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April 21, 2017

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

2016AP782-CR

State of Wisconsin v. James Earl Dyson (L.C. # 2014CF3387)

Before Kessler, Brash and Dugan, JJ.

James Earl Dyson appeals a judgment of conviction entered after a jury found him guilty of burglary. He also appeals an order denying postconviction relief. He contends his trial counsel was ineffective for failing to tell him that his latent palm prints, which police found at the scene of the crime, would be admissible evidence against him at trial. Upon our review of

the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We summarily affirm.

To establish that counsel provided constitutionally ineffective representation, a defendant must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Id.* at 690. 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 analysis, the court need not address the other. *Id.* at 697.

Here, Dyson filed a postconviction motion and supporting affidavit alleging ineffective assistance of trial counsel. He alleged that during trial preparation his counsel wrongly suggested Dyson's palm prints found at the scene of the burglary might be inadmissible. He further alleged that his counsel performed deficiently because counsel subsequently failed to correct the misinformation by telling Dyson the palm prints would in fact be admissible. Dyson went on to allege that he was prejudiced because, but for counsel's failure to tell him about the admissibility of the palm print evidence, he would have accepted the State's offer to resolve the case with a favorable plea bargain.

Dyson argues that the foregoing facts show he is entitled to relief under *State v. Ludwig*, 124 Wis. 2d 600, 369 N.W.2d 722 (1985). There, the supreme court held that trial counsel was

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

ineffective during the plea bargaining process. Specifically, the court concluded that trial counsel performed deficiently by rejecting a plea bargain without disclosing the terms to the defendant or explaining that the defendant alone had the right to accept or reject the State's proposal. *See id.* at 611. The defendant showed prejudice flowing from counsel's errors because the record demonstrated a "reasonable probability" that the defendant would have accepted the plea bargain if counsel had properly presented it. *See id.* at 604, 611. Dyson maintains that his trial counsel was similarly ineffective during the plea bargaining process and that, like the defendant in *Ludwig*, he is entitled to a new trial.

As *Strickland* allows, we proceed directly to a consideration of prejudice in analyzing Dyson's claim. *See id.*, 466 U.S. at 697. We undertake our analysis in light of the bedrock principle that a postconviction motion requires more than conclusory assertions. *See State v. Allen*, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433. Rather, a defendant must present sufficient material facts in support of his or her claim. *See id.* For example, to support an allegation that counsel's errors and omissions adversely affected the defendant's decision about whether to plead guilty or have a trial, a defendant might offer reasons for attaching particular significance to information he or she lacked when making the decision. *See State v. Bentley*, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996).

In this case, Dyson failed to offer anything in his postconviction motion to show that exclusion of the palm print evidence was important to his decision to reject the plea bargain and proceed to trial. Moreover, nothing elsewhere in the record supports such a claim. As the circuit court explained, the evidence against Dyson was overwhelming even without the palm prints: he "was caught red-handed in a residence that he did not own, holding property that was not his, and he admitted that he entered the dwelling with the intent to take items that did not belong to

him.” Thus, while the State also presented evidence that Dyson left his palm prints on a trash can outside the window of the residence in which Dyson himself was found, that palm print evidence was cumulative, a superfluous flourish at most. Because Dyson did not offer material facts showing why he attached particular significance to the palm print evidence under the circumstances here, his postconviction motion was insufficient to support a claim that he was prejudiced by counsel’s alleged failure to inform him about the admissibility of that evidence. *See id.*

Dyson also asserts that he received a harsher sentence than the circuit court would have imposed had he pled guilty instead of going to trial. Assuming for the sake of argument only that this speculative assertion is true, it does not demonstrate that prejudice resulted from an alleged deficiency on the part of trial counsel. As we have just explained, Dyson failed to present any material facts showing that his counsel’s allegedly deficient performance had an impact on Dyson’s decision to have a trial. Accordingly, any sentencing ramifications of that decision are also unrelated to trial counsel’s alleged deficiency.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals