COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1903 **Cir. Ct. No. 2002CF2857**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES G. MONTGOMERY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Charles G. Montgomery appeals from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion for postconviction relief. In

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

that motion, Montgomery contended that his trial and postconviction counsel had been ineffective. After Montgomery was unable to procure the presence of trial counsel at an evidentiary hearing, the circuit court denied the motion. We affirm.

BACKGROUND

¶2 Montgomery was charged with second-degree reckless homicide in connection with the death of Jessie Neely, the estranged husband of Montgomery's sister, Sheila Neely. According to the Criminal Complaint, Sheila had obtained a restraining order against Jessie. On May 26, 2002, at approximately 12:30 a.m., Jessie came to Sheila's house and tried to enter. Sheila went to Montgomery who was sleeping in the basement and asked for help. Montgomery grabbed a gun and went outside.

¶3 According to Montgomery's statement to police, when he got outside, he yelled for Jessie. Jessie jumped out from behind the house and pushed Montgomery. Montgomery told police that he began falling backwards and the gun discharged an unknown number of times. Jessie started running toward an alley. Montgomery dropped the gun and returned to Sheila's house.

¶4 At 1:52 a.m., officers were dispatched to a report of "shooting–man down" and found Jessie dead in the alley. The medical examiner determined that Jessie had been shot once in the upper back and died from loss of blood.

¶5 This was a "negotiated issuance" and, on June 27, 2002, Montgomery pled guilty to the crime charged in the Criminal Complaint. The court sentenced Montgomery to thirteen years of initial confinement and five years of extended supervision.

¶6 Montgomery filed a WIS. STAT. RULE 809.30(2)(h) postconviction motion seeking to withdraw his guilty plea as not knowingly, voluntarily and intelligently entered. He also argued that his trial counsel provided ineffective assistance of counsel by failing to provide him with all necessary information and for not fully investigating the case. The circuit court denied the postconviction motion without a hearing.[2] Montgomery appealed.

¶7 On appeal, this court affirmed. ***State v. Montgomery***, No. 2004AP2398-CR, unpublished slip op. (WI App Jan. 31, 2006). This court held that the circuit court properly denied Montgomery's ineffective assistance of counsel claim without a hearing because he did "not identify the specific information that was lacking, and [did] not explain with specificity how having that information sooner would have affected his decision to plead guilty." ***Id.***, ¶11. This court also noted that "the record belie[d] Montgomery's assertions that he lacked information about his case." ***Id.***, ¶12. This court pointed to the discussion, at the outset of the sentencing hearing, between the circuit court and Montgomery about his dissatisfaction with his attorney's representation. During that discussion, Montgomery's trial attorney told the court that Montgomery had been given everything that counsel had received from the State before entering his guilty plea. ***Id.*** The trial court found that there was nothing in the record that supported Montgomery's assertion that he had not been provided with police reports and witness statements. ***Id.***

[2] The Honorable Jean W. DiMotto presided over Montgomery's plea, sentencing, and the WIS. STAT. RULE 809.30 postconviction motion. The Honorable Jeffrey A. Wagner denied Montgomery's WIS. STAT. § 974.06 postconviction motion from which this appeal is taken.

¶8 In Footnote 2 to our opinion, this court addressed Montgomery's "Motion to Supplement" his brief to include "newly discovered evidence [that] supports [the] claim that he did not receive discovery information before his guilty plea." ***Id.***, ¶12, n.2. Because Montgomery sought to add evidence to the appellate record that had not been presented to the trial court, this court denied the motion. We stated, however, that the motion was "denied, without prejudice to Montgomery's right to raise the question of newly discovered evidence, and its impact, by proper motion with the trial court." ***Id.***

¶9 Following remittitur, Montgomery filed a WIS. STAT. § 974.06 postconviction motion premised in large part on that newly discovered evidence—a letter, dated July 9, 2002, to Montgomery from his trial attorney that stated, among other things: "Enclosed please find a copy of the discovery regarding this matter." Montgomery offered the letter in support of his assertion that he did not receive the discovery before he pled guilty on June 27, 2002. To avoid the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), Montgomery argued that postconviction and appellate counsel (the same person) was ineffective for not getting the letter into the postconviction record and for not making sufficiently specific factual allegations describing the information in the police reports that Montgomery claimed to not know at the time of his plea. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996) (A claim that postconviction counsel was ineffective may be "sufficient reason" to avoid the procedural bar of ***Escalona-Naranjo***.). Montgomery then reiterated the underlying argument he made on direct appeal—that his trial attorney was ineffective because he did not give Montgomery the discovery materials until after he pled guilty.

¶10 After briefs were filed, the circuit court scheduled Montgomery's motion for a ***Machner***[3] hearing. At that hearing, Montgomery's attorney told the court that trial counsel, Ronald Langford, had left the practice of law. Although a private investigator had discovered where Langford was living, Langford did not answer the door on the two days before the hearing and a "subpoena … was tacked on the door" that morning. Langford did not appear at the hearing.

¶11 As a result of the unavailability of Langford, the State argued that Montgomery's motion must be denied. Relying on ***State v. Lukasik***, 115 Wis. 2d 134, 340 N.W.2d 62 (Ct. App. 1983), the State argued that because "the transcript [of the sentencing hearing] reads that Langford gave [Montgomery] the discovery [before the plea], he's got to have Langford here in order to