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**DISTRICT I**

September 9, 2020

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

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2019AP768 State of Wisconsin v. Clarence Benjamin Taylor
(L.C. # 2013CF2365)

Before Brash, P.J., Blanchard and Donald, 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).**

Clarence Benjamin Taylor appeals from a circuit court order denying his WIS. STAT. § 974.06 (2017-18) motion for postconviction relief without a hearing.[1] Based upon our review

[1] In this decision, we refer to the judge who presided over the jury trial as the trial court, and we refer to the judges who decided the postconviction motions as the postconviction court.

All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm the order.

In 2014, a jury found Taylor guilty of one count of armed robbery with use of force, as a party to a crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (2013-14). The postconviction court denied Taylor's postconviction motion, and Taylor appealed.[2]

In the direct appeal, Taylor asserted that he was entitled to a new trial on three grounds, only one of which is pertinent to Taylor's current appeal. Specifically, Taylor argued that "the [trial] court erred by allowing testimony by an officer not listed on the State's amended witness list." *See* ***State v. Taylor***, No. 2016AP240-CR, unpublished slip op. ¶1 (WI App July 20, 2017). ***Taylor*** summarized the pertinent facts as follows:

> Sergeant David Ligas testified to the following. Sgt. Ligas pursued an SUV that matched the description [of the suspect vehicle] provided by a responding officer. The SUV fled, then crashed into a tree, and Sgt. Ligas observed two people run from the SUV and found a third inside the vehicle. Sgt. Ligas found firearms, money, and marijuana inside and near the vehicle.
>
> The State then called Officer Matthew Claudio, who was listed on the State's first witness list but not its amended witness list. Taylor objected to the testimony on grounds that the State did not list Officer Claudio on its amended witness list, and thus the potential jurors were never asked, during voir dire, whether any of them knew Officer Claudio. The [trial] court allowed the testimony. Officer Claudio testified that his vehicle was behind Sgt. Ligas's vehicle during the pursuit of the red SUV and that Officer Claudio observed three people run from the SUV after the crash….
>
> ….

[2] The Honorable Timothy G. Dugan presided over the trial and the Honorable Ellen R. Brostrom denied Taylor's postconviction motion.

> Following Officer Claudio's testimony, the [trial] court noted that, at a sidebar, the defense had objected to the testimony because Officer Claudio was not on the State's amended witness list. The court noted that the State explained that it decided to call Officer Claudio after Sgt. Ligas testified that he saw only two people run from the SUV after the crash, because the State had expected Sgt. Ligas to testify that he saw three people run from the SUV. The court also noted that Officer Claudio had been on the State's original witness list, that the defense had Officer Claudio's name and report, and that there was no surprise to the defense. Defense counsel then clarified that the defense objection to Officer Claudio's testimony was solely that "the jury was never asked whether any of them actually knew Officer Matthew Claudio," because Officer Claudio was not identified to the potential jurors during voir dire. Defense counsel stated that he "agree[d] that this wasn't a surprise, so not on that grounds," but then clarified that the issue was "not a surprise to [the defense], but a surprise to the jurors. That's all." … [A]fter the court offered defense counsel the opportunity to ask the jurors whether any of them knew Officer Claudio, defense counsel declined the offer.

***Id.***, ¶¶6-7, 11.

Taylor argued in the direct appeal that the trial court should have excluded Claudio's testimony "because the State failed to disclose Officer Claudio as a potential witness by failing to list Officer Claudio on its amended witness list, without good cause for the failure to disclose." ***Id.***, ¶12; *see also* ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517 (2007) (holding that if State violates the discovery statute by failing to list a witness it intends to call at trial, and does not show good cause for the violation, the witness's testimony must be excluded).

We concluded that this direct appeal argument was not properly preserved. *See* ***Taylor***, No. 2016AP240-CR, ¶14. We explained the forfeiture as follows:

> Taylor did not argue in the [trial] court that the [trial] court should exclude Officer Claudio's testimony as a sanction for the State's failure to list Officer Claudio on the State's amended witness list without good cause for the failure…. Instead, as we have

> explained, when the State told the court why it had not listed Officer Claudio as a witness on its amended witness list, the defense clarified that its objection was limited to not having had the opportunity to voir dire the potential jurors as to their knowledge of Officer Claudio. Accordingly, Taylor has forfeited the argument he seeks to raise for the first time on appeal.

***Id.***

After concluding that the issue was forfeited, we added:

> Moreover, were we to reach Taylor's argument that the State violated the requirement that it provide a written list of all witnesses it intended to call at trial, without good cause for the violation, we would reject that argument on the merits. Taylor argues that the State failed to list Officer Claudio on its amended witness list because it failed to adequately prepare for trial. He contends that, had the State adequately prepared, it would have known how Sgt. Ligas would testify and that it would need to call Officer Claudio. He cites ***Wold v. State***, 57 Wis. 2d 344, 350-51, 204 N.W.2d 482 (1973), for the proposition that "the failure of adequate preparation for trial should not constitute 'good cause ... shown for failure to comply'" with the discovery statute. (Quoting WIS. STAT. § 971.23(7m).) However, so far as the record reflects, it was not unreasonable for the State to expect that Sgt. Ligas would testify that he saw three individuals exit the SUV, in light of evidence that other officers on the scene reported witnessing three men flee the SUV. Thus, the record does not support the conclusion that the State intended to call Officer Claudio or reasonably should have anticipated the need for his testimony. *See* ***State v. Wille***, 2007 WI App 27, ¶¶36-38, 299 Wis. 2d 531, 728 N.W.2d 343 (question of whether State intended to call a witness not listed on its witness list embodies an objective standard of what a reasonable prosecutor would have known and done under the circumstances). Moreover, for the same reason, even if the State's failure to list Officer Claudio were a violation, the State showed good cause for the violation. *See* ***Rice***, 307 Wis. 2d 335, ¶¶16-18 (whether State had good cause is an objective question of whether the State acted in good faith and established a specific reason for failing to disclose).

