COURT OF APPEALS DECISION DATED AND FILED

October 26, 2011

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. 2011AP4-CR

Cir. Ct. No. 2007CF129

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONTEZ R. MORRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. Dontez R. Morris, pro se, appeals from a judgment, entered upon a jury verdict, convicting him of possession of a firearm as a felon, two counts of second-degree reckless endangerment as domestic abuse with a

dangerous weapon, disorderly conduct and misdemeanor bail jumping. All charges except for possession of a firearm as a felon included a repeater penalty enhancer. He also appeals an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 Morris was charged with the above crimes[1] after chasing his sister and mother with a gun, threatening to kill everyone in the house and firing the gun in their direction. After a four-day trial, the jury found him guilty.

¶3 Without filing a postconviction motion or notice of appeal, appointed appellate counsel Ann T. Bowe advised Morris that there were no meritorious issues to raise on appeal. Bowe moved to withdraw. Her supporting affidavit averred that Morris said he intended to retain another attorney and that Attorney Tayyibah Sethi advised her that she, Sethi, had been retained by Morris. A hearing was held on the motion. No transcript is in the record. Automated court records indicate that Morris appeared by telephone, voiced no objection to Bowe's motion and advised the court that his family had retained new counsel. The court granted Bowe's motion.

¶4 Morris moved for postconviction relief on the basis of ineffective assistance of trial counsel. The State opposed the motion, asserting that it was too vague to respond to. The trial court ordered Sethi to rectify the motion's "numerous defects" within thirty days. When she did not do so, the court denied the motion. Sethi filed a new motion asserting that she was unaware of the court's orders until learning of them by a "chance" CCAP search. She again requested a

[1] A second disorderly conduct charge was dismissed on the prosecutor's motion.

hearing on the postconviction motion. The trial court granted Sethi ten days in which to file an amended motion. She did not. The court denied the motion without a hearing. After apparently discharging Sethi, Morris appeals pro se.

¶5 Morris first asserts that he was denied the right to counsel in his first direct appeal. He contends that when Bowe told him she believed his appeal had no merit, she advised him he could proceed pro se or secure private counsel. He contends that he never knowingly and voluntarily waived counsel, however, and that no court warned him about proceeding pro se or that, by retaining private counsel, he was waiving the right to have counsel appointed.

¶6 Morris argues that the absence of waiver in the record compels us to conclude that he did not waive his right to counsel on appeal. We reject this argument. We cannot review what occurred at the hearing on Bowe's motion to withdraw because no transcript was provided. "It is the appellant's burden to ensure that the record is sufficient to address the issues raised on appeal." ***Lee v. LIRC***, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996). Our rules likewise make clear that it is the defendant's responsibility to obtain all transcripts necessary for an appeal. *See* WIS. STAT. RULE 809.11(4).

¶7 We advised Morris in response to motions he filed in this court that we saw "no indication that the circuit court erred in permitting appointed counsel to withdraw" and that the sole outstanding transcript was that of the March 18, 2009 hearing at which Bowe was allowed to withdraw. Morris filed a statement on transcript stating that no further transcripts were necessary for his appeal.

¶8 Morris failed to provide a transcript of the hearing that might have shed light on his waiver-of-counsel claim. We must assume that the transcript

would establish that the court gave proper advisements. *See* ***State v. Holmgren***, 229 Wis. 2d 358, 362 n.2, 599 N.W.2d 876 (Ct. App. 1999). Morris has not demonstrated that he was deprived of appellate counsel.

¶9 Morris next claims he was denied the effective assistance of trial counsel and that the trial court wrongly denied his postconviction motion without a hearing. A trial court has the discretion to do so "if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Roberson***, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111 (citation and emphasis omitted). Whether a motion was sufficiently supported to warrant an evidentiary hearing is a legal question that we review de novo. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

¶10 Like the State, we will address the merits of Morris' claims as presented to the trial court, rather than the somewhat different ones he raises here on appeal. To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that the lawyer's representation was deficient and that he or she suffered prejudice as a result of the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. A defendant's failure to prove one prong of the test relieves the court of addressing the other. ***Strickland***, 466 U.S. at 697.

¶11 Morris first contends that his attorney failed to object to prosecutorial misconduct during plea negotiations, specifically, the State's "arm twisting" with its "take-it-or-leave-it" plea proposal. A defendant does not have a constitutional right to a plea bargain. ***State v. Tkacz***, 2002 WI App 281, ¶27, 258 Wis. 2d 611, 654 N.W.2d 37. Furthermore, Morris rejected that offer and a

subsequent plea offer was made. Counsel's failure to object, therefore, can in no way be said to be "outside the wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690.

¶12 We confess confusion at Morris' next claim of deficient performance. In his postconviction motion, he complained that the court overruled counsel's objections to a police officer's hearsay testimony. We fail to see how that reflects on counsel's performance. Here on appeal, Morris complains that counsel *failed* to object. Morris is mistaken. Defense counsel objected on hearsay grounds when the officer testified at the preliminary hearing and twice at trial. Whatever Morris' complaint is in this regard, it fails.

¶13 Next, Morris asserts that trial counsel failed to file "certain motions challenging suppression of the evidence" that he wanted filed. This claim is devoid of facts that would allow us to meaningfully assess it. Moreover, counsel need not file every motion a defendant demands without regard to its merit or its place in the trial strategy.

¶14 Morris next claims that trial counsel failed to object to the all-white jury when "[t]he fact is that black people are more sympathetic to the elements of crime than white people are." Morris points to no facts about the racial makeup of the jury pool. He does not allege a tainted selection process. We reject his conclusory, unsupported claim.

¶15 Lastly, Morris alleges that counsel did not object to "police violations in interrogating children," specifically, questioning them at school "in the presence of a school official," and that counsel did not object to "the child

forced to be a witness at trial." In support, Morris points to WIS. STAT. § 950.055 (2009-10)[2] and ***In re S.W.*** to no avail. The statute addresses rights and protections—such as clear, age-appropriate explanations of proceedings—that are available to child witnesses and victims. It has nothing to do with police conduct, and Morris gives no hint how he believes the statute was violated. ***In re S.W.*** apparently discusses the reasonableness standard during searches of students at school. We cannot be sure because he provides no citation. This utterly unsupported claim fails.

¶16 Morris' motion presents only conclusory allegations and is devoid of meaningful facts. After twice granting additional time to remedy the motion's serious shortcomings, the trial court properly exercised its discretion in denying the motion without a hearing.

By the Court.—Judgment and order affirmed.

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

[2] All references to the Wisconsin Statutes are to the 2009-10 version.