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**DISTRICT I**

April 30, 2024

To:

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Electronic Notice

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Waupun, WI 53963-0700

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

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2022AP1806-CR

State of Wisconsin v. Novel Otis Foster (L.C. # 2019CF3799)

Before White, C.J., Donald, P.J., and Geenen, J.

**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).**

Novel Otis Foster, *pro se*, appeals a judgment convicting him of first-degree reckless homicide with use of a dangerous weapon and three counts of possessing a firearm as a felon. Foster additionally appeals an order denying his motion for postconviction relief. 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) (2021-22).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

### ***Background***

The criminal complaint alleged that in August of 2019, Foster got into a verbal altercation with two women. Foster subsequently told the women to leave because “[t]his is how people get killed.”

One of the women then called Anthony Moten, who arrived at the scene moments later. A witness reported that Foster had a small black gun in his hand. Initially Moten and Foster were friendly with each other and bumped fists. Foster then began shooting at the vehicle Moten was in.

Foster later confessed to shooting at Moten. He told police that one of the women told Moten to “pop him, shoot him,” in reference to Foster. Foster got scared, fired his gun, and fled the scene. Moten died from his injuries.

When they arrested Foster, police found ammunition in his pocket and two firearms along his flight path. The State charged Foster with first-degree reckless homicide with use of a dangerous weapon and three counts of possessing a firearm as a felon.

Prior to trial, Foster filed a number of *pro se* motions. As relevant for purposes of this appeal, Foster filed a *pro se* motion to suppress evidence, and argued that officers seized his truck without a warrant. He additionally sought to suppress the firearms because he argued that they were illegally obtained from searching his home. Finally, Foster sought to suppress his statement as fruit of the poisonous tree.

Foster then filed a second *pro se* motion again seeking to suppress the firearms and his statement. The circuit court explained to Foster that because he was represented by an attorney,

she needed to file motions on his behalf. The court said it would not address any *pro se* motions unless Foster's trial counsel determined that they had merit. Before the trial began, counsel told the court that she would not adopt any of Foster's *pro se* motions.

The case proceeded to trial, and the jury found Foster guilty of all charges. The court ordered Foster to serve sentences totaling thirty-five years of initial confinement and fifteen years of extended supervision.

Foster, *pro se*, sought postconviction relief. The circuit court, noting that Foster's arguments were difficult to discern, interpreted the motion as raising seven different claims. The court denied the claims without a hearing.

This appeal follows. Additional facts relevant to Foster's claims are provided below.

### ***Discussion***

Foster's arguments continue to be difficult to discern. We adopt the State's reframing: (1) whether the circuit court properly exercised its discretion when it granted continuances based on good cause, per the Intrastate Detainers Act and WIS. STAT. § 971.10; and (2) whether the circuit court properly denied Foster's claims that trial counsel was ineffective without holding a hearing.

#### ***(1) The circuit court properly exercised its discretion when it granted continuances.***

Foster argues that the State violated the Intrastate Detainers Act and his right to a speedy trial. Foster claims dismissal was warranted. We disagree.

This court has explained:

The Intrastate Detainer Act, WIS. STAT. § 971.11 ... requires that a case be brought on for trial within 120 days of an inmate’s request for prompt disposition, “subject to” WIS. STAT. § 971.10, the Speedy Trial Statute. The Speedy Trial Statute requires that a felony trial shall commence within ninety days of a demand, but a continuance may be granted for good cause.

*State v. Butler*, 2014 WI App 4, ¶1, 352 Wis. 2d 484, 844 N.W.2d 392 (footnote omitted). In *Butler*, we made clear that an intrastate detainer request and the attendant time limit are “subject to” the speedy trial grounds for a continuance. *Id.*

Whether to grant a continuance is a matter of circuit court discretion. *State v. Davis*, 2001 WI 136, ¶15, 248 Wis. 2d 986, 637 N.W.2d 62. Continuances are permitted under WIS. STAT. § 971.10—and, thus, under WIS. STAT. § 971.11—if “the ends of justice served by granting a continuance outweigh the best interests of the public and the accused in a speedy trial.” *Davis*, 248 Wis. 2d 986, ¶15.

