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**DISTRICT I/IV**

January 28, 2015

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

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2014AP776-CR

State of Wisconsin v. Willie K. Norman (L.C. # 2012CF2102)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Willie Norman appeals a judgment of conviction. He also appeals an order denying his postconviction motion without a hearing. Norman argues that he was entitled to an evidentiary hearing on his claim of ineffective assistance of 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 summarily affirm.

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

Norman was charged with possession of a firearm based on a police report that Norman had dropped a firearm while running from police. At trial, the State introduced testimony showing the following facts. Police responded to a service call in Milwaukee, and one officer pursued Norman in a foot chase. The officer chased Norman for about two minutes before tackling Norman to the ground, and did not lose sight of Norman during that time. The officer observed Norman drop a firearm during the chase. After the officer took Norman into custody, the officer walked back over and retrieved the firearm within about a minute. The area was relatively well-lit at night. The ground was covered in dew, but the gun was dry except for the side of the gun that was in contact with the ground.

Norman's defense was that police lost sight of him during the chase and did not see him drop a firearm. The jury returned a guilty verdict, and Norman was convicted.

Norman moved for a new trial, arguing that his counsel was ineffective by failing to introduce a police report and crime scene photographs in his defense. Norman argued that the police report showed the times that police relayed information to dispatch on the night Norman was arrested. He argued that the police report directly contradicted police testimony at trial as to the timing of the events leading up to Norman's arrest. Specifically, he asserted that the police report showed that: (1) the foot chase was eleven minutes long, measured by the time between a report of a subject stop and when the police activated an emergency button during the pursuit; and (2) that police recovered the firearm six minutes after arresting Norman, measured by the time between a subject inquiry and reporting the evidence. He also contended that some of the crime scene photos depicted the poor lighting conditions and lack of any visible dew on the grass in the area. Thus, Norman argued, the police report and photos would have corroborated Norman's defense and would have undermined the police officers' credibility.

The circuit court denied the motion without a hearing. The court determined that the police report did not conflict with the police officers' trial testimony because the police report showed the times that events were reported to dispatch, not necessarily when those events occurred. The court also determined that Norman had not presented any facts to show that the crime scene photographs accurately depicted the lighting or whether there was dew on the grass. The court determined that there was not a reasonable probability that the jury would have reached a different verdict if defense counsel had introduced the police report and crime scene photos.

A claim of ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. To demonstrate prejudice, "[t]he 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.* at 694. If a defendant fails to satisfy one prong of the ineffective assistance of counsel test, we need not address the other. *Id.* at 697.

A claim of ineffective assistance of counsel requires an evidentiary hearing only if the motion contains allegations of material fact 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. "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,

the circuit court has the discretion to grant or deny a hearing.” *Id.* We independently determine whether the facts set forth in a postconviction motion require an evidentiary hearing. *Id.* If they do not, we review a circuit court’s decision whether to hold a hearing for an erroneous exercise of discretion. *Id.*

We agree with the State and the circuit court that Norman’s postconviction motion, on its face, did not entitle Norman to a hearing. The motion merely asserts, in conclusory fashion, that a jury may have deemed Norman’s version credible and the police version incredible if the defense had introduced the police report and the crime scene photos. As to the police report, we agree with the circuit court that there is nothing about the report itself that contradicts the police testimony; as the circuit court explained, nothing in the police report or Norman’s motion indicates that the times of events being reported to dispatch were real-time recordings of the events. Additionally, the dispatch entries are too vague to support Norman’s assertion of the time that police first made contact with him. As to the photographs, we agree with the circuit court that details such as lighting and the presence or absence of dew on grass are not the types of details that are readily captured by photography; nothing indicates the photos would have contradicted the testimony of the police officers on the scene. Thus, the facts asserted in Norman’s postconviction motion fail to show prejudice.

Norman contends that the circuit court denied him the opportunity to present evidence to support his claims. He argues that, at an evidentiary hearing, he could have presented evidence from police officers as to the accuracy of the crime scene photos and the times documented in the police report. He argues that the additional evidence was necessary for the circuit court to determine whether or not there was a reasonable probability that the jury would have reached a different verdict if defense counsel had introduced the police report and crime scene photos.

However, Norman does not explain what he would have expected the police testimony to be or how it would have shown prejudice. Indeed, the only reasonable inference is that police would have testified consistently with their trial testimony as to the conditions at the scene and the timing of events and that their reports to dispatch are generally not simultaneous with the events.

Because the facts set forth in the postconviction motion do not show prejudice, Norman was not entitled to a hearing. The well-reasoned circuit court decision provides ample grounds to deny Norman's motion without a hearing.

Therefore,

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*