OFFICE OF THE CLERK
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 II/IV

February 8, 2013

To:

Hon. Daniel J. Bissett
Circuit Court Commissioner
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54904-2808

Melissa M. Konrad
Clerk of Circuit Court
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903

Christian A. Gossett
District Attorney
P. O. Box 2808
Oshkosh, WI 54903-2808

Eileen W. Pray
Asst. Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Brian R. Tubbs 240767
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

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

2012AP465 State of Wisconsin v. Brian R. Tubbs
(L.C. #2001CF87)

Before Higginbotham, Blanchard and Kloppenburg, JJ.

Brian Tubbs appeals from an order denying his postconviction motion, in which he alleged various deficiencies in the criminal complaint and ineffective assistance of counsel. 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 (2011-12).[1] We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

On February 14, 2001, the State charged Tubbs with armed robbery by use of a dangerous weapon in violation of WIS. STAT. § 943.32(2) (2001-02). The complaint named Citizens First Credit Union as the owner of the property allegedly taken by Tubbs. Tubbs first argues that the criminal complaint did not name a "natural person" as the victim of the armed robbery, which he alleges renders the complaint defective.

WISCONSIN STAT. § 943.32(1)(b) makes it a crime to "[take] property from the person or presence of the owner by ... *threatening the imminent use of force against the person of the owner or of another who is present* with intent thereby to compel the owner to acquiesce in the taking or carrying away of the property" (emphasis added). Here, the robbery allegedly involved Tubbs threatening a teller with the use of a grenade if the teller did not hand over the money that he demanded. In addition to naming Citizens First Credit Union as the owner of the property demanded, the complaint included the name of the individual teller whom Tubbs threatened. Consistent with the terms of § 943.32(1)(b), the complaint named the teller as the person who was "present," and the person against whom Tubbs threatened "imminent use of force." Thus, the record does not support Tubbs's argument that the complaint did not name a natural person as a victim of the armed robbery.

Tubbs next argues that both trial and postconviction counsel were ineffective for not challenging the complaint's failure to name a natural person as the victim. Because the complaint was not defective, any challenge to its deficiency would have been without merit. Counsel does not perform deficiently when he or she fails to raise meritless claims. ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441. Because counsels' performances were not deficient, their assistance was not ineffective and we need not continue to the second prong of the ***Strickland*** test. *See* ***Strickland v. Washington***, 466 U.S. 668, 687

(1984) (a claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defendant).

Tubbs next argues that the complaint, which states, in part, "Detective Schauz subsequently met with Brian R. Tubbs, D.O.B. 03-31-59, who admitted to his involvement with the robbery at Citizens First Credit Union," shows "on its face" that Tubbs confessed without having first been informed of his ***Miranda***[2] rights. Tubbs further argues that postconviction counsel should have argued that trial counsel was ineffective for failing to seek suppression of his confession on this ground.

A criminal complaint is a written statement of the essential facts constituting the offense charged. WIS. STAT. § 968.01(2). The complaint provides notice of the charges against the defendant and the possible penalties for those offenses. WIS. STAT. § 970.02(1)(a). Tubbs does not provide authority, nor are we aware of any, for the proposition that a criminal complaint that purports to reflect statements of the accused made to police must state whether police provided the accused with notice of his or her ***Miranda*** rights. Therefore, a suppression motion on the above ground would have lacked merit, and thus counsel was not ineffective by failing to move to suppress Tubbs's statements to police. *See* ***Wheat***, 256 Wis. 2d 270, ¶23; ***Strickland***, 466 U.S. at 687.

Finally, Tubbs argues that postconviction counsel should have argued that trial counsel was ineffective for failing to object at the plea hearing that the court had not ascertained that Tubbs knowingly, intelligently, and voluntarily waived certain constitutional rights and did not

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

understand the elements of his offense. Our review of the plea colloquy does not demonstrate any legal deficiency. Moreover, the second prong of the ***Strickland*** test requires a showing of prejudice: that had trial counsel not performed deficiently, the defendant would not have pleaded guilty but would have gone to trial. *See* ***Missouri v. Frye***, 566 U.S. ___, 132 S. Ct. 1399, 1409 (2012) (explaining that a defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial, or if applicable, would have accepted an earlier plea offer). Even if Tubbs could establish any deficiency in the plea colloquy, Tubbs has not demonstrated that, had he understood the constitutional rights he was waiving and the elements of his offense, he would have chosen to go to trial rather than plead guilty.

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals