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September 23, 2016

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

2015AP1707 State of Wisconsin v. Anthony Dushun Freeman (L.C. # 1994CF942953A)
2015AP1708 State of Wisconsin v. Anthony Dushun Freeman (L.C. # 1994CF943906)

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

Anthony Freeman appeals, pro se, an order denying his WIS. STAT. § 974.06 motion for postconviction relief. Freeman argues that trial and postconviction counsel rendered ineffective assistance and that the circuit court erred in declining to grant him a hearing on his motion. Based on our review of the record and the briefs, we conclude at conference that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We summarily affirm.[2]

Freeman entered a no contest plea to one count of first-degree reckless homicide as party to a crime and guilty pleas to one count of first-degree reckless homicide and one count of first-degree reckless injury in 1994. Prior to sentencing, Freeman filed a motion to withdraw his pleas, which the circuit court denied. He was sentenced to consecutive prison terms totaling ninety years in 1995. Freeman appealed his conviction and an order denying his subsequent motion for postconviction relief. We summarily affirmed the circuit court in 1997.[3]

Freeman now raises issues of ineffective assistance of trial and postconviction counsel. The State argues that Freeman's current challenge to the validity of his pleas is barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).[4] The circuit court reviewed the merits of Freeman's claims pursuant to ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). We elect to use the same framework.

As noted, the circuit court declined to grant Freeman an evidentiary hearing on his motion. Although the court did not address this issue directly in its extensive, well-reasoned

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Milwaukee County Circuit Court Judge Maxine White was assigned to Freeman's cases through his first postconviction motion and appeal. Milwaukee County Circuit Court Judge Stephanie Rothstein was subsequently assigned the case and decided Freeman's second postconviction motion.

[3] *See* ***State v. Freeman***, Nos. 1995AP3195/3196-CR, unpublished op. and order (WI App Jan. 9, 1997).

[4] Freeman's first postconviction motion from October 1995 raised both a ***Bangert*** challenge to the plea and an allegation of ineffective assistance of counsel by trial counsel. *See* ***State v. Bangert,*** 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

decision, we conclude that it properly declined to grant the hearing. After examining each of Freeman's claims, the court concluded, based on a review of the record, that none were meritorious. Whether Freeman's postconviction motion on its face alleges sufficient facts to entitle him to a hearing is a question of law that we review *de novo*. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. The circuit court is permitted to deny a hearing if key factual allegations are conclusory or if the record conclusively demonstrates that Freeman is not entitled to relief. ***Id.***, ¶12. Because we conclude that Freeman's key allegations are conclusory in nature and that the record conclusively demonstrates that Freeman is not entitled to relief, we affirm the circuit court's denial of an evidentiary hearing.

Freeman's ineffective assistance of counsel allegations require him to demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Ineffective assistance of counsel claims present mixed questions of fact and law. ***Id.*** at 698. We will accept the circuit court's factual findings regarding counsel's actions so long as those findings are not clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's performance fell below the requisite constitutional standard is a question of law we review *de novo*. ***Id.***

Freeman argues that trial counsel was deficient for having failed to ensure that the 1994 plea colloquy complied with WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), requirements, specifically the requirements that Freeman understand the elements of the offenses to which he was pleading and that an adequate factual basis for the plea existed. Further, Freeman argues that trial counsel was deficient for allegedly having failed to explore the issue of Freeman's competency to enter his guilty and no contest pleas. Finally, Freeman alleges that postconviction counsel was deficient for having failed to raise all of trial

counsel's alleged errors, and for having failed to request a stay of his postconviction matters to pursue an inquiry of Freeman's competency to assist with postconviction matters. We reject Freeman's claims of deficient performance; thus we need not address his attendant claim of prejudice. *See* ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854 ("A court need not address both components of [the ineffective assistance of counsel] inquiry if the defendant does not make a sufficient showing on one.").

We agree with the circuit court that Freeman's ***Bangert*** challenge is improperly framed as an ineffective assistance of counsel claim, but review the challenge on its merits nonetheless. Freeman alleges that the plea colloquy was insufficient to ensure that he understood the elements of the offenses to which he pled. We disagree. The circuit court directly informed Freeman of the elements of each offense prior to taking his pleas, and inquired, with Freeman responding in the affirmative, that Freeman understood the elements of each offense. Further, Freeman signed plea questionnaires which attested that Freeman understood the elements of the offenses. Finally, the attorney who represented Freeman at the plea hearing testified at the pre-sentencing hearing on the motion to withdraw the pleas that he had reviewed the elements of the offense with Freeman prior to entry of the pleas.

Similarly, we reject Freeman's claim that no factual basis for the pleas was established at the plea hearing. The following exchange between the circuit court and Freeman establishes Freeman's understanding and agreement that a factual basis supported his pleas:

> THE COURT: Mr. Freeman, as to the July 27, 1994, incident on West Clarke Street and the death of Jonathon Simmons, the Court has inquired of both of the lawyers as to the facts in the case and whether or not there are any disputes. Your lawyer has indicated to this Court that you agree substantially with the facts as the state presented them in its papers about this crime,

> and except for your specific role which you will argue at your sentencing hearing, that you agree with the facts of this case, is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: That you have no disputes with the fact of your participation and your firing a weapon and with the way the state has laid out the facts against you and two others in this case, is that correct?
>
> THE DEFENDANT: Yes.
>
> ….
>
> THE COURT: Mr. Freeman, on the issue of the July 20th facts, the facts that relate to your participation in the death of Corey Boatright and the injury of [J.S.], do you have any disputes with the facts that are contained in the Criminal Complaint?
>
> THE DEFENDANT: No.

