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

January 15, 2015

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
215 South Hamilton, Br.15, Rm. 7107
Madison, WI 53703

Christopher G. Wren
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

Johnathan L. Franklin 347408
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

Ismael R. Ozanne
District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

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

2013AP1420	State of Wisconsin v. Johnathan L. Franklin (L.C. # 1996CF1253)
2013AP1421	State of Wisconsin v. Johnathan L. Franklin (L.C. # 1996CF1902)

Before Lundsten, Sherman and Kloppenburg, JJ.

Johnathan Franklin, *pro se*, appeals the circuit court's orders denying his motion for postconviction relief under WIS. STAT. § 974.06 (2011-12)[1] and an order denying reconsideration of that decision. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We further conclude that the circuit court's decision dated May 20, 2013, identified and applied the proper legal standards

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

to the relevant facts to reach the correct conclusion. Specifically, we agree with the court's analysis that the arguments raised in Franklin's postconviction motion are procedurally barred. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We therefore incorporate into this order the circuit court's decision, which we are attaching, and summarily affirm on that basis. *See* WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009).

The State requests sanctions for frivolity under ***State v. Casteel***, 2001 WI App 188, ¶¶23-27, 247 Wis. 2d 451, 634 N.W.2d 338, including an order limiting Franklin's future filings and making Franklin responsible for the full filing fee for this appeal. We decline to impose sanctions at this time, but we caution Franklin that continued litigation on points previously addressed and rejected, if such litigation is deemed frivolous, may subject him to sanctions.

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

Diane M. Fremgen
Clerk of Court of Appeals

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 15 | DANE COUNTY

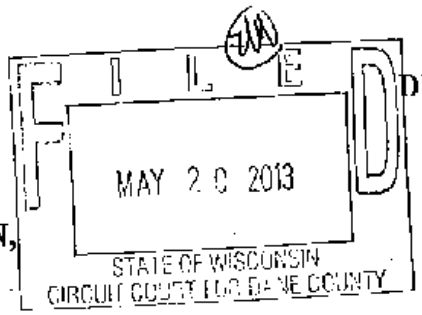
STATE OF WISCONSIN,

Plaintiff,

vs.

JONATHAN L. FRANKLIN,

Defendant.



DECISION AND ORDER

Case Nos. 96-CF-1902
96-CF-1253

DECISION AND ORDER ON DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF PURSUANT TO WIS. STAT. § 974.06

On April 19, 2013, Defendant Jonathan L. Franklin (a.k.a. Johnathan L. Franklin) (hereinafter referred to as "Defendant") moves this court for post-conviction relief pursuant to Wis. Stat. § 974.06 in Dane County Circuit Court Case Nos. 96-CF-1902 and 96-CF-1253. No hearing is required regarding this motion because an independent review of the record conclusively establishes that Defendant is not entitled to relief. Therefore, Defendant's motion is summarily **DENIED.**

BACKGROUND

Jonathan Daniel was killed in September 1996, during a drug transaction in Madison. Defendant was identified as being the driver of the getaway car and another man, whose identity was unknown at the time, was said to have been the "shooter." Defendant was arrested and brought to the police station for questioning. Police detectives, hoping to learn the shooter's identity from Defendant, intentionally elected to continue questioning him after he had invoked his right to counsel—knowing that, because they were violating his rights under *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), they would lose the

71-1

opportunity to use any self-incriminating statements as substantive evidence. *Id.* at 484-85 (once the Fifth Amendment right to counsel is invoked, all police-initiated questioning must stop until counsel is present—unless the accused initiates further communication with the police). During the interrogation, Defendant identified the person who had done the shooting and accompanied the detectives to a house in Madison, which he pointed out to them as the shooter's residence.