***Taylor***, No. 2016AP240-CR, ¶15.

After this court affirmed Taylor's conviction, he filed a petition for review in the Wisconsin Supreme Court, which was denied in December 2017. ***State v. Taylor***, No. 2016AP240-CR, unpublished slip op. (WI Dec. 12, 2017).

In February 2019, Taylor filed the WIS. STAT. § 974.06 motion that is the subject of this appeal. He alleged that *postconviction* counsel provided ineffective assistance by not alleging that *trial counsel* provided ineffective assistance by "failing to make the proper timely objection on the record that Claudio's testimony should have been excluded." Taylor argued that trial counsel should have argued to the trial court that Claudio's testimony should be excluded because the State violated WIS. STAT. § 971.23(1)(d) by not including Claudio on its amended witness list. As part of this argument, Taylor contended that the State's explanation for calling Claudio at trial—that Ligas had not testified as expected—did not constitute good cause to excuse that violation. Taylor contended that postconviction counsel was ineffective for failing to identify this alleged ineffective assistance by trial counsel.

The postconviction court denied Taylor's WIS. STAT. § 974.06 motion without a hearing.[3] The postconviction court did not specifically address whether the State violated WIS. STAT. § 971.23(1)(d) by not including Claudio on its amended witness list. Instead, the postconviction court focused on whether the State had shown good cause for an assumed violation of the discovery statute. The postconviction court concluded that, even if the trial court and the court of appeals had been provided with Ligas's report, both courts still would have concluded that the State had good cause for failing to list Claudio on its amended witness list. The postconviction

[3] The Honorable Jeffrey A. Wagner denied the postconviction motion at issue in this appeal.

court explained: "This was nothing more than an oversight on the part of the State, a reasonable oversight. It was not done in bad faith. It was not something purposely done to subvert the trial or to take the defense by surprise." Taylor now appeals the denial of his motion.

At issue is whether Taylor is entitled to a ***Machner*** hearing on his WIS. STAT. § 974.06 motion alleging that postconviction counsel and trial counsel provided ineffective assistance. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). If a postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court must hold an evidentiary hearing on the motion. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "However, if the motion does not raise facts sufficient to entitle the movant 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.***

A claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant makes an insufficient showing as to either deficient performance or prejudice, we need not address the other. ***State v. Mayo***, 2007 WI 78, ¶61, 301 Wis. 2d 642, 734 N.W.2d 115.

Applying those legal standards, we conclude that Taylor is not entitled to an evidentiary hearing on his ineffective assistance claims because "the record conclusively demonstrates that [Taylor] is not entitled to relief." *See* ***Allen***, 274 Wis. 2d 568, ¶9. This court concluded in Taylor's direct appeal that the record as it then existed did not suggest that the State committed a discovery violation and, even if it did, the State showed good cause for the violation. *See*

***Taylor***, No. 2016AP240-CR, ¶15. The only difference now, when we analyze the issue in the context of an ineffective assistance claim, is that the record includes a copy of Ligas's police report in which Ligas stated that he personally saw two men flee the SUV. Taylor argues that because the State had that police report in advance of trial, and Ligas testified at trial consistently with that report on the issue of how many persons exited the SUV, the State lacked good cause not to have recognized prior to trial that it would need to call Claudio to testify to Claudio's perception that three men exited.

The contents of Ligas's police report does not change our original conclusion that, if there was a discovery violation, the State showed good cause for the violation. *See* ***id.*** Further, beyond simply pointing to the Ligas report, Taylor fails to explain what type of evidence he could now elicit or present at a ***Machner*** hearing that would alter our conclusion of good cause. When the State indicated at trial that it wanted to call Claudio, the trial court accepted the State's explanation that it was surprised by Ligas's testimony. Even now, Taylor has not alleged that the State intended all along to call Claudio but intentionally left him off the amended witness list in order to deceive trial counsel or otherwise acted in bad faith in connection with related pretrial discovery or conduct at trial. Rather, Taylor argues that the State should have known that it would need to call Claudio and therefore could not have good cause for failing to include his name on the amended witness list.

We conclude that in this relatively complex criminal case, which involved four defendants, a high-speed chase, responses by many officers to multiple locations, and twenty-six witnesses on the State's original witness list, "it is understandable that the potential significance" of Ligas's reference to seeing two men exit the vehicle, rather than three men, was overlooked. *See* ***Rice***, 307 Wis. 2d 335, ¶18 (concluding that the State's explanation for not identifying a

particular witness in a complex case constituted good cause for allowing the testimony). This is especially true because Ligas's report also referred to the existence of four suspects (including one individual who remained in the vehicle) and because Ligas testified that, as he and the other officers "approached the vehicle to confront the individual in the car," the other officers told Ligas that the other officers "observed three people flee from the vehicle."

In summary, we once again conclude that the State demonstrated good cause for not including Claudio on its amended witness list. Thus, Taylor cannot show that he was prejudiced by trial counsel's failure to properly raise the issue during the trial or postconviction counsel's failure to allege trial counsel ineffectiveness. Because the record conclusively demonstrates that Taylor is not entitled to relief, the postconviction court did not erroneously exercise its discretion when it denied Taylor's WIS. STAT. § 974.06 motion without a ***Machner*** hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. Therefore, we summarily affirm the order.

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.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*