COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0103 **Cir. Ct. No. 87CF000112**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALAN DAVID MCCORMACK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Burnett County: MICHAEL J. GABLEMAN, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Alan David McCormack appeals an order denying his WIS. STAT. § 974.06[1] postconviction motion in which he requested a John Doe

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

investigation and a new trial based on newly discovered evidence and ineffective assistance of counsel. He argues that he presented sufficient evidence to compel a postconviction hearing and to justify a John Doe investigation into the murder of Diane Larson, the crime for which he was convicted in 1988. He also argues that the trial court engaged in an impermissible *ex parte* communication before denying his postconviction motion. Because we conclude that McCormack's motion does not provide sufficient basis for a John Doe investigation or a postconviction hearing and the trial court did not engage in impermissible *ex parte* communication, we affirm the order.[2]

¶2 At the 1988 trial, the State presented evidence that McCormack confessed to killing Larson near his parents' cottage. McCormack now claims to have new evidence, partially corroborated by physical evidence, that Larson's brother and members of his motorcycle club killed Larson. McCormack claims to have two unidentified witnesses who told other unidentified individuals that they were willing to inculpate themselves and others in the crime and exculpate McCormack. McCormack's summary of these witnesses' statements also contradicts his own trial testimony. McCormack also claims that a third witness, a retired police officer, would testify to police mishandling of evidence and destruction of evidence, particularly a bandana that McCormack claims was used to blindfold Larson before she was shot, a version of the incident that would not be

[2] The denial of a John Doe investigation is reviewable by writ and not by notice of appeal. ***State ex rel. Reimann v. Circuit Court***, 214 Wis. 2d 605, 625-26, 571 N.W.2d 385 (1997). Here, the request for a John Doe investigation was coupled with the postconviction motion. For that reason, and because the result would be the same if McCormack had filed a petition for a writ, we review the merits of the petition for a John Doe investigation as part of this appeal.

consistent with his confession.[3] He also argues that his trial and postconviction counsel provided inadequate representation because they failed to notice that the bandana was depicted in police photographs but it was not preserved as evidence. McCormack also claims newly discovered evidence of a Minnesota domestic abuse injunction that Larson and her sister-in-law obtained against Larson's brother shortly before her murder.

¶3 To be entitled to a John Doe investigation, McCormack must present allegations supported by objective, factual assertions. *See* ***State ex rel. Reimann v. Circuit Court for Dane Cty.***, 214 Wis. 2d 605, 618, 571 N.W.2d 385 (1997). Because McCormack has already been convicted of the crime in question, he must present more than conclusory allegations to establish that someone else committed the crime. To support a claim of newly discovered evidence, McCormack must establish by clear and convincing evidence that (1) the evidence was discovered after trial; (2) he was not negligent in seeking discovery of the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to evidence introduced at trial; and (5) it is reasonably probable that a different result would be reached upon retrial. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987). To support a claim of ineffective assistance of counsel, McCormack must establish deficient performance by his trial counsel and sufficient prejudice to undermine this court's confidence in the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687, 694 (1984).

[3] McCormack also alleges that the shotgun admitted into evidence at his trial was not the murder weapon and that police misconduct can be shown from the fact that officers handled his gun without wearing gloves but their fingerprints were not found on the weapon. That issue was presented and rejected in McCormack's 1989 motion for a new trial and it will not be revisited at this time.

¶4 McCormack has not presented sufficient facts to warrant a John Doe investigation or a hearing on his postconviction motion. He has not identified the two witnesses who would inculpate themselves and exculpate him, and has not identified the individuals who told him these witnesses would support his defense. He claims that he did not identify the individuals in part because he fears they would flee. That statement suggests that they would not be willing to testify on his behalf. He also states that he could produce a videotape of these individuals before any hearing, but has not produced a videotape, sworn statement or even a letter from any exculpatory witness. The facts he presents regarding these two witnesses would not cause an objective person to believe that someone other than McCormack murdered Larson. He also fails to establish that these witnesses would provide newly discovered evidence. According to his motion, these witnesses would testify that they were with him as the murder took place and he spoke with them. McCormack provides no explanation why this evidence was not known to him at the time of his trial or why he was not negligent for failing to present that information in a more timely manner.

¶5 McCormack's third new witness is a retired police officer who would testify to mishandling and destruction of evidence. McCormack fails to present any grounds for conducting a John Doe investigation or holding a postconviction hearing on those allegations. Again, the officer is not identified and McCormack presents no documentary evidence to establish his willingness to testify. To the extent the officer would present evidence on the destruction of the bandana, McCormack has offered no reason to believe the bandana would provide exculpatory evidence. He does not indicate what type of tests could have been done on the bandana to determine whether it was utilized as a blindfold during the murder. The bandana had no apparent evidentiary value at the time it was

destroyed. The retired officer's alleged statements would not provide a basis for postconviction relief and would not tend to establish that someone other than McCormack committed the murder.

¶6 McCormack's discovery of a Minnesota domestic abuse injunction that Larson obtained against her brother shortly before the murder does not meet the test for newly discovered evidence. In a September 19, 2002 letter to the trial court, McCormack stated "I've always known of this restraining order…." By his own admission, the existence of the restraining order was not discovered after his trial. It is also unlikely that the existence of the restraining order would have resulted in a different verdict.

¶7 McCormack's counsels' failure to make an issue of the destruction of the bandana and their failure to discover the restraining order do not constitute deficient performance. The reasonableness of counsel's actions may be determined or substantially influenced by a defendant's own statements or actions. ***Strickland***, 466 U.S. at 691. McCormack provides no evidence that he informed his trial attorney of the domestic abuse injunction. Furthermore, our confidence in the outcome of the trial is not affected by that omission. Because, based on McCormack's trial testimony regarding the incident, the bandana/blindfold had no obvious significance at the time of trial, his attorney had no basis for alleging that the State destroyed exculpatory evidence.

¶8 McCormack alleges that Judge Gableman improperly communicated with Judge Taylor about this case before ruling on his postconviction motion. We conclude that no improper communication occurred. McCormack's initial request for a John Doe investigation as well as other postconviction matters were submitted to Judge Taylor. McCormack petitioned this court for a supervisory

writ to compel Judge Taylor to rule on his postconviction motion. Judge Gableman responded to the petition, stating that Judge Taylor had retired and Judge Gableman succeeded Judge Taylor. Judge Gableman then asked this court to extend the time for filing a response to the petition so that he could consult with Judge Taylor on McCormack's submissions. We conclude that this consultation does not constitute an improper *ex parte* communication.

¶9 Finally, McCormack has filed a post-briefing letter arguing that his transcripts had been altered because the font on seven pages was different from the other pages. He does not identify any specific items on those pages that he believes were misrepresented. We attach no significance to the use of a different font. McCormack also cites federal law regarding the preparation of a transcript. That law applies only to transcripts of proceedings in the federal court.

By the Court.—Order affirmed.

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