The court concluded that a sufficient factual basis was established to support the pleas to both sets of charges. We agree.

Freeman argues that the circuit court could not possibly find a factual basis to support the plea because he asserted to some degree at both the plea hearing and later that he did not recall the events giving rise to the charges and pleas. However, Freeman's argument misses the point. The circuit court need not secure Freeman's verbal agreement that a factual basis for the pleas exists, but need only find support for the pleas in the record and satisfy itself that Freeman understands the law in relation to the facts. ***State v. Thomas***, 2000 WI 13, ¶22, 232 Wis. 2d 714, 605 N.W.2d 836, holds that WIS. STAT. § 971.08(1)(b):

> does not specifically require a defendant to articulate personally the factual basis presented. Section 971.08[(1)(b)] states that a court must "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." The phrase, "such inquiry," indicates that a judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware

> of the elements of the crime, and the defendant's conduct meets those elements.

We are satisfied that the circuit court's method of inquiry, as set forth above, was adequate to meet the requirements of ***Thomas***, and that a factual basis for Freeman's pleas was established at the plea hearing.

The circuit court conducted a lengthy evidentiary hearing prior to denying Freeman's pre-sentencing motion to withdraw his pleas in February 1995, at which time Freeman testified that he did not understand the proceedings and did not recall the events underlying the charges and pleas. After listening to Freeman's testimony, as well as that of counsel who represented Freeman at the plea hearing, the circuit court stated:

> When I look at the totality of the circumstances in this case, and I do include those matters that I addressed earlier, not only the plea transcript, the guilty plea questionnaire and waiver of rights form, the defendant's testimony at the hearing today, [Freeman's mother's] testimony at the hearing today, … Dr. Robert Alvarez' report dated October 19 of 1994 [which the defense obtained in its evaluation of Freeman's competence], I don't find any support in the record from the testimony of any of those parties to suggest this defendant doesn't present the requisite level to the understanding to comprehend … what was explained to him.
>
> I do find the testimony of [trial counsel] as to the procedures that he used to, both by mail as well as in person, communicate the nature of the offenses, the penalties, the role of the parties in the case, the burden of proof, the complaint, information, that dealt with the various witnesses, the follow up that he testified about in terms of hiring an investigator, as well as hiring an evaluator, Dr. Alvarez[], and all of those matters he testified to, demonstrated to this Court that [trial counsel] was not only attentive to Mr. Freeman's concerns, but he did something that demonstrated that level of concern with making certain that he had a manner in which he could communicate various information to the defendant.

The circuit court's credibility finding with regard to Freeman's understanding of the plea hearing procedures and the information trial counsel conveyed to him in advance of the pleas will not be disturbed on appeal. *See* ***State v. Plank***, 2005 WI App 109, ¶11, 282 Wis. 2d 522, 699 N.W.2d 235. Our review of the record, in conjunction with the circuit court's credibility finding, leads us easily to conclude that Freeman did, in fact, understand the elements of the offense and the factual basis for the pleas. Non-meritorious claims of deficient performance do not give rise to a successful ineffective assistance of counsel claim. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (counsel is not obligated to file non-meritorious motions to avoid an ineffective assistance claim).

Freeman's final claim alleges that trial counsel and postconviction counsel were deficient in failing to properly investigate and litigate his competency to proceed both at the plea hearing and postconviction proceedings. We reject Freeman's claim. Although Freeman makes only brief reference to it in his reply brief, trial counsel filed a motion to determine competency and appoint an expert to examine Freeman. The circuit court conducted a hearing on the motion and denied it. Subsequent to the court's denial, Freeman's counsel secured an independent examination of Freeman which was conducted by Dr. Robert Alvarez, a licensed psychologist and associate professor in the Department of Psychiatry and Mental Health Sciences at the Medical College of Wisconsin, over the course of three days in October 1994. Dr. Alvarez's report is dated October 19, 1994, just days before Freeman's October 24, 1994, plea hearing, and concludes: "It is my opinion within a reasonable degree of psychological certainty that there is no sufficient reason to believe that Anthony D. Freeman is suffering from mental retardation and/or mental illness at this time, nor that as a result of mental retardation and/or mental illness

he lacks substantial capacity to assist his attorney in his defense." Trial counsel fulfilled his responsibility as it relates to Freeman's claimed incompetence.

Freeman also alleges that postconviction counsel was similarly deficient in having failed to investigate his competency at the time postconviction matters were undertaken and makes several factual allegations, including that he was heavily medicated and that postconviction counsel "was made aware of Freeman's fragile mental state." Freeman fails to support any of his allegations with evidentiary proof and fails to state with any specificity what information postconviction counsel might have uncovered had he investigated Freeman's competency at the time. We will not consider his argument further. *See* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126 (allegation of failure to investigate must allege with specificity what the investigation would have uncovered and how it would have affected the outcome).

Our review of the record indicates that none of the issues Freeman raises are meritorious. Thus, we agree that the circuit court properly denied Freeman's request for an evidentiary hearing and properly denied his WIS. STAT. § 974.06 motion for postconviction relief.

Upon the foregoing reasons,

IT IS ORDERED that the circuit court order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals