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DISTRICT I

August 7, 2018

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

2017AP1832 State of Wisconsin v. Dumar Dominique Leblanc
(L.C. # 2015CF3152)

Before Brennan, Brash and Dugan, JJ.

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).

Dumar Dominique Leblanc, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2015-16) motion.[1] Leblanc contends his trial counsel was ineffective because he did not challenge the legality of Leblanc's arrest. Based upon our review of the briefs and record,

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

we conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21.

Background

Leblanc was convicted upon his guilty plea to battery or threat to a witness. The conviction stemmed from events that transpired during a party on July 4, 2015. On that date, according to the complaint, Leblanc, his brother, and others were gathered at a home watching fireworks.

A witness reported that when she went inside the home, Leblanc and his brother were outside. Shortly thereafter, a child ran into the house yelling that someone had been shot. The witness heard another person say that Leblanc's brother was the shooter. At that time, the witness could see Leblanc on the porch directly outside the front door. The witness saw that Leblanc's aunt was on the phone with a 911 dispatcher, and she heard Leblanc yelling, "Tell them it was a drive-by!"

The complaint further alleged that when another witness, J.J., said he would tell the police that Leblanc's brother shot the victim, Leblanc grabbed J.J. by the throat, pushed him against the wall, and threatened to hurt J.J. if he told the police about the murder. It was this conduct that resulted in the charge against Leblanc of battery or threat to a witness.

After accepting Leblanc's guilty plea, the circuit court sentenced him to one year of initial confinement and one year of extended supervision.

Leblanc did not file a notice of intent to pursue postconviction relief and did not directly appeal his conviction.

In his *pro se* WIS. STAT. § 974.06 motion, as relevant to this appeal, Leblanc asserted that his arrest, under a false pretense, was the direct result of the police use of his probation agent as a "stalking horse."[2] Leblanc claimed that his trial counsel was ineffective for not investigating and challenging the circumstances of his arrest. Leblanc went on to argue: "There can be no reasonable dispute that [trial c]ounsel's errors prejudiced Mr. Leblanc[']s defense and that, but for those errors, there exist[s] a reasonable probability that Mr. Leblanc would have prevailed in having all statements against him suppressed as the fruit of the illegal arrest."

The postconviction court denied the motion without a hearing. In doing so, the postconviction court highlighted the fact that transcripts that may have assisted the court in evaluating Leblanc's claims were not prepared. In a footnote to its decision, the postconviction court wrote: "The defendant's allegations also appear to rely on police reports contained in discovery and alleged findings of fact by an administrative law judge in his revocation proceedings, none of which are attached to his motion."

Discussion

Whether a WIS. STAT. § 974.06 motion is sufficient on its face to entitle a defendant to an evidentiary hearing on his or her ineffective assistance of counsel claim is a question of law that appellate courts review *de novo*. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. The circuit court may deny a postconviction motion without a hearing "if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory

[2] Leblanc additionally argued that trial counsel was ineffective for not arguing that there was a ***Riverside*** violation. *See* ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991). He abandons this issue on appeal, and we, therefore, do not address it further.

allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief[.]" *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

In order to establish ineffective assistance of his trial counsel, Leblanc must show both that his counsel's representation was deficient and that this deficiency prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance is established by showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** Prejudice is shown when the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

We conclude that the postconviction court properly denied Leblanc's motion without a hearing because it failed to allege sufficient material facts. *See* ***Allen***, 274 Wis. 2d 568, ¶14 ("A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief."). In his motion, Leblanc claimed that while he was on extended supervision on an unrelated charge, his probation agent asked him to immediately report to the agent's office. Three days after the shooting, Leblanc showed up at the agent's office and found that two police officers were waiting for him. Shortly thereafter, he claims he was taken into custody and a probation hold was placed on him at the request of the police. Leblanc claims that his arrest was illegal because at the time, his agent did not have information that Leblanc had committed a new crime or violated the terms of his extended supervision.

Leblanc argues that his probation agent improperly colluded with the police in violation of the Fourth Amendment and that there was no probable cause for police to arrest him in connection with the shooting. Based on these assessments, Leblanc submits that his trial counsel was ineffective for not challenging the legality of his arrest. However, Leblanc's conclusory allegations that his arrest was improper are insufficient to warrant an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Aside from Leblanc's own description of the circumstances, the record does not contain any details regarding his arrest. The only transcript in the record is from the sentencing hearing. When an appellate record is incomplete, we must assume the missing material supports the circuit court's ruling. *See* ***State v. Provo***, 2004 WI App 97, ¶19, 272 Wis. 2d 837, 681 N.W.2d 272.

Leblanc relies on ***State v. Hajicek***, 2001 WI 3, 240 Wis. 2d 349, 620 N.W.2d 781, as support for his position that a challenge to his arrest would have been successful. His reliance is misplaced. In that case, the issue was whether a search was a police or a probation search. *See* ***id.***, ¶14. Ultimately, our supreme court rejected Hajicek's argument that the search was a police search and that the probation officers acted as a "stalking horse" for the police. *See* ***id.***, ¶¶22, 29 (concluding that the search was a probation search).[3] This case does not support Leblanc's

[3] Our supreme court in ***State v. Hajicek***, 2001 WI 3, ¶22, 240 Wis. 2d 349, 620 N.W.2d 781, explained:

> A "stalking horse" is "[s]omething used to cover one's true purpose; a decoy." In the context of determining whether a search is a police or probation search, a "stalking horse" is a probation officer who uses his or her authority "to help the police evade the [F]ourth [A]mendment's warrant requirement."

(Brackets in ***Hajicek***; citations omitted.)

claim, and, therefore, did not provide his trial counsel with a basis on which to object to the purported circumstances of Leblanc's arrest.

Because Leblanc did not allege sufficient material facts that, if true, would establish both that counsel provided deficient performance and that Leblanc was prejudiced by that performance, the circuit court properly denied his postconviction motion without an evidentiary hearing.

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals