

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP168

Cir. Ct. No. 2001CF580

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE NORTHERN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
ERIC J. WAHL, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Lawrence Northern appeals an order denying WIS. STAT. § 974.06 (2005-06)¹ relief from a conviction on two drug charges. The issue is whether he is entitled to a hearing on his claim that he received ineffective assistance from trial counsel. We conclude he is not entitled to a hearing and therefore affirm.

¶2 The State charged Northern with six counts of possessing more than 100 grams of cocaine with intent to deliver it, one for each month between January and June 2001, and one count of possessing 15-40 grams of cocaine with intent to deliver it, committed on September 20, 2001. At a hearing on the afternoon before trial he learned that one of his codefendants, Hollie Peterson, had entered a plea and was now available to testify. Although the trial court offered an adjournment to allow the defendants time to prepare for Peterson's testimony, Northern and his remaining codefendants all agreed to proceed with the trial. The prosecutor then requested and received permission to amend the information to eliminate the counts charged against Peterson.

¶3 The amended information filed the next day not only dismissed the Peterson charges but also consolidated Northern's six counts of possessing more than 100 grams of cocaine into one count, committed between January and September 2001. The amended information left Northern facing two charges, as it retained the charge of delivering a lesser amount of cocaine on September 20, 2001. It is undisputed that Northern had no warning in advance of the trial that the amendments to the information pertained to him as well as Peterson.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 Trial counsel did not object to the amended information, and Northern was tried and convicted on both counts. The proof against him on the consolidated count consisted of testimony from Sherri Mitchell and Peterson. Mitchell testified that in January 2001 Northern came to her home to deliver cocaine intended for processing and sale, and repeated his deliveries to her home five to ten times in total between January and July 2001, with all deliveries involving at least one quarter kilogram of cocaine. Petersen testified that on one occasion Northern delivered 125 grams of cocaine to her for processing and sale. She could not remember the date of that delivery, but her testimony left little doubt that it occurred late in the period of January to September 2001.² It is clear that Peterson could not have provided inculpatory testimony about deliveries Northern allegedly made between January and June 2001.

¶5 After two unsuccessful appeals on other grounds, Northern filed a motion under WIS. STAT. § 974.06 alleging that the State's last minute amendment, charging one offense committed between January and September 2001, rather than six committed between January and June 2001, "unfairly denied him an opportunity to develop a defense because the amendment presented new charges with new time periods and thus did not give him sufficient notice to prepare a defense." Therefore, in his view, trial counsel performed ineffectively, and her ineffectiveness prejudiced him, when she failed to object to the amended information.

² Petersen testified that she sold some of the cocaine Northern delivered but still possessed a substantial amount of it when she was arrested in late September 2001.

¶6 The trial court denied the motion without a hearing and without giving reasons. Northern appeals that decision.

¶7 A defendant who could have raised grounds for relief in a prior postconviction motion or appeal may not raise them in a subsequent postconviction motion or appeal absent sufficient reason for the prior omission. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). However, correspondence with this court, and orders of this court, show that Northern could not obtain the record documents and transcripts needed to pursue his claim until after his prior proceedings concluded. We therefore address the merits of Northern's argument because we conclude that he sufficiently explained why he did not raise his ineffectiveness claim in his prior postconviction proceedings.

¶8 If a postconviction motion alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). However, if the defendant fails to sufficiently raise a question of fact, or presents only conclusory allegations, or the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may deny the motion without a hearing. *See id.* at 309-10 (citation omitted). An ineffectiveness claim fails without proof that counsel's act or omission was prejudicial. *See id.* at 311-12. To prove prejudice, a defendant must show that counsel's errors deprived the defendant of a fair trial and a reliable outcome. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In other words, "[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. If the defendant cannot establish prejudice, we need not

address the issue of counsel's performance. *State v. Tomlinson*, 2001 WI App 212, ¶¶40-42, 247 Wis. 2d 682, 635 N.W.2d 201.

¶9 Northern contends that had counsel objected to the amended information, the trial court would have compelled the State to prosecute on the multiple count information. The court would have done so, in Northern's view, to sanction the prosecutor for not divulging sooner his intent to broaden Northern's timeline in the amended information. Northern speculates as to how the trial court would have responded had defense counsel objected to the amended information. There is no basis in the record to conclude that the trial court would have imposed that particular sanction, or any sanction for that matter, for the brief delay in notification that ensued.³ Nothing in Northern's motion explains how a postponement might have affected the outcome of the trial.

¶10 Northern next contends that it is reasonably probable a trial on the multiple count information would have resulted in acquittal on each of the six unconsolidated charges. However, the record shows otherwise. As noted, Mitchell testified to a cocaine delivery she observed in January 2001, and later testified that each delivery she witnessed Northern making involved much more than 100 grams of cocaine. Although her testimony regarding other deliveries she witnessed was not time specific as to the month of occurrence, this one was. Consequently, at the very least, her testimony provided the basis for conviction on the one count alleging a January transaction. Additionally, if questioned further, Mitchell might have provided dates between February and June 2001 for some of

³ The hearing at which the prosecutor allegedly concealed his intent to amend the timeline began at 2 p.m. the afternoon before trial. Northern received notice of the amended timeline no later than shortly after 9 a.m. the next morning.

the other deliveries she witnessed, resulting in Northern's conviction on more than one count. As it was, the prosecutor did not ask Mitchell for more precise dates for those other deliveries because it was no longer necessary for the State to link a transaction to a particular month under the amended timeline. In short, although the State could not have used Peterson's testimony to prove its case under the original timeline, Mitchell's testimony supported convicting Northern of at least one count, and possibly more. Consequently, acquittal on all counts would not have been a reasonably probable outcome of a trial on the multiple counts, leaving Northern no better off than he was under the consolidated count prosecution.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