After he was charged as a party to the crimes of murder and robbery with a dangerous weapon, Defendant moved to suppress the statements he made to police. After a hearing, the trial court ruled that, while the *Edwards* violation required suppression of any evidence of Defendant's statements in the State's case-in-chief, because the statements were voluntarily made, they could be used by the State for impeachment or rebuttal purposes should Defendant elect to testify at his trial. Defendant eventually pled guilty to the murder charge, and to an unrelated charge of aggravated battery. Prior to sentencing, Defendant moved to withdraw his pleas, and the trial court denied the motion, concluding that he had not put forth a fair or just reason for withdrawal.

Defendant appealed the judgments of conviction and the trial court's order denying his motions to suppress evidence and withdraw his plea. *See State v. Franklin,* 228 Wis. 2d 408, 596 N.W.2d 855, 856 (Ct. App. 1999). On appeal, Defendant argued that the trial court erred in ruling that: (1) statements he made to police officers after invoking his right to counsel were voluntary and thus admissible for impeachment purposes only; and (2) he did not establish a fair and just reason to withdraw his pleas. *Id.* at 410-11. The court of appeals ultimately rejected both arguments and affirmed the trial court's judgments and orders. *Id.*

In ruling on Defendant's first argument, the court of appeals found that *voluntary* statements obtained in violation of a suspect's right to counsel may be used to impeach the

defendant's conflicting testimony, although inadmissible in the prosecution's case-in-chief. *Id.* at 412. The court reasoned that because the Fifth Amendment right to counsel was established as "a second layer of prophylactics for the *Miranda* right to counsel," *id.* at 415 n. 3 (citing *McNeil v. Wisconsin*, 501 U.S. 171, 176, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)), an *Edwards* violation raises a presumption of compulsion only for the prosecution's case-in-chief. Therefore, absent an affirmative showing of police coercion, voluntary statements obtained after a suspect invoked his right to counsel may be used for impeachment purposes. *Id.* at 415.

The court then considered whether the trial court erred when it ruled that the challenged statements were voluntary. The court stated:

> The [trial] court proceeded properly by balancing [Defendant's] personal characteristics against any coercive police practices and, doing so, determined that his statements were voluntary, and that, while the officers concededly questioned him in violation of *Edwards*, no unjust police coercion bearing on the voluntariness of the statements was present. Specifically, the court found no indication that the officers made any promises of leniency to [Defendant], or threatened him in any way, or that they questioned him beyond their intended narrow purpose of attempting to establish the identity of the shooter. The [trial] court also considered that the interrogation lasted for only an hour and a half, during which time [Defendant] was allowed to make phone calls (and in fact made three), smoke cigarettes, go to the restroom if he desired, and was offered refreshments. With respect to [Defendant's] personal characteristics, the [circuit] court noted that he was coherent and aware of his surroundings and what was taking place, was not under the influence of alcohol or drugs, never indicated that he was hungry, tired, or suffering from physical pain or discomfort. The record also indicates that [Defendant] has had prior police experience, having been charged with three unrelated felonies in the recent past.

Id. at 416-17 (footnote omitted). After independently considering the totality of the circumstances, the court of appeals concluded that the challenged statements "were not coerced, but were voluntarily given by [Defendant], and that the circuit court did not err in ruling that they could be used at trial for impeachment purposes...". *Id.* at 417.

The court of appeals then turned to Defendant's second argument alleging that the trial court erred when it denied his motion to withdraw his pleas. *Id.* More particularly, Defendant argued that the trial court erroneously exercised its discretion by failing to address the following three issues which he alleged established fair and just reasons for withdrawing his pleas: (1) his trial counsel's failure to "investigate" certain alibi witnesses; (2) his desire to discharge his attorney before entering his pleas; and (3) the assistant district attorney's involvement in the investigatory phase of the case. *Id.* at 418.

