COURT OF APPEALS DECISION DATED AND RELEASED

June 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1893-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MELVIN CABALLERO,

Defendant-Appellant.

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

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Melvin Caballero appeals from a judgment convicting him of first-degree reckless homicide while armed, as party to a crime. *See* §§ 940.02(1), 939.63 and 939.05, STATS. Caballero also appeals from an order denying his post-conviction motion. Caballero claims: (1) that he was denied effective assistance of counsel; and (2) that his confession should have been suppressed.

Caballero was charged with first-degree reckless homicide while armed, party to a crime, based upon his role in the death of Nelson Morales. After his arrest, Caballero gave a statement to the police, implicating himself in the death of Morales. After a jury trial, Caballero was convicted as charged. Caballero filed a post-conviction motion challenging trial counsel's effectiveness. The motion was denied.

1. *Ineffective Assistance of Counsel.*

First, Caballero alleges that the trial court erroneously denied his claim of ineffective assistance of counsel without holding a ***Machner*** hearing.[1] To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and also that this deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To be considered prejudicial, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.***, 466 U.S. at 694.[2] Normally, a post-conviction challenge to the effectiveness of trial counsel requires an evidentiary hearing at which counsel testifies regarding the defendant's assertions of deficient performance. ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). If a post-conviction motion alleges facts that, if true, would entitle the defendant to relief on his claim of ineffective assistance, the trial court must hold a ***Machner*** hearing. *See* ***State v. Bentley***, 195 Wis.2d 580, 587, 536 N.W.2d 202, 204 (Ct. App. 1995) (conclusory allegations unsupported by factual assertions, however, are legally insufficient to compel a ***Machner*** hearing).

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[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] Caballero bases his ineffective assistance of counsel claim on case law interpreting the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. Caballero argues that Article I, Section 7 of the Wisconsin Constitution requires that the State bear the burden of showing that a defendant was not prejudiced by the ineffectiveness of counsel. Caballero bases his argument on ***State v. Marty***, 137 Wis.2d 352, 356, 404 N.W.2d 120, 122 (Ct. App. 1987), where the court suggested that the analysis of whether the defendant has been prejudiced as a result of deficient representation may differ under the state and federal constitutions. Wisconsin applies the ***Strickland*** test. *See, e.g.,* ***State v. Sanchez***, No. 94-0208, 1996 WL 26999 at ***3-9 (May 22, 1996).

In his post-conviction motion, Caballero argues that trial counsel was ineffective for: (1) failing to hire a private investigator; (2) failing to disclose pending attorney disciplinary charges against him; (3) failing to file pretrial motions; (4) failing to object to testimony during trial; and (5) failing to hire an expert to ascertain Caballero's ability to understand the ramifications of his confession. The trial court determined that Caballero's arguments consisted solely of conclusory allegations and that he provided no factual support for his allegations. The trial court concluded that Caballero did not meet the ***Strickland*** test, and denied his motion without a ***Machner*** hearing. We agree.

Regarding the failure to hire a private investigator to locate witnesses, Caballero states that defense counsel failed to subpoena three witnesses who allegedly saw two individuals of another race leaving the crime scene. Caballero, however, does not indicate how there was a reasonable probability that these witnesses would have had the potential to alter the outcome of the case. *See* ***State v. Johnson***, 153 Wis.2d 121, 129, 449 N.W.2d 845, 848 (1990). Trial counsel called five different witnesses to substantiate Caballero's claim that he was elsewhere at the time of the death of Morales. The jury chose not to believe Caballero's version of the events. Caballero's naked assertions are insufficient to necessitate an evidentiary hearing.

Caballero also argues that the trial counsel's failure to disclose pending attorney disciplinary charges against him deprived him of effective assistance of counsel. He cites no authority for this claim, and does not indicate how this prejudiced him. We will not address this argument. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545–546, 292 N.W.2d 370, 378 (Ct. App. 1980) (we disregard arguments unsupported by references to authority).

Caballero next argues that trial counsel was ineffective for failing to file various pretrial motions and discovery demands. The trial court determined that trial counsel was able to adopt all of the motions filed by Caballero's co-defendant, which sought the same relief Caballero asserts should have been sought by his trial counsel. Where discovery demands are not filed by trial counsel, his duty to diligently investigate and secure information is not breached if the information is obtained in another way. ***State v. Pitsch***, 124 Wis.2d 628, 639–640, 369 N.W.2d 711, 717–718 (1985). Further, Caballero does not indicate what evidence would have been suppressed or discovered if his

trial counsel had filed the motions and discovery demands. Caballero, therefore, has not shown prejudice.

Caballero also argues that trial counsel was ineffective for failing to object to any trial testimony during trial. He does not, however, indicate what particular trial testimony was objectionable or explain how his defense was prejudiced by trial counsel's failure to make objections at trial. This allegation, therefore, is insufficient to necessitate a ***Machner*** hearing.

Finally, Caballero contends that trial counsel should have hired an expert to aid the trial court in determining his ability to understand the ramifications of his confession. Again, Caballero does not tell us what this expert testimony would have been—he has not shown prejudice.

2. *The Confession*.

Caballero claims that his confession should have been suppressed because it was the result of improper pressure by the police. The trial court determined at a mid-trial ***Miranda-Goodchild*** hearing that Caballero's statement to the police implicating himself in the death of Morales was knowingly and voluntarily made. We will not upset a trial court's findings of historical or evidentiary fact unless they are contrary to the great weight and clear preponderance of the evidence. ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987); *see* § 805.17(2), STATS. As to the credibility of disputed testimony in relation to historical or evidentiary facts, this court will not substitute its judgment for that of the trial court. ***Turner v. State***, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977).

Our review of the record indicates that the trial court identified the dispositive issue regarding the voluntariness of Caballero's statement. The trial court summarized the testimony of all the witnesses and then stated:

> There's nothing in the record as to [Caballero] that would indicate that [he was] held under conditions that would have caused [him] to feel pressure and

> would cause [him] to give the statement[] under duress.
>
> So the court finds that [Caballero] gave the statement[] freely and voluntarily after having been properly advised of his Miranda rights....

In the instant case, the trial court was required to suppress the defendant's statement if it found that the statement was coerced or the product of improper pressures exercised by the police. ***Clappes***, 136 Wis.2d at 235–236, 401 N.W.2d at 765. The fact that the trial court expressly found Caballero's statement to be voluntary and denied his suppression motion indicates that it did not find credible Caballero's assertions of improper pressures. The trial court's findings are not "clearly erroneous," ***id.***, 136 Wis.2d at 235, 401 N.W.2d at 765, and support its denial of Caballero's suppression motion.

Caballero also claims that he is entitled to have his confession suppressed because of an alleged ***Riverside*** violation, specifically that he did not receive a probable-cause review within 48 hours of confinement. A suspect arrested without a warrant has a Fourth Amendment right to prompt judicial determination of whether probable cause existed for his arrest. ***Gerstein v. Pugh***, 420 U.S. 103, 124–125 (1975). Absent extraordinary circumstances, "prompt" means within 48 hours. ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56–57 (1991). The trial court determined that there was a ***Riverside*** violation here but noted that Caballero never sought to have his confession suppressed as a result. An alleged ***Riverside*** violation is waived unless it is raised before the trial court. ***United States v. Alvarez-Sanchez***, 114 S. Ct. 1599, 1605 n.5 (1994). Since Caballero failed to make a ***Riverside*** objection at trial, we will not address this issue. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (appellate court will not generally review issues raised for first time on appeal).

By the Court.—Judgment and order affirmed.

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