



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

June 13, 2014

To:

Hon. John W. Markson
Circuit Court Judge
Dane County Courthouse
215 South Hamilton, Br. 1, Rm. 6109
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

Sarah Burgundy
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Matthew Moeser
Asst. District Attorney
Dane County District Attorneys Office
Rm. 3000
215 South Hamilton
Madison, WI 53703

Larry D. Sullivan 509354
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

You are hereby notified that the Court has entered the following opinion and order:

2013AP371

State of Wisconsin v. Larry D. Sullivan (L.C. #2007CF985)

Before Lundsten, Sherman and Kloppenburg, JJ.

Larry Sullivan, pro se, appeals an order of the circuit court denying his postconviction motion for plea withdrawal. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Sullivan was convicted, after entering a no-contest plea, of possession of cocaine with intent to deliver, as a party to a crime. *See* WIS. STAT. §§ 939.05, 961.41(1m)(cm)3. Sullivan originally received probation with sentencing withheld. His probation was later revoked, and the circuit court sentenced him to three years of initial confinement and three years of extended supervision, to be served consecutively with a sentence in another case. Sullivan filed a motion to withdraw his plea based on ineffective assistance of trial counsel. The circuit court denied the motion after a *Machner*² hearing. Sullivan then filed a motion under WIS. STAT. § 974.06, alleging that his postconviction counsel was ineffective for failing to allege four additional claims of ineffective assistance of counsel. The circuit court denied the motion without a hearing, and Sullivan now appeals.

To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In Sullivan's brief, the first three of his four ineffective assistance of counsel arguments relate to his assertion that he was not present at the drug house at the time of the raid that led to his arrest. However, because Sullivan pled to possession of cocaine with intent to deliver as a party to a crime, the State was not required to prove that Sullivan was at the house at the time of the raid. WISCONSIN STAT. § 939.05(1) provides that anyone "concerned in the commission of a crime ... may be charged with and convicted of the commission of the crime although the person did not directly commit it." Under WIS. STAT. § 939.05(2), a person "concerned in the commission of the crime" is defined as someone who intentionally aids and abets or conspires to commit the crime.

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

The criminal complaint sets forth statements obtained from co-actors who identified Sullivan as the person who brought the cocaine base into the house and hid it. These facts were the basis upon which the State charged Sullivan as a party to the crime of possession of cocaine with intent to deliver—not whether or not Sullivan was present at the time of the raid. *See* WIS. STAT. §§ 939.05, 961.41(1m)(cm)3. Thus, Sullivan’s counsel was not ineffective for failing to move to dismiss the charge of possession with intent to deliver, as a party to a crime, even if Sullivan could have proven that he was not present at the drug house or that he was out of town when it was raided. Sullivan has not identified any other reason why the charge would reasonably have been dismissed. Thus, Sullivan is unable to establish prejudice and cannot succeed on his three claims of ineffective assistance of counsel for failure to have the charge dismissed.

Sullivan’s fourth claim of ineffective assistance of counsel involves his trial counsel’s alleged failure to move to dismiss Dane County Circuit Court case No. 2006CF1330 based on deficiencies in the complaint. The record in that case is separate from the record before us in the present appeal, and the two cases have not been consolidated. Thus, the proceedings in 2006CF1330 are outside the scope of this appeal, which is limited to the order on appeal and “all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding.” WIS. STAT. RULE 809.10(4).

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals