



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

June 5, 2013

To:

Hon. Timothy M. Van Akkeren
Circuit Court Judge
Sheboygan County Courthouse
615 N. 6th Street
Sheboygan, WI 53081

Nan Todd
Clerk of Circuit Court
Sheboygan County Courthouse
615 N. 6th Street
Sheboygan, WI 53081

Joseph R. DeCecco
District Attorney
615 N. 6th St.
Sheboygan, WI 53081

Jacob J. Wittwer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Michael M. Moffett, #384291
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2012AP2564

State of Wisconsin v. Michael M. Moffett (L.C. #2009CF143)

Before Brown, C.J., Reilly and Gundrum, JJ.

Michael M. Moffett appeals pro se from an order denying his motion for postconviction discovery. Based on 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 affirm the order of the circuit court.

Moffett was convicted following a jury trial of first-degree intentional homicide. The charge stemmed from Moffett's actions in the shooting death of Luis DeLeon in Sheboygan.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

By counsel, Moffett filed a direct appeal arguing that the evidence was insufficient to support the conviction. Specifically, Moffett maintained that the evidence showed he had an actual and reasonable belief that he was in imminent danger, thus justifying his use of deadly force. We rejected Moffett's argument and summarily affirmed the judgment of conviction. *See State v. Moffett*, No. 2011AP1290-CR, unpublished op. and order (WI App Feb. 15, 2012).

Moffett subsequently filed a pro se motion for postconviction discovery. The motion sought copies of witness statements and documents prepared by the witnesses, copies of all photographs from the investigation, and the opportunity to copy, inspect, or photograph all pieces of evidence. The circuit court denied Moffett's request on the ground that Moffett had already had his appeal of right and was "not entitled to obtain at public expense materials to proceed in any further manner." When Moffett filed another motion essentially seeking the same relief, the court again denied it for "[t]he reasons stated."² This appeal follows.

In *State v. O'Brien*, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999), our supreme court recognized that a criminal defendant has a limited right to postconviction discovery. However, to obtain postconviction discovery, the defendant must first establish that the sought-after evidence is consequential to the case. *Id.* Evidence is consequential when there is a reasonable probability it would have resulted in a different outcome. *Id.* The circuit court has discretion to grant or deny a request for postconviction discovery. *State v. Ziebart*, 2003 WI App 258, ¶32, 268 Wis. 2d 468, 673 N.W.2d 369.

² The State acknowledges that the circuit court was mistaken to the extent it suggested that there is no right to postconviction discovery after the defendant has completed his direct appeal. Nonetheless, the State submits that the court's order denying Moffett's motion for postconviction discovery can be affirmed on other grounds. *See, e.g., State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987). We agree.

Here, we conclude that Moffett was not entitled to postconviction discovery for two reasons. First, it appears from Moffett's appellate brief that the materials he seeks were already provided to the defense before trial. Thus, there was no basis for his discovery request directed at the State.³ Second, even if the materials had not been provided, Moffett's motion fails to show that they are consequential within the meaning of *O'Brien*. Instead, his motion simply relies on unspecified claims of ineffective assistance of counsel. Such allegations are insufficient to entitle him to the materials. Accordingly, we affirm the order of the circuit court.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

³ If Moffett wished to compel trial counsel to turn over discovery materials to him, he needed to seek that relief in the circuit court.