To analyze Foster’s claim, we review the procedural history. At the time Foster shot Moten, he was on extended supervision. As a result of the charges in this case, Foster’s extended supervision was revoked. On April 29, 2020, Foster filed a request for prompt disposition. The prompt disposition request required the State to bring the case to trial within 120 days subject to the terms in the speedy trial statute. WIS. STAT. § 971.11(2). The 120-day window was to expire on August 27, 2020. The trial was set to begin within the time limit on August 3, 2020.

On July 20, 2020, at the final pretrial hearing, the court discussed the COVID-19 pandemic and how it had disrupted trials in Milwaukee County. That date marked the first trial in the county since the pandemic began. The court stated that it could not try Foster’s case

within his prompt disposition period. The court called the times “unprecedented” and noted the global nature of the pandemic. The court concluded that good cause existed to extend the time limit. The court rescheduled the jury trial for October 5, 2020.

At the final pretrial hearing on September 10, 2020, the circuit court stated that it was not authorized to have a trial on October 5, 2020. The court stated that each branch had been assigned only certain weeks to hold trials, and October 5th was not one of its weeks. Rather than immediately reschedule, the court scheduled another pretrial hearing. The court was aware of Foster’s prompt disposition request.

On September 21, 2020, the circuit court held a hearing and stated that it could hold Foster’s trial on October 19, 2020. The court told Foster that this was the best it could do. Due to the pandemic and because the court did not have a courtroom to have a trial on October 5th, it found good cause to extend the time limits until October 19th.

On October 14, 2020, Foster filed a motion to dismiss based on a speedy trial violation. On October 15, 2020, the circuit court explained that it had learned that eight members of the Milwaukee Police Department’s homicide team would not be able to attend the trial because they had COVID-19 and were quarantining. The court did not immediately make a decision about the October 19th trial at that hearing. The next day the court told the parties that they should be prepared to go to trial on October 19th and that Foster’s trial was the top-priority trial on that date.

On October 19, 2020, the State informed the circuit court that eight of its police officer witnesses did not believe they would be permitted to enter the courthouse due to the COVID-19 guidance in place at the time. Foster’s attorney objected to allowing those witnesses to testify by

Zoom. The court noted that the witnesses included the State's court officer, the scene detective, and the two law enforcement officers who took Foster's statement confessing to the homicide. The State said that it could not go forward with the trial without the missing witnesses.

Based on the missing witnesses and Foster's objection to their appearances by Zoom, the court found good cause to adjourn the trial. The court noted that the chief judge of the Milwaukee County Circuit Court had ordered courts to be very careful because COVID-19 cases were on the rise. The court additionally remarked that the rules on entry into the courthouse were intended to keep the defendant and the witnesses safe. The court denied Foster's motion to dismiss, and scheduled the trial for January 19, 2021. The trial began on that date.

The procedural history as detailed above reflects that the circuit court was navigating a global pandemic while recognizing the importance of holding a trial in a prompt manner. Each time the court delayed the trial, it did so after finding good cause to grant the continuance based on a number of factors. The court kept Foster's case as its top priority for trial. We conclude the circuit court properly exercised its discretion when granted continuances and found good cause to extend the initial time limits.

***(2) The circuit court properly denied Foster's remaining claims.***

In his postconviction motion, Foster sought an evidentiary hearing on grounds that his trial counsel provided ineffective assistance in a number of ways. To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *Id.* at 688. To

demonstrate prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

Although a defendant alleging ineffective assistance of counsel must seek to preserve counsel’s testimony in a postconviction hearing, *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), the defendant is not automatically entitled to such a hearing, *State v. Bentley*, 201 Wis. 2d 303, 308-10, 548 N.W.2d 50 (1996). Rather, the circuit court is required to hold an evidentiary hearing only if the defendant has alleged, within the four corners of the postconviction motion, “sufficient material facts that, if true, would entitle the defendant to relief.” *State v. Allen*, 2004 WI 106, ¶¶14, 23, 274 Wis. 2d 568, 682 N.W.2d 433. A defendant’s postconviction motion will normally be sufficient if it includes allegations that establish “the five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” *Id.*, ¶23. Whether a defendant’s motion alleges sufficient material facts to entitle the defendant to relief is a question of law that we review *de novo*. *Id.*, ¶9. If a defendant’s postconviction 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, in its discretion, may deny relief without a hearing. *Id.*, ¶¶9, 34. We review a circuit court’s discretionary decisions with deference. *Id.*, ¶9. With the foregoing principles in mind, we examine whether Foster made a sufficient showing in his postconviction motion to require the circuit court to grant a hearing on his claims.

Foster claimed trial counsel was ineffective for failing to investigate and seek suppression under the Fourth Amendment. Specifically, he argued trial counsel failed to investigate the

tracking of his phones and the circumstances surrounding the search of the home where he was an overnight guest.<sup>2</sup>

Foster did not point to any evidence suggesting that the contents of either of his two phones were searched, let alone that a search would have been illegal. Foster provided a police report stating that officers processed a cell phone located in his truck for DNA and latent fingerprints. Another police report Foster submitted stated that officers obtained a cell phone number for Foster from the mother of his child. According to the police report, based on exigent circumstances suggesting that Foster may have been suicidal, officers tracked the phone number to determine his location.

Neither report provided indicates any search was made of the contents of either of Foster's phones.<sup>3</sup> We conclude Foster did not allege sufficient facts to support his claim. Trial counsel was not deficient for not filing a motion to suppress the fruits of a purported search that does not appear to have occurred. Consequently, this claim fails. *See Strickland*, 466 U.S. at 697 (explaining that the defendant must satisfy both components of the *Strickland* test and failure to make a sufficient showing as to one component ends the inquiry).

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<sup>2</sup> We note that in his appellate brief, Foster alleges that trial counsel should have challenged an illegal seizure and subsequent search of his truck. The State aptly points out that Foster did not raise this particular issue in the postconviction motion that is the subject of this appeal. Consequently, we reject it on this basis alone. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

<sup>3</sup> Foster relied on *State v. Tate*, 2014 WI 89, 357 Wis. 2d 172, 849 N.W.2d 798, to support his claim that tracking alone is considered a search with the scope of the Fourth Amendment. However, the *Tate* court made clear that the question of whether such tracking qualified as a search was not before it. *Id.*, ¶20.



Foster's claim that trial counsel was ineffective because she did not challenge the search of his girlfriend's home, where he claims to have been an overnight guest, likewise fails. The record indicates that police did a security sweep of the home that Foster fled from immediately prior to his arrest. The police report suggests the officers conducted an exigent circumstances sweep of the home for their own safety. *See State v. Rogers*, 2008 WI App 176, ¶18, 315 Wis. 2d 60, 762 N.W.2d 795. Foster failed to meet his burden to allege sufficient facts to support his claim that his attorney was deficient for not filing a motion to suppress based on the security sweep. He offers only conclusory assertions. Therefore, this claim also fails.

The same can be said of Foster's claim in his postconviction motion that trial counsel was ineffective for failing to obtain and present favorable discovery and his claim that the State and the prison improperly withheld discovery. He offered little more than vague assertions that he could have used favorable body camera evidence to impeach witnesses. Beyond conclusory statements, Foster does not show that there is a reasonable probability that, but for counsel's purported unprofessional errors, the result of the proceeding would have been different. This claim, like the ones before it, fails. We will not abandon our neutrality to develop Foster's arguments for him. *See Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

Therefore,

IT IS ORDERED that the judgment and order are 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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*Samuel A. Christensen*  
*Clerk of Court of Appeals*