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DISTRICT II

March 23, 2022

To:

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Circuit Court Judge
Electronic Notice

Christian A. Gossett
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
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Eric Michael Muellenbach
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You are hereby notified that the Court has entered the following opinion and order:

2020AP957-CR

State of Wisconsin v. Jerimiah I. Perry (L.C. #2016CF274)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Jerimiah I. Perry appeals from a judgment of conviction and postconviction orders denying his motions for relief. He contends that his trial counsel was ineffective. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Perry was convicted following no contest pleas to two counts of discharging bodily fluids at a public safety worker. He was accused of spitting in the faces of law enforcement officers. After much delay,² the matter proceeded to sentencing where the circuit court placed Perry on probation for twenty-four months.

Perry subsequently filed a postconviction motion alleging ineffective assistance of counsel. Specifically, he faulted trial counsel for failing to request expungement at sentencing. According to Perry, this failure denied him the opportunity to (1) have his case sealed; (2) not have to report his conviction to certain potential employers and landlords; and (3) not have his conviction cause collateral consequences in any future criminal actions.

The circuit court denied Perry's postconviction motion without an evidentiary hearing. Perry then filed a motion for reconsideration, which the court also denied. The court concluded that Perry had "not presented evidence that . . . there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." This appeal follows.

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court need not address both prongs of the analysis if the defendant makes an insufficient showing on either one. *Id.* at 697.

² Perry failed to appear at his scheduled sentencing hearing and eluded police for over a year before being rearrested. As a result of his absconion, he was later convicted of felony bail jumping.

When a defendant pursues postconviction relief based on trial counsel's alleged ineffectiveness, the defendant must preserve trial counsel's testimony in a postconviction evidentiary hearing. *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). However, a defendant is not automatically entitled to an evidentiary hearing upon filing a motion that alleges ineffective assistance of counsel.

To earn an evidentiary hearing on a postconviction motion, the defendant must allege "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion alleges sufficient facts, a hearing is required. *Id.* If the motion is insufficient, if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may exercise its discretion in deciding whether to grant a hearing. *Id.* We review the court's discretionary decision under the deferential erroneous exercise of discretion standard. *Id.*

Here, we are satisfied that the circuit court properly denied Perry's postconviction motion without an evidentiary hearing. While Perry's motion cites the benefits of expungement, it fails to allege sufficient facts showing that a grant of expungement was a reasonable probability. *See Strickland*, 466 U.S. at 694 (to show prejudice, the defendant must demonstrate that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different). We will not presume prejudice based solely upon trial counsel's failure to request expungement at sentencing. Indeed, there are ample reasons why the circuit court might have denied such a request—ranging from the aggravated nature of Perry's offenses to his absconion. In any event, on this record, we perceive no error.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and orders 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.

Sheila T. Reiff
Clerk of Court of Appeals