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DISTRICT I

February 7, 2023

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
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Dwayne T. Freeman 567392
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You are hereby notified that the Court has entered the following opinion and order:

2021AP609 State of Wisconsin v. Dwayne T. Freeman (L.C. # 2014CF3400)

Before Donald, P.J., Dugan and White, 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).

Dwayne T. Freeman, *pro se*, appeals an order denying his ineffective-assistance-of-counsel claim without a ***Machner*** hearing.[1] 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(1) (2019-20).[2] We affirm.

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[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In 2005, following a jury trial, Freeman was convicted of armed robbery as party to the crime and as a repeater, burglary with use of a dangerous weapon as party to the crime, and possession of a firearm by a felon. On direct appeal, this court affirmed. ***State v. Freeman*** (***Freeman I***), No. 2016AP232-CR, unpublished slip op. (WI App Feb. 28, 2017). The Wisconsin Supreme Court denied his petition for review.

In 2018, Freeman, *pro se*, filed a postconviction motion. He raised multiple claims, including that his trial counsel was ineffective for not investigating and calling Arzell Chisom as a witness. The postconviction court denied the motion and Freeman appealed. This court affirmed in part and reversed in part. *See* ***State v. Freeman*** (***Freeman II***), No. 2019AP205, unpublished slip op. (WI App Sept. 1, 2020). We rejected all of the claims Freeman made, except for his claim related to Chisom. ***Id.***, ¶4.

We explained:

> In his underlying postconviction motion, Freeman asserted that on October 31, 2014, [Chisom] went to the home of Freeman's stepmother, Christina Glover, and told her that he was an eyewitness who could testify to facts demonstrating that Freeman had nothing to do with the July 30, 2014 armed robbery and that, against his penal interest, [Chisom] was willing to testify about what he knew.

Id., ¶38.[3] This court noted that Freeman claimed that his stepmother had informed or made trial counsel aware of Chisom. ***Id.***, ¶41. We remanded the case to the circuit court to hold a ***Machner*** hearing on Freeman's claim that his trial counsel was ineffective for not calling Chisom as a witness. ***Id.***, ¶56. Counsel was appointed to represent Freeman at the hearing.

[3] Following our decision, the State advised the circuit court that in researching the issue, it had learned that Chisom's name was misspelled as Chisholm.

Prior to the hearing on remand, the prosecutor informed the circuit court that Chisom had died on January 21, 2015, before Freeman's trial began on February 16, 2015. The prosecutor submitted Chisom's death certificate. The postconviction court denied Freeman's ineffective assistance of counsel claim without a hearing, finding that "Arzell Chisom … could not have testified at the jury trial in this matter because he was deceased[.]"

On appeal, Freeman argues that he is entitled to a ***Machner*** hearing on his claim that trial counsel performed deficiently by not investigating and by not getting an affidavit from Chisom. For a hearing to be warranted, Freeman needed to allege facts sufficiently showing both deficiency and prejudice, which if true, would entitle him to relief. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance results from specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. Prejudice occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. We need not address both prongs of the ***Strickland*** test if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

The parties agree that it is unclear whether trial counsel investigated and spoke to Chisom before Chisom died. Even if trial counsel performed deficiently by not investigating, Freeman would not have been able to show a reasonable probability that the result of his trial would have been different given that Chisom could not have testified. Freeman's claim that postconviction counsel was ineffective fails for the same reason: He cannot show prejudice. Again, even if postconviction counsel had questioned trial counsel at a hearing and proved that trial counsel performed deficiently by not investigating, he would not have been able to show that Freeman was prejudiced by trial counsel's error.

Insofar as Freeman claims that trial counsel should have had Chisom complete an affidavit, we conclude that this was not deficient performance. If trial counsel met with Chisom before he died, there would have been no reason to require Chisom to complete an affidavit relating to what he witnessed, as opposed to simply planning to have him testify at trial. Chisom died unexpectedly from a gunshot. Under the circumstances, failing to preserve Chisom's purportedly favorable testimony was not outside the wide range of professionally competent assistance.

In his reply brief, Freeman claims that Glover should have been called as a witness at trial because she was the only other person who could support the statement Chisom purportedly made. We previously addressed this argument and concluded that Glover would not have been able to testify about what Chisom told her because it was hearsay. *See* ***Freeman II***, No. 2019AP205, ¶42 ("As far as Glover is concerned, she would not be able to testify about anything [Chisom] allegedly told her because it appears to be clearly hearsay and Freeman does not argue to the contrary."). We need not address this issue again. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."). To the extent that Freeman suggests Glover should have been called as a witness at a ***Machner*** hearing, her testimony would have been problematic there as well. *See generally* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 612, 516 N.W.2d 362 (1994) ("Evidentiary hearings on ineffective assistance of counsel claims are governed by the standard rules of evidence.").

Freeman additionally takes issue with the fact that neither he nor his trial counsel were present during court proceedings that took place on March 15, 2021. The CCAP entry on that

date indicates that both the prosecutor and postonviction counsel were present, but Freeman was not because he "could not be produced for this hearing."[4] The entry additionally reflects that the case was heard off the record, adjourned, and scheduled for a Zoom hearing to take place three days later.

A defendant's right to be present is applicable only to the critical stages of the criminal proceeding. *See* ***State v. Carter***, 2010 WI App 37, ¶19, 324 Wis. 2d 208, 781 N.W.2d 527. A proceeding is critical if the defendant's presence would contribute to the fairness of the procedure. *See* ***Kentucky v. Stincer***, 482 U.S. 730, 745 (1987); *see also* WIS. STAT. § 971.04(1)(a)-(h) (defining proceedings at which a criminal defendant has the right to be present). There is no indication that the circuit court heard any argument on that date and instead appears to have simply rescheduled the matter. The record does not support Freeman's claim that his right to be present was violated.

Lastly, Freeman asserts that he is entitled to a new trial in the interest of justice. *See* WIS. STAT. § 752.35 (allowing this court to reverse in its discretion "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried"). We deny the request because we are not convinced that this is the type of exceptional case warranting an exercise of our discretionary powers. *See* ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469 (this court exercises its discretionary

[4] CCAP, an acronym for Wisconsin's Consolidated Court Automation Programs, is a website that contains information entered by court staff. *See* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522. We may take judicial notice of CCAP records pursuant to WIS. STAT. § 902.01. *See* ***Kirk***, 346 Wis. 2d 635, ¶5 n.1.

reversal power sparingly, and in only the most exceptional cases). After the details of Chisom's death came to light on remand, there was no longer a need for a ***Machner*** 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