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January 10, 2018

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

2016AP1120-CR State of Wisconsin v. Nazir I. Al-Mujaahid (L.C. # 2013CF4172)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Nazir Al-Mujaahid appeals from a judgment convicting him of five counts of filing false income tax returns after a court trial and from an order denying his postconviction motion seeking a new trial. Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2015-16).¹ We affirm.

Al-Mujaahid was charged in connection with five years of false Wisconsin income tax returns (2006-2010) filed in the name of Damien Sherrer, an individual whose tax returns claimed homestead and earned income tax credits to which he was not entitled because he resided in Egypt. The circuit court denied Al-Mujaahid's motion to have Sherrer testify from Egypt via a video link.

Postconviction, Al-Mujaahid argued that his trial counsel was ineffective in the manner in which he argued the motion to have Sherrer testify from Egypt. In rejecting the ineffective assistance of counsel claim without a hearing, the circuit court concluded that even if trial counsel had performed as Al-Mujaahid urged, the court would not have permitted Sherrer to testify.

A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted).

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

On appeal, Al-Mujaahid argues that his trial counsel ineffectively argued his motion to present Sherrer's testimony from Egypt. We need not address the law governing such a request² because, regardless of the arguments trial counsel might have made, the circuit court would not have permitted Sherrer to testify. The circuit court rejected the pretrial request to have Sherrer testify from Egypt because Al-Mujaahid's counsel did not offer any authority for the request. However, in its decision rejecting Al-Mujaahid's postconviction ineffective assistance of counsel claim, the circuit court stated that even if counsel had offered such authority, the court would not have permitted Sherrer, a likely co-actor in the false tax return scheme, to testify because "[i]t would have been impossible for the court to fully impress upon [Sherrer] the duty to testify truthfully from Egypt, where the witness would not have faced consequences for perjury or contempt of court.

As additional grounds for rejecting the ineffective assistance of counsel claim, the circuit court observed that as the fact finder at trial, it found highly credible the testimony of three revenue agents that Al-Mujaahid confessed to them that he filed Sherrer's false tax returns, he forged rent certificates for the homestead tax credit, and he agreed to split the associated tax refunds with Sherrer. Even if Sherrer had been permitted to testify, the court would not have found his testimony credible enough to undermine the agents' highly credible testimony. In addition, the circuit court found that there was sufficient other evidence that Al-Mujaahid committed the crimes charged. Sherrer's testimony would not have changed the outcome at trial.

Based on the foregoing, there was no reasonable probability that the outcome of the trial would have been different had trial counsel's performance been other than what it was in relation to

² WISCONSIN STAT. §§ 885.50 and 885.56 (2015-16).

the request that Sherrer testify from Egypt. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694 (ineffective assistance of counsel requires deficient performance that prejudices the defendant); *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885 (To show prejudice, a defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (citation omitted)). We agree with the circuit court that under these circumstances, Al-Mujaahid’s postconviction motion did not warrant a hearing. The circuit court did not misuse its discretion in denying a hearing. See *Allen*, 274 Wis. 2d 568, ¶12.

Al-Mujaahid’s second appellate issue relates to an alleged *Brady*³ violation arising from what he claims was the State’s failure to disclose exculpatory evidence in the form of the IP address from which some of the false tax returns were filed. Al-Mujaahid alleged that the IP address evidence was exculpatory because such evidence might have established that someone else filed the false tax returns. The circuit court rejected this claim without a hearing.

In order to establish a *Brady* violation, a “defendant must show that the State suppressed the evidence in question, that the evidence was favorable to the defendant and that the evidence was ‘material’ to the determination of a defendant’s guilt.” *State v. Rockette*, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269 (citation omitted). “Evidence is material for *Brady* purposes only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.*, ¶40.

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

Postconviction, the circuit court concluded that Al-Mujaahid's **Brady** claim lacked merit. Even if the State failed to disclose certain IP addresses, which we need not decide, evidence of such other IP addresses would not have led to a different outcome at trial. As stated earlier, the circuit court deemed highly credible the agents' testimony that Al-Mujaahid confessed that he filed the false tax returns. Information regarding other IP addresses would not have impeached the agents' credibility. Additionally, at trial, Al-Mujaahid's expert, Scott Benton, offered the following testimony: (1) an IP address does not necessarily identify a single computer user because the address is attached to a router to which multiple persons could have access; and (2) using certain software, a person could gain access to an IP address from another location entirely.

Given this record, the IP address information upon which Al-Mujaahid relies carries neither the favorability nor the materiality necessary for relief under **Brady**. The circuit court did not misuse its discretion when it rejected Al-Mujaahid's **Brady** claim without a hearing. *See Allen*, 274 Wis. 2d 568, ¶12.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals