COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2012

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. 2011AP137**

**Cir. Ct. No. 2003CF3178**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JUAN ANGEL ORENGO,**

**DEFENDANT-APPELLANT.**

---

APPEAL from an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed*.

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

¶1 FINE, J. In 2005, a jury found Juan Angel Orengo guilty of being party to the crime of possessing cocaine with intent to sell, and possessing marijuana with intent to sell as a second or subsequent offense. *See* WIS. STAT. §§ 961.41(1m)(h)2., 961.41(1m)(cm)4, 961.48 & 939.05. Police found the

cocaine and the marijuana in a closet that the State contended he was using at his sister's home. We affirmed Orengo's conviction on direct appeal. *See* ***State v. Orengo***, 2007AP1954-CR, unpublished per curiam (WI App Feb. 5, 2009). In June of 2010, Orengo filed a WIS. STAT. § 974.06 motion claiming that his trial and postconviction lawyers gave him constitutionally deficient representation. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (ineffective assistance of postconviction lawyer may be a sufficient reason for not have previously raised issues). The trial court denied the motion without holding a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (hearing to determine whether lawyer gave a defendant ineffective assistance, and adopted the State's brief as its decision). Orengo appeals. We affirm.

**I.**

¶2 In February of 2003, the police found marijuana and crack cocaine in a bedroom closet of Orengo's sister's home. The crack cocaine was on a plate that had Orengo's fingerprint. The police also found his wallet with four identification cards in a dresser drawer in that bedroom, as well as a loaded handgun under the mattress in that room. Orengo's sister, Anna Arias, told police that she used the bedroom, but that her brother, who had moved in one week earlier, used the bedroom closet. In March of 2003, police saw Orengo in the passenger seat of his girlfriend Jennifer Zaniewski's car. When police stopped the car, Orengo fled. The police caught Zaniewski and another passenger trying to hide bags of marijuana and drug scales.

¶3 The State charged Orengo with possessing cocaine with intent to sell the crack cocaine and the marijuana from the closet, and charged both Orengo and

Zaniewski with possessing with intent to sell the marijuana found in Zaniewski's car. Zaniewski plea-bargained her case and agreed to testify against Orengo. Orengo pled not guilty. When the trial court granted Orengo's motion *in limine* to exclude evidence of the gun found in the bedroom, the State amended the complaint to add a felon-in-possession-of-a-weapon charge. After the State rested, however, the trial court dismissed the gun charge because it determined that the State had not proved that Orengo possessed the gun. The jury found Orengo guilty of possessing with intent to sell the crack cocaine and the marijuana from the closet, but acquitted him of possessing with intent to sell the marijuana from Zaniewski's car.

¶4 Orengo argues that his postconviction lawyer gave him constitutionally ineffective representation because the lawyer did not raise the issue of his trial lawyer's ineffectiveness. Orengo contends his trial lawyer gave him ineffective assistance because the lawyer: (1) did not seek to sever the felon-in-possession-of-a-gun charge from the drug charges; (2) did not try to negotiate dismissal of the gun charge; and (3) did not object to or seek a mistrial after a police witness gave hearsay testimony. Orengo also argues that the trial court erroneously exercised its discretion by adopting the State's brief as its decision.

**II.**

¶5 To establish constitutionally ineffective representation, Orengo must show: (1) deficient representation; and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance," *see* ***id.***, 466 U.S. at 690, and to prove resulting prejudice, he must show that his lawyer's errors were so serious

that he was deprived of a fair trial and reliable outcome, *see* ***id.***, 466 U.S. at 687. We do not need to address both ***Strickland*** aspects if a defendant does not make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶6 The circuit court must hold an evidentiary hearing on an ineffective-assistance claim only if the defendant "'alleges sufficient material facts that, if true, would entitle the defendant to relief.'" ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 123, 700 N.W.2d 62, 68 (quoted source omitted). If the postconviction motion does not assert sufficient facts, or presents only conclusory allegations, or if the Record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the claim without a hearing. ***Ibid.*** Whether the Record "'conclusively demonstrates that the defendant is not entitled to relief'" is a legal question that we review *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996) (quoted source omitted).

A. *Severance of gun charge.*

¶7 Orengo's first complaint is that his trial lawyer did not ask the trial court to sever the gun charge from the drug charges. He claims that the gun evidence prejudiced the outcome. We disagree.

¶8 Wisconsin law recognizes that guns and drug dealers go together. *See* ***State v. Guy***, 172 Wis. 2d 86, 98, 492 N.W.2d 311, 316 (1992) ("[T]hose involved in drug dealing often keep weapons handy."); ***State v. Richardson***, 156 Wis. 2d 128, 144, 456 N.W.2d 830, 836 (1990) ("drug dealers and weapons go hand in hand"). Further, the trial court dismissed the gun charge at the close of the State's case because there was no evidence directly connecting the gun to Orengo. What Orengo got was arguably even better than a severance; the trial court put its

imprimatur on his innocence of unlawfully possessing the gun. There was no prejudice.

