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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

September 14, 2018

To:

Hon. Peter Anderson
Circuit Court Judge
Br. 17, Rm. 6103
215 S. Hamilton St.
Madison, WI 53703

Corey C. Stephan
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Damien D. Smith 547387
New Lisbon Correctional Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

Sarah Burgundy
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2017AP216	State of Wisconsin v. Damien D. Smith (L.C. # 2008CF1010)
2017AP217	State of Wisconsin v. Damien D. Smith (L.C. # 2008CF2232)
2017AP218	State of Wisconsin v. Damien D. Smith (L.C. # 2009CF557)

Before Lundsten, P.J., Sherman and Kloppenburg, 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).

Damien Smith, pro se, appeals a circuit court order denying his motion for postconviction relief. After reviewing the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We summarily affirm.

Smith was convicted of several felonies and misdemeanors in three separate cases. The circuit court withheld sentence and placed Smith on probation. After Smith's probation was revoked, the court imposed prison sentences. Through appointed counsel, Smith filed a postconviction motion arguing that at sentencing the court improperly considered pending federal drug charges against him. The circuit court denied the motion, and we affirmed the decision of the circuit court on direct appeal.

Smith then filed a second postconviction motion under WIS. STAT. § 974.06, acting pro se. He argued that he received ineffective assistance of counsel because his attorney failed to argue that the circuit court at sentencing relied on inaccurate information. Specifically, Smith argued that the court relied upon acts of "alleged violence" for which Smith was never charged. The circuit court denied Smith's second postconviction motion without a hearing. Smith now appeals.

If a postconviction motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court must hold an evidentiary hearing. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does not raise facts sufficient to entitle the defendant 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.*

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

Here, in order to plead his claim of ineffective assistance of counsel, Smith had to allege facts that, if true, would show that counsel was deficient and that the deficiency prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Smith’s postconviction motion failed to do so. The brief Smith submitted in support of the motion included quotations of statements made by the prosecutor at the sentencing hearing. The prosecutor referred to two tavern shootings and expressed his belief that Smith had been detained in relation to the shootings. Even if we assume without deciding that the information about Smith’s involvement in the shootings was incorrect, Smith’s motion fails to show that the circuit court actually relied on the information in sentencing Smith. *See State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (a defendant who requests resentencing due to the circuit court’s use of inaccurate information must show both that the information was inaccurate and that the court actually relied on the inaccurate information).

In fact, the sentencing transcript demonstrates that the circuit court expressly stated that it was *not* coming to any conclusions regarding Smith’s involvement in violent acts for which he was not charged. The court stated: “Now, it’s true some of the violence that’s been suggested in this case is merely suggested, and I don’t conclude that he has been involved in all the things that have been suggested” The court further stated that there were “other shootings that he may have been involved in or may not have been involved in” and that the court was not concluding that Smith had been involved. The court did acknowledge that the uncharged violent acts were brought to its attention. However, there was nothing improper about such an acknowledgement. A sentencing court may consider uncharged and unproven offenses, and even facts related to offenses for which a defendant has been acquitted. *State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341.

Based on all of the above, we conclude that Smith's motion fails to establish that he would have been entitled to relief on a claim that the circuit court relied on inaccurate information at sentencing. Accordingly, Smith's counsel was not ineffective for failing to raise the issue. See *State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel is not ineffective for failing to pursue a meritless argument). The circuit court's denial of Smith's second postconviction motion without a hearing was, therefore, within the proper exercise of its discretion.

Smith also argues in his appellant's brief that his due process rights were violated because he never received notice of the State's brief that was filed in the circuit court in response to his WIS. STAT. § 974.06 motion. Smith argues that he was deprived of the opportunity to file a reply brief. We agree with the State's position that any error related to lack of notice under the circumstances was harmless. Under *State v. Johnson*, 2012 WI App 21, ¶14, 339 Wis. 2d 421, 811 N.W.2d 441, the test for harmless error is whether there is a reasonable probability that the error contributed to the outcome. Here, Smith submitted a "status" filing to the circuit court after the State filed its response brief. That status filing raised additional arguments related to Smith's § 974.06 motion. Smith fails to identify what additional arguments he might have included in a reply brief that likely would have led to a different decision by the circuit court.

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

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

Sheila T. Reiff
Clerk of Court of Appeals