The court of appeals ultimately rejected all of Defendant's arguments. It found that Defendant failed to raise the second and third points in the trial court and therefore waived his right to pursue them on appeal. *Id.* As to the first point, the court of appeals examined testimony from the hearing on Defendant's motion to withdraw his pleas. The court stated:

> [Defendant's] claim that his trial attorney failed to properly investigate his case is based on his assertion that counsel failed to interview various people who, he says, would have provided him with an alibi; and he testified at the motion hearing that counsel's failure to pursue the matter contributed to his ([Defendant's]) decision to plead to the charges. Defendant's attorney also testified at the hearing. He stated that Defendant wanted him to present a defense that Defendant himself admitted was not true -that he had some people who would say he was somewhere else at the time of the shooting, even though he had already admitted to driving the shooter to and from the scene of the murder. According to counsel, he informed Defendant that, ethically, he couldn't call witnesses who he knew were lying.

Id. at 419. The court of appeals noted that the trial court made the following conclusions based on the hearing testimony:

> The trial court considered [Defendant's] and his attorney's testimony and found the attorney's to be more credible, stating that "much of it [wa]s corroborated" and that [Defendant's] testimony to the contrary was "not ... credible." The court went on to conclude that counsel's performance was not deficient in any way, noting that he had spent numerous hours with Defendant, had reviewed all the evidence, and had counseled Defendant that the decision whether to plead guilty must be his own.

Id. Based on the foregoing, the court of appeals concluded that the trial "court did not erroneously exercise its discretion in failing to give more consideration to [Defendant's] claim that his attorney's failure to interview these witnesses constituted a 'fair and just reason' for withdrawing his guilty pleas." *Id.* As such, the court of appeals rejected Defendant's arguments and affirmed the trial court's judgments and orders. Defendant subsequently filed a petition for review with the Wisconsin Supreme Court, which was denied on July 23, 1999. *See State v. Franklin,* 228 Wis. 2d 175, 602 N.W.2d 761 (1999) (review denied).

After the resolution of his direct appeal, Defendant filed several additional actions alleging that his conviction and sentence were imposed in violation of the Constitution. He filed a petition in federal court pursuant to 28 U.S.C. § 2254, which was dismissed as untimely on July 13, 2006. *See Franklin v. Pollard,* 06-C-0752, 2006 WL 1993439 (E.D. Wis. July 13, 2006). Defendant moved for reconsideration of the dismissal decision, which was denied on August 7, 2006. *Franklin v. Pollard,* 06-C-752, 2006 WL 2256986 (E.D. Wis. Aug. 7, 2006). The court subsequently denied Defendant's request for a certificate of appealability. *Franklin v. Pollard,* 06-C-752, 2006 WL 3422572 (E.D. Wis. Sept. 25, 2006).

On June 25, 2013, Defendant filed a petition for writ of habeas corpus with the court of appeals, alleging that his appellate counsel was ineffective for not raising additional issues. *See State ex rel. Johnathan L. Franklin v. Jeffrey Pugh,* No. 2012AP001399 (Wis. Ct. App. July 11, 2012). On July 11, 2012, the court of appeals denied the petition *ex parte*. Notably, the court of appeals court stated that Defendant's claims that appellate counsel was ineffective by not arguing ineffective assistance by trial counsel must be raised in the circuit court.

Defendant also filed an action under 42 U.S.C. § 1983 in federal court alleging that various law enforcement personnel violated his constitutional rights by interrogating him after he

had requested counsel. *See Franklin v. Burr*, *12*-CV-779-BBC, 2013 WL 104433 (W.D. Wis. Jan. 8, 2013). On January 8, 2013, the court dismissed the complaint under *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994), which prohibits a plaintiff from bringing claims for damages if judgment in favor of the plaintiff would "necessarily imply the invalidity of his conviction or sentence." The court reasoned that Defendant's conviction had not been invalidated and that a judgment in his favor in the action in her court would necessarily implicate the validity of the conviction.

Finally, on April 19, 2013, Defendant filed the post-conviction motion that is the subject of this decision. Defendant subsequently filed an amended motion for post-conviction relief on May 6, 2013.

