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July 24, 2013

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

2012AP2567 State of Wisconsin v. Charles S. McNeal (L.C. #2002CF243)

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

Charles S. McNeal appeals from circuit court orders denying his motion for production of transcripts and motion for reconsideration. 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 affirm the orders of the circuit court.

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

In 2002, McNeal was charged with (1) possession with intent to deliver between five and fifteen grams of cocaine as a party to a crime, as a second or subsequent offense; and (2) possession of THC as a second or subsequent offense. Pursuant to a plea agreement, he entered a guilty plea to the reduced charge of possession of cocaine with intent to deliver. The THC possession count was dismissed.

In 2012, McNeal filed a motion for production of transcripts of "the initial appearance; preliminary hearing; arraignment; plea hearing, pre-trial motion and conferences, etc." Attached to the motion was a "rough draft" of the arguments he wished to raise in a postconviction motion. In it, McNeal alleged that the criminal complaint was insufficient to demonstrate probable cause that he possessed the cocaine and that the THC charge was deficient because the complaint failed to allege that he lacked a prescription to possess THC. McNeal further alleged that his trial counsel was ineffective for failing to challenge the complaint.

The circuit court entered an order denying McNeal's motion, which stated that "[t]he time for appeals in this case expired long ago." McNeal subsequently filed a motion for reconsideration, which the court also denied. This appeal follows.

On appeal, McNeal contends that the circuit court erroneously exercised its discretion when it denied his motion for production of transcripts because, while the time for filing a direct appeal had expired, he was not time-barred from filing a WIS. STAT. § 974.06 motion. He also contends that he asserted sufficient reasons for requesting the transcripts.

We agree with McNeal that the circuit court did not apply the proper legal standard to his motion for production of transcripts. As McNeal correctly points out, there is no time limit on filing a motion for postconviction relief under WIS. STAT. § 974.06. *See* ***State v. Brunton***, 203

Wis. 2d 195, 207, 552 N.W.2d 452 (Ct. App. 1996). However, it is not necessary to remand this case to the court because the record conclusively demonstrates that McNeal is not entitled to the free transcripts he seeks. *See* ***State v. Bentley***, 201 Wis. 2d 303, 318, 548 N.W.2d 50 (1996).

An indigent defendant may be entitled to waiver of the cost of the transcripts if he or she has an arguably meritorious claim. *See* ***State ex rel. Girouard v. Circuit Court for Jackson County***, 155 Wis. 2d 148, 159, 454 N.W.2d 792 (1990). However, "a meritless assertion by a putative appellant will not furnish a foundation for a judicially ordered waiver of fees." ***Id.*** Whether a claim has arguable merit is a question of law that this court reviews de novo. ***State ex rel. Hansen v. Circuit Court for Dane County***, 181 Wis. 2d 993, 998, 513 N.W.2d 139 (Ct. App. 1994).

As noted, McNeal's reasons for requesting the transcripts relate to two arguments he wished to raise in a postconviction motion. First, he alleged that the criminal complaint failed to establish probable cause on either of the two counts with which he was charged. Second, he alleged that his trial counsel was ineffective for failing to challenge the sufficiency of the complaint.

Because McNeal's guilty plea waived all non-jurisdictional defects and defenses, his challenge to the sufficiency of the criminal complaint cannot be reviewed directly on its merits. Consequently, his challenge would properly be brought as a claim of ineffective assistance of counsel. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. To establish such a claim, McNeal would have to show both that his trial counsel's performance was deficient and that he suffered prejudice as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Here, the record conclusively demonstrates that trial counsel was not ineffective for not moving to dismiss the cocaine possession count. By alleging that police found cocaine in the front seat area of the vehicle in which McNeal was a front seat passenger, the criminal complaint contained sufficient facts "to allow a reasonable person to conclude that a crime was probably committed and that the defendant probably committed it." ***State v. Reed***, 2005 WI 53, ¶12, 280 Wis. 2d 68, 695 N.W.2d 315. Thus, McNeal's trial counsel did not perform deficiently by failing to file a motion to dismiss the count. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to raise an issue of law is not deficient performance if the legal issue is later determined to be without merit."). Even if this court were to conclude that counsel's performance was deficient, McNeal cannot show prejudice because any insufficiency as to that count could have been readily cured by the State.[2]

The record also conclusively demonstrates that trial counsel was not ineffective for not moving to dismiss the THC possession count. Although McNeal suggests that the complaint was deficient for failing to allege that he lacked a prescription to possess THC, he is mistaken. The lack of a prescription is not an element of the offense. *See* ***State v. Harris***, 190 Wis. 2d 718, 723, 528 N.W.2d 7 (Ct. App. 1994); WIS JI-CRIMINAL 6030. Accordingly, McNeal's trial counsel did not perform deficiently for failing to file a meritless challenge to the THC possession count. *See* ***Wheat***, 256 Wis. 2d 270, ¶14. Moreover, McNeal cannot show prejudice because the THC possession count was ultimately dismissed.

[2] If McNeal's attorney had successfully challenged the sufficiency of the complaint as to the cocaine possession count, the State could have refiled the complaint to provide additional factual allegations linking McNeal to the cocaine. For example, at the preliminary hearing, the investigating officer testified that he observed a bag of cocaine in plain view on the floor of the front passenger side of the vehicle where McNeal was sitting.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals