COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP937-CR **Cir. Ct. No. 2007CF843**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER GRIFFIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY A. WITKOWIAK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Peter Griffin appeals from a judgment of conviction, entered upon a jury's verdict, on one count of cocaine possession as a second or subsequent offense, and from an order denying his postconviction motion. The circuit court denied the motion, which alleged ineffective assistance

of counsel, without a hearing. Because the motion was conclusory and failed to demonstrate Griffin is entitled to relief, we affirm.

¶2 Griffin was arrested following a traffic stop on February 12, 2007. The events between that arrest and the appointment of his fourth trial attorney are largely irrelevant. On May 5, 2008, the circuit court held a hearing on counsel's suppression motion. The motion was denied, as were two motions that Griffin had previously filed *pro se*. The court set trial for August 25, 2008.

¶3 On August 22, 2008, Griffin filed five *pro se* motions.[1] On the trial date, the circuit court expressed concern over whether it should even acknowledge the motions, given that Griffin was represented by counsel. The court also noted that the motions had been filed well past the deadline set by a prior scheduling order. Counsel asked for an adjournment to review her client's motions and to decide whether she should pursue them. The court granted the request.

¶4 Eventually, on the final pretrial date in November 2008,[2] counsel explained that she had reviewed the motions and was seeking to withdraw them. She told the circuit court that she "explained to [Griffin] if he wants to proceed with the motions, then he would have to get rid of me as his lawyer and then proceed pro se." The case was passed so that counsel could confer further with Griffin. Counsel then advised the court: "[T]his is what Mr. Griffin wants to do.

[1] Appellate counsel identifies six motions. However, counsel has counted two that predated the May 5 motion hearing, and has omitted a fifth motion that Griffin filed before the August trial date. The dispute on appeal regarding motions, if properly focused, relates back only to the five motions filed in August 2008—and even then, only specifically to two of them, as explained herein.

[2] On the first return date, Griffin failed to appear, so the circuit court issued a bench warrant.

He wants me to represent him. And I think that's in his best interest that I represent him. But he wants his motions reserved for potential appellate review depending on what happens." The court responded that it would not hear the motions, but they would remain part of the file. The case proceeded to trial and the jury convicted Griffin.

¶5 Postconviction counsel was appointed, and Griffin moved for relief on the basis of ineffective assistance of trial counsel. Specifically, he alleged that trial counsel incorrectly stated that Griffin's motions would be preserved for appellate review and claimed that she was ineffective for not raising the judicial recusal and expert testimony issues identified in two of Griffin's motions. He also alleged that trial counsel was ineffective for deciding that evidence of $3,400 cash seized from Griffin should be prohibited from introduction, and for agreeing that a police report should not be shown to the jury upon its request.

¶6 The circuit court rejected the motion. In short, it ruled that the judicial recusal and expert testimony motions would have been denied, and that trial counsel was on record, with sound reasoning, that both the $3,400 cash and the police report would have been prejudicial to her client. Griffin appeals.

¶7 Whether a motion, on its face, alleges sufficient material facts that, if true, entitle a defendant to relief is a question of law. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion raises such facts, an evidentiary hearing must be held. ***Id.*** If the motion is insufficient, or conclusory, or if the record conclusively demonstrates the defendant is not entitled to relief, the circuit court may grant or deny a hearing in its exercise of discretion. ***Id.*** A discretionary determination is reviewed for an erroneous exercise of that discretion. ***Id.*** We conclude that the postconviction motion is, on its face,

insufficient to entitle Griffin to relief, and we conclude that the circuit court properly exercised its discretion in denying the motion.

¶8 With regard to the unpreserved *pro se* motions, the postconviction motion specifically alleged that Griffin raised issues of judicial recusal—because the trial court had presided over a case involving Griffin's brother—and of calling an expert to rebut the State's expert's testimony. The motion claims that if properly litigated "these issues could have materially altered the course of the trial. By not being properly litigated, the absence of these issues cast doubt on the proceedings and the outcome of the trial."

