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**DISTRICT II**

July 16, 2014

*To:*

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

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2013AP2586-CR

State of Wisconsin v. Robert P. Meier (L.C. #2010CF452)

Before Neubauer, P.J., Reilly, and Gundrum, JJ.

Robert P. Meier appeals from a judgment of conviction of being a party to the crime of obtaining a controlled substance by fraud and from an order denying his postconviction motion for a new trial based on newly discovered evidence and a claim of ineffective assistance of trial counsel. 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).<sup>1</sup> We affirm the judgment and order.

The evidence at Meier's jury trial was that Meier had filled a prescription for oxycodone in his name on a prescription form from the office of Dr. Neville Duncan. Duncan testified that Meier was not a patient of his and that he did not sign the prescription form. Meier testified that he had seen Duncan because of back pain and that he paid Duncan \$250 in cash for the prescription.

Postconviction Meier sought a new trial on the ground of newly discovered evidence. He presented a report of a handwriting expert who had conducted a comparison between exemplars of Duncan's handwriting and that of the fraudulent prescription. The report concluded, "My professional opinion is that it is inconclusive as to who wrote the prescription in question because I cannot rule out the physician as the writer." At the postconviction hearing, the expert indicated that because of the inconclusive result, Duncan could very well have been the author of the prescription just as he could very well not have been its author. Meier also alleged that his trial counsel was ineffective for not conducting sufficient investigation which would have allowed the expert's examination before trial.<sup>2</sup> The circuit court denied Meier's postconviction motion.

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

<sup>2</sup> The expert indicated that he needed at least ten exemplars of Duncan's handwriting. Meier's postconviction counsel had an investigator examine circuit court case files in which Duncan was a party to obtain a sufficient number of exemplars.

When moving for a new trial on the basis of newly discovered evidence, a defendant must establish four threshold criteria: that the evidence was discovered after conviction, the defendant was not negligent in seeking the evidence, the evidence is material to an issue in the case, and the evidence is not merely cumulative. *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. When these criteria are satisfied, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a new trial. *Id.* The determination of whether a reasonable probability of a different result exists is a question of law. *Id.*, ¶33. “A reasonable probability of a different outcome exists if ‘there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant’s guilt.’” *Id.* (bracketed language in original; quoted source omitted).

Here, based on the State’s concession that the four threshold criteria are satisfied, we address whether the expert’s report creates a reasonable probability of a different result in a new trial. We conclude it does not because the expert’s report was inconclusive. The expert could neither exclude nor include Duncan as the author of the prescription. The inconclusiveness of the expert’s opinion was not enough to create a reasonable doubt for the jury. Meier is not entitled to a new trial based on the newly discovered evidence.

It follows that Meier’s ineffective assistance of trial counsel claim fails. The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not consider whether trial counsel’s performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). To establish prejudice, the defendant must show that there is a

reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *Id.* A reasonable probability contemplates a probability sufficient to undermine confidence in the outcome. *Id.* Whether counsel's performance prejudiced the defendant is a question of law. *Id.* The expert's inconclusive report does not undermine our confidence in the outcome of the jury trial as it does not create a reasonable probability that a jury would have a reasonable doubt as to the defendant's guilt. Meier was not prejudiced by deficient performance, if any, which prevented the expert's comparison examination before trial and consequently, the availability of the inconclusive report at trial.<sup>3</sup>

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>3</sup> In his list of trial counsel's deficient performance, Meier includes trial counsel's failure to attempt to interview Duncan before trial and failure to investigate Duncan's employment status at the time of trial. However, he does not make any specific argument as to those alleged deficiencies. A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *See State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Moreover, Meier only asserts he was prejudiced by the jury's failure to hear "the additional evidence"—the expert's report.