ANALYSIS

I. Standard of review

Once a defendant's direct appeal rights are exhausted or the time for filing an appeal has expired, a defendant in custody under a sentence of a court may collaterally attack his conviction on jurisdictional and constitutional grounds via a motion under Wis. Stat. § 974.06. However, Wis. Stat. § 974.06(4) requires that "[a]ll grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion," and that "[a]ny ground finally adjudicated or not so raised... may not be the basis for a subsequent motion." In *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), the Wisconsin Supreme Court interpreted this section to prohibit claims of error that could have been raised in the direct appeal or in a previous motion under Wis. Stat. § 974.06 from being raised in a subsequent Wis. Stat. § 974.06 motion absent a sufficient reason for the failure to raise the

claims in the earlier proceeding. The Wisconsin Supreme Court later reaffirmed this procedural rule in *State v. Lo*, 2003 WI 107, ¶ 44, 264 Wis. 2d 1, 665 N.W.2d 756.

To be entitled to a hearing on a post-conviction motion, the defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required, though, when the defendant presents only conclusory allegations or when the record conclusively demonstrates that the defendant is not entitled to relief. *Nelson v. State*, 54 Wis.2d 489, 497–98, 195 N.W.2d 629 (1972); *Smith v. State*, 60 Wis. 2d 373, 381, 210 N.W.2d 678, 682 (1973). Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for the court to meaningfully assess the claim. *Allen*, 2004 WI 106 at ¶ 23.

A. Withdrawing plea after sentencing

When a defendant seeks to withdraw a plea after sentencing, he must demonstrate by clear and convincing evidence that a "manifest injustice" has occurred. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). Wisconsin courts consider six factual scenarios that could constitute manifest injustice: (1) ineffective assistance of counsel; (2) the defendant did not personally enter or ratify the plea; (3) the plea was involuntary; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement. *State v. Krieger*, 163 Wis. 2d 241, 251 n. 6, 471 N.W.2d 599 (Ct. App. 1991).

II. Discussion

Defendant makes six main arguments in support of his motion for post-conviction relief. First, Defendant argues that the inculpatory statements he made to the police were coerced and taken in violation of his rights under the Fifth Amendment and *Miranda*. Defendant contends that various law enforcement personnel violated his constitutional rights by interrogating him after he had requested counsel and then used the "illegally obtained statements [and] derivative evidence" to obtain an arrest warrant. (Def.'s Supp. Br. 2-3). Defendant argues that law enforcement officials "mislead" him to think that the Assistant District Attorney who interrogated him was his attorney. (Def.'s Supp. Br. 2). He also alleges that the "State did not meet its' [sic] burden of proof as the State failed to show that the defendant received and understood his *Miranda* warnings." (Def.'s Supl. Br. 1)

However, Defendant already raised the same or similar claims on direct appeal as part of his challenge to the trial court's decision denying his motion to suppress. The court of appeals rejected these claims and concluded that the inculpatory statements "were not coerced, but were voluntarily given by [Defendant]." *Franklin*, 228 Wis. 2d 408 at 417. The court of appeals specifically found that there was "no indication that the officers made any promises of leniency to [Defendant], or threatened him in any way, or that they questioned him beyond their intended narrow purpose of attempting to establish the identity of the shooter." *Id.* at 416. To the extent that Defendant puts a different spin on these issues in the present motion, he fails to explain in any manner why he did not raise these claims earlier on direct appeal. Therefore, Defendant's arguments in this respect have either been disposed of by his direct appeal or are procedurally barred by *Escalona-Naranjo*.

Second, Defendant argues that his plea and plea bargain were involuntary because they were the result of the trial court's "erroneous suppression ruling." (Def.'s Supp. Br. 2). As previously discussed, Defendant already challenged the trial court's suppression decision on direct appeal and may not re-litigate the issue in the present post-conviction motion.

Defendant also argues that the plea bargain "was involuntarily [and] not understandingly entered because it was the result of coercion... and vague clauses of the plea agreement, see #9 which indicate that defendant would beable [sic] to get a trial free of statements [and] testimony shall one occur." (Def.'s Amend. Br. 1). Defendant's citation to "see #9" appears to be a reference to the ninth paragraph of his plea bargain with the State. (*See* Plea Agreement Ltr, Dec. 10, 1997).

However, Defendant's arguments in this respect are completely conclusory. Although Defendant states that he was "coerced" into entering the plea bargain, he fails to provide any factual details whatsoever to support his claim. *See Smith v. State*, 60 Wis. 2d 373, 380, 210 N.W.2d 678 (1973) (a 'bare-bones' allegation that the plea was coerced is a 'conclusory allegation' and is insufficient to require an evidentiary hearing). Similarly, Defendant does not explain why he believes paragraph nine of the plea bargain is vague, nor does he explain how this provision made his plea involuntary. In addition, Defendant does not give any reason for why he did not raise these specific claims regarding the voluntariness of his plea and plea bargain earlier on direct appeal.

Furthermore, an examination of the record reveals that the trial court conducted a thorough and appropriate colloquy before accepting Defendant's pleas. (*See* Plea Trans., March 20, 1997). The trial court reviewed each of the paragraphs of the plea bargain on the record, and Defendant acknowledged that he understood. (*Id.* at 9:12-15:5). Defendant stated that he had

reviewed the plea bargain with his lawyer and that he had not been threatened or coerced. (*Id.*; *Id.* at 42:23-43:4). Defendant also acknowledged that he was entering his pleas knowingly, voluntarily and intelligently. (*Id.* at 46:3-6). As such, the plea colloquy fully complied with the requirements of Wis. Stat. § 971.08 and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Therefore, Defendant's bald assertion that his plea was involuntary does not warrant further post-conviction litigation. *See Allen*, 2004 WI 106 at ¶ 9.

Third, Defendant argues that the trial court breached the plea agreement when it sentenced him to a term of imprisonment that exceeded the State's recommendation. (Def.'s Supp. Br. 2-3). This argument fails because the trial court is not bound by the plea agreement. *State v. Hampton*, 2004 WI 107, ¶ 38, 274 Wis. 2d 379, 683 N.W.2d 14. Moreover, "when a defendant enters a plea with full knowledge of the fact that the trial court was not bound by the state's recommendation in the plea agreement, the trial court's decision to exceed the state's recommendation does not result in any "manifest injustice" and does not justify withdrawal of the plea." *State v. Williams*, 2000 WI 78, ¶ 16, 236 Wis. 2d 293, 613 N.W.2d 132.

Here, an examination of the record reveals that the trial court reviewed the terms of the plea bargain with Defendant, and that Defendant acknowledged that he understood. Notably, the court's review included the following exchange:

> THE COURT: ... Do you understand that at the time of sentencing I'm not bound by the recommendations of anyone and am free to give you the maximum penalties on every count you are convicted of and have those penalties run consecutively, that is one right after the other?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you have any questions in that regard?
>
> THE DEFENDANT: No.

(Plea Trans. 14:1-9). Later during the plea hearing, the trial court again reiterated that it was not bound by anyone's recommendations:

> THE COURT: I want to emphasize to you what I have gone over. Do you understand at the time of the sentencing I don't have to follow anyone's recommendations?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And that I am free to give you up to the maximum penalties on both counts and have them run one right after the other; in other words if I think it is appropriate I can give you a total of seventy (70) years in prison and a $10,000 fine. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you have any questions in that regard?
>
> THE DEFENDANT: No.

(*Id.* at 43:5-19). As such, Defendant entered the pleas with full knowledge of the fact that the trial court was not bound by anyone's recommendation. Therefore, the trial court's decision to exceed the state's sentencing recommendation does not justify the withdrawal of Defendant's pleas. *See Williams*, 2000 WI 78 at ¶ 16.

Fourth, Defendant argues that the co-defendant testified that he "was asleep during the commission of the crime, while Felony Murder requires defendant to be concerned in the commission of the crime." (Def.'s Amend. Br. 2). The court construes this argument as challenging the sufficiency of the evidence in the record to find him guilty of felony murder.

However, by entering a plea, Defendant waived his right to trial and thereby relieved the State of its burden to prove the charges beyond a reasonable doubt. Instead, the only factual basis required was that necessary for the trial court to satisfy itself that the conduct Defendant was acknowledging actually constituted the crimes charged. *See State v. Harrington*, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). The factual basis for the felony murder charge

was established when counsel stipulated on the record to the facts in the criminal complaint. (Plea Trans. 47:9-16). *See State v. Black*, 2001 WI 31, ¶ 13, 242 Wis. 2d 126, 624 N.W.2d 363. Therefore, Defendant's attempt to challenge the sufficiency of the evidence is barred as well.

Fifth, Defendant argues that the trial court "denied the defendant the right to self-representation based on incompetency." (Def.'s Amend. Br. 1). However, he fails to provide any factual support for this claim whatsoever. Similarly, Defendant does not give any explanation regarding why he believes the court should have granted his motion to proceed without counsel. Furthermore, he failed to explain in any manner why he did not raise this issue earlier on direct appeal. Therefore, his argument is procedurally barred by *Escalona-Naranjo*.

Finally, Defendant argues that his trial and appellate counsel were ineffective. To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's action or inaction constituted deficient performance and that the deficiency prejudiced the defense. *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove deficient performance, the defendant must identify specific acts or omissions of her attorney that were "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice, the defendant must demonstrate that there is a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. *Id.* at 694. If the defendant fails on either prong – deficient performance or prejudice – his ineffective assistance of counsel claims fails. *Id.* at 697.

As to his trial counsel, Defendant argues that his attorney "rendered deficient performance" because he "refused to object to breached [sic] plea agreement." (Def.'s Supp. Br. 5). Again, the trial court is not bound by the plea agreement. *Hampton*, 2004 WI 107 at ¶ 38. Accordingly, trial counsel was not ineffective by failing to raise an objection that lacked merit.

See State v. Toliver, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel not ineffective for failing to pursue futile arguments).

As to his appellate counsel, Defendant contends that his attorney on direct appeal was ineffective failing to raise a claim on appeal that trial counsel was ineffective. The whole of Defendant's argument on this issue in his original motion is as follows:

> Post-conviction/appellate counsel inadequately challenged trial counsel representation at circuit court suppression hearing & plea withdrawal hearing.

(Def.'s Supp. Br. 5). In his amended motion, Defendant includes the following information:

> Postconviction counsel was ineffective for failing & refusing to assert ineffective trail counsel after the defendant had fired trial counsel and court allowed attorney Christopher Van Wagner to withdraw due [sic] to conflict of interest.

(Def.'s Amend. Br. 1).

Ultimately, Defendant's argument that his appellate counsel was ineffective is too conclusory and convoluted for the court to be able to provide any type of meaningful response. Contrary to Defendant's assertion, the record establishes that appellate counsel challenged trial counsel's effectiveness on direct appeal as it related to investigating certain alibi witnesses. *Franklin*, 228 Wis. 2d 408 at 419. As such, Defendant's argument in this respect fails because he has not alleged sufficient material facts that, if true, would entitle him to relief. *See Allen*, 2004 WI 106 at ¶ 9.

CONCLUSION

Defendant's motion for post-conviction relief is summarily **DENIED** because an independent review of the record conclusively establishes that Defendant is not entitled to relief. This order is final for purposes of appeal.

Dated: This 20 **day of** May, **2013.**

By the Court:

Judge Stephen E. Ehlke
Circuit Court Judge, Branch 15

cc: Parties

copy to DA's & defn 5-21-13 ep