¶9 The circuit court rejected these arguments as conclusory. It noted that nothing in the motion papers caused it to recall Griffin's brother's case, and the motion failed to allege any objective claim that the court was biased. It further noted that the State's expert merely confirmed that powder found on Griffin was cocaine, and that Griffin had neither identified any potential expert who would counter that, nor had he identified the substance of what any defense expert would testify to.

¶10 On appeal, Griffin does not address these omissions. Instead, he reiterates that "[i]f properly litigated, these issues could have reasonably altered the outcome of the pretrial stages." However, this assertion, like the motion, is entirely conclusory and devoid of any factual support. Griffin has not attempted to show the motions could have been successful. Counsel is not ineffective for failing to pursue meritless motions, *see* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987), and it is not this court's duty to "'sift and glean the record'" for facts that would support Griffin's claims, *see* ***Grothe v. Valley***

Coatings, Inc., 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (citation omitted).

¶11 Griffin also asserts on appeal that "it is a reasonable outcome that in light of counsel deciding not to litigate Appellant's *pro se* motions, thus waiving the right to challenge the substantive portion of the motions on appeal, Appellant would not have agreed to proceed with trial counsel." However, Griffin's motion never alleged that trial counsel personally advised him that she could ensure his issues were preserved for appeal, and we do not read her comments to the court as anything other than a statement of her client's wishes. To the extent Griffin's appellate argument means he would have proceeded *pro se* had he known the issues would not be preserved, the record demonstrates that counsel specifically informed him he would need to so elect if he wanted to pursue the motions. To the extent Griffin means he would have requested a new attorney, he has neither alleged nor shown that he would have been appointed, or would have been able to retain, a fifth trial attorney.

¶12 With regard to the $3,400, Griffin complains only that the decision to exclude the evidence "was deficient because it prevented the jury from considering alternate theories for why the traffic stop may have been initiated. Moreover, this decision is prejudicial because it cast doubt on the proceedings and the trial outcome." This, too, is conclusory. The circuit court explained that trial counsel's reasoning was quite clear: Griffin had only been charged with cocaine possession, and she did not want the jury to brand him a drug-dealer. We give great deference to trial counsel's performance, *see* ***State v. Koller***, 2001 WI App 253, ¶9, 248 Wis. 2d 259, 635 N.W.2d 838, and her strategy here appears beyond sound. On appeal, Griffin does not attempt to show that counsel's strategy was

improper, nor does he demonstrate how failing to introduce the $3,400 casts doubt on the proceedings in any way.

¶13 Finally, with regard to the police report, Griffin claims it was deficient for trial counsel to agree that the jury should not see the written report, despite the jury's request for it. He indicates that the officer who wrote the report was not the officer who testified. He asserts that "[i]f the jury was allowed to see the report, it would have cast doubt on the credibility of the police officer that testified, thus casting doubt on the proceedings and the outcome of trial …. [B]y agreeing not to let the jury see the written police report, it prevented the jury from considering evidence that may rebut the testimony and the credibility of the police officer."

¶14 The circuit court noted that trial counsel wanted the report excluded because it contained information prejudicial to Griffin—like the fact that $3,400 had been recovered—and that in any event, counsel did an admirable job cross-examining the police officer. Further, Griffin never alleges what the police officer actually testified to, what in the report was contradictory to that testimony, or how a discrepancy between the two might have swayed the jury.

¶15 Ultimately, to demonstrate ineffective assistance of counsel, a movant must show prejudice, which means "showing that counsel's alleged errors actually had some adverse effect on the defense." ***Id.***, ¶¶7, 9. Griffin's postconviction motion, like his appellate brief, is comprised of conclusory claims and little else. The motion was, therefore, insufficient to warrant relief, *see* ***Allen***, 274 Wis. 2d 568, ¶21, so the circuit court properly denied the motion.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).