleges in a conclusory fashion that he would have gone to trial if his counsel had allowed him to listen to the audio recordings of the drug transactions.

¶8 We conclude that Walker's postconviction motion does not allege facts sufficient to entitle him to a hearing on his claim of ineffective assistance of counsel. See *Bentley*, 201 Wis. 2d at 309-10.

¶9 Walker first asserts that if he had listened to the audio recordings of the drug transactions he would have gone to trial. However, he does not explain in the motion what he might have heard that could have carried more weight than the testimony of the police officers who identified Walker as the seller in the controlled buys. He also does not explain why he would have decided to go to trial after listening to the tapes himself, but did not decide to do so after, according to his assertion, Attorney Westrick informed him that the voice on the tapes did not sound like Walker.

¶10 Next, Walker contends that trial counsel was ineffective during the plea proceedings. He asserts that Attorney Westrick agreed to the court's scheduling of the plea hearing without his knowledge and then told him that the State would pursue the maximum sentence if Walker did not agree to the plea agreement. These facts do not rise to the level of ineffective assistance of counsel, which requires a showing that counsel's performance was deficient, that is, that counsel's performance fell outside "the wide range of reasonable professional assistance." See *Strickland*, 466 U.S. at 689.

¶11 Walker's final claim of ineffective assistance of counsel is that Attorney Westrick failed to argue for a concurrent sentence. However, the record establishes that Walker entered a joint recommendation for a consecutive sentence, and there is therefore no basis in the record to entitle Walker to a hearing

on whether his counsel was ineffective for failing to then argue for a concurrent sentence.<sup>4</sup>

¶12 Walker also asserts that the circuit court erroneously exercised its discretion in failing to address separately each of the issues he raised in his postconviction motion, relying on *Smith v. State*, 60 Wis. 2d 373, 385, 210 N.W.2d 678 (1973) (where postconviction motion sets forth several grounds for relief, circuit court is to address each separately in denying motion without a hearing). Specifically, he contends that reversal is necessary because the circuit court did not separately address his claim that trial counsel was ineffective at sentencing. However, we independently review a postconviction motion to determine whether the defendant has established that he or she is entitled to a hearing on the motion. See *Bentley*, 201 Wis. 2d at 310. Therefore, the circuit court's detail of analysis is not relevant to our review. As we explained above, we have concluded on our own review that Walker's motion is not sufficient to entitle him to a hearing on any of his claims.

¶13 Finally, Walker contends that the sentencing transcript he obtained from the prison records was incomplete, denying him his right to appeal. He cites *State v. Perry*, 136 Wis. 2d 92, 401 N.W.2d 748 (1987), and WIS. STAT. § 973.08 as establishing that the clerk of the circuit court is responsible for sending this court a complete transcript of all of the proceedings in this case. We reject this argument for three reasons. First, in *Perry*, the issue was that the defendant was

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<sup>4</sup> Walker also asserts that his trial counsel was ineffective for not informing him of his right to appeal. However, as the State points out, the record contains a notice of right to seek postconviction relief signed by Walker and his counsel on March 26, 2009, the same day Walker entered his plea.

unable to obtain a complete transcript because portions of the court reporter's notes were missing; the issue was not whether the clerk of the circuit court had the responsibility to obtain the transcripts for the defendant. Second, § 973.08(2) requires the filing of the sentencing portion of a prisoner's transcript with the prison; it does not entitle the prisoner to that transcript or to any other transcript on appeal. Third, our rules make clear that it is the defendant's responsibility to obtain all transcripts necessary for an appeal. *See* WIS. STAT. RULE 809.11(4). We note that, in this case, Walker filed a statement on transcript stating that no transcripts are necessary for this appeal. If Walker believed additional transcripts were necessary for this appeal, it was his responsibility to obtain them. *See* WIS. STAT. RULE 809.11(4).

*By the Court.*—Order affirmed.

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