B. *Negotiating dismissal of the gun charge.*

¶9 Orengo next claims that after the trial court allowed the State to add the gun charge, his lawyer should have negotiated with the prosecutor to dismiss the gun charge in exchange for a stipulation about the gun that would not have let the jury learn that he was a convicted felon. *See* ***State v. Veach***, 2002 WI 110, ¶¶124–128, 255 Wis. 2d 390, 440–442, 648 N.W.2d 447, 472–473 (Where a defendant's status is an element of the crime, the defendant may stipulate to that status, which should not be revealed to the jury.). Assuming that Orengo's trial lawyer should have tried to have the State stipulate to letting in evidence of the gun in exchange for dismissing the felon-possessing-a-gun charge (which was what the prosecutor had wanted to do before Orengo sought to have the gun evidence excluded), Orengo has not shown prejudice. First, Orengo points to nothing that indicates that the prosecutor would have agreed to dismiss the gun charge he so recently added. Indeed, the prosecutor submitted an affidavit to the trial court indicating that he would not have done that. Second, the jury heard from another sister's testimony that Orengo's "probation officer" visited Orengo at her home. Orengo does not argue on this appeal that this testimony was erroneously received. Third, as we have seen, the trial court dismissed the gun charge, and Orengo has not shown that a confluence of the jury learning his status and the trial court's dismissal of the gun charge undermined the jury's ability to be fair; as noted, the jury acquitted Orengo of one of the charges.

C. *Hearsay.*

¶10 Orengo contends that his trial lawyer gave him ineffective assistance by not objecting to a police officer's hearsay testimony, and also by not asking for a mistrial because of that testimony. The hearsay came during the cross-examination of Officer Michael Washington:

> Q. Okay. And in the bedroom, southeast bedroom, was there any kind of decor, decoration that would indicate whether it was a male bedroom or a female bedroom?
>
> A. Well, she [Anna Arias—Orengo's sister] said it was her bedroom but that he [Orengo] occupied the closet.

¶11 As we have seen, many things, other than the hearsay statement by Orengo's sister, connected him to the bedroom: his fingerprint on the plate holding the crack cocaine and his wallet. Further, Zaniewski testified that Orengo was using the closet. The hearsay was both *de minimis* and cumulative. *See* ***Jones v. Dane County***, 195 Wis. 2d 892, 936–937, 537 N.W.2d 74, 89 (Ct. App. 1995) (defendant is not prejudiced by the admission of allegedly improper evidence that is cumulative).

D. *Postconviction Lawyer.*

¶12 Inasmuch as Orengo's trial lawyer did not give him ineffective representation, it follows that Orengo's postconviction lawyer did not give Orengo ineffective representation by not contending that the trial lawyer was ineffective.

E. *Adopting the State's brief.*

¶13 Orengo argues the trial court erroneously exercised its discretion when it largely adopted the State's brief in its order denying his WIS. STAT. § 974.06 motion:

> The court has reviewed the parties' briefs and agrees with the State's position as to each issue. First, this court is satisfied that there is not a reasonable probability that [the trial court] would have severed the gun charge. Second, the court is satisfied that there is not a reasonable probability the State would have negotiated a dismissal of the gun charge after the trial court indicated it was the only way that it would allow evidence of the gun into the trial. Third, the court is further satisfied there is not a reasonable probability [the trial court] would have granted a mistrial based on Officer Washington's testimony. The jurors heard from other sources that the defendant had used the closet at the house in which the drugs were found. [Footnote listing the other evidence omitted.] Therefore, the jurors did not rely wholly on Officer Washington's statement; there was other testimony to establish that the defendant had possessions in the dresser and in the closet area of his sister's bedroom. There is not a reasonable probability that confidence in the outcome was undermined by the admission of Officer Washington's hearsay statement.
>
> *The court denies the defendant's motion based on the analysis set forth in the State's response and adopts its brief as its decision on this matter.* The court finds that trial counsel's action (or inaction) did not prejudice the defendant's case, and hence, postconviction counsel cannot be deemed ineffective for failing to raise these issues pertaining to trial counsel's effectiveness.

(Emphasis added.) We agree with Orengo that judges must not only make their own independent analyses of issues presented to them for decision, but should also explain their rationale to the parties and to the public beyond merely parroting one side's submissions. *See* ***Trieschmann v. Trieschmann***, 178 Wis. 2d 538, 541–542, 504 N.W.2d 433, 434 (Ct. App. 1993) (Improper to "simply accept[] [a

party]'s position on all of the issues of fact and law without stating any reasons for doing so[.]"); *cf.* WIS. STAT. § 751.10 ("The supreme court shall decide all cases in writing."); WIS. STAT. § 752.41(1) ("In each case, the court of appeals shall provide a written opinion containing a written summary of the reasons for the decision made by the court."). Although the trial court here appeared to give its reasons, it also appeared to cobble those reasons from the State's submissions. We suggest that more is required. *See* ***DiLeo v. Ernst & Young***, 901 F.2d 624, 626 (7th Cir. 1990). Since our review of the trial court's denial of Orengo's postconviction motion is *de novo*, however, the trial court's apparent adoption of the State's brief is of no consequence.

*By the Court*.—Order affirmed.

Publication in the official reports is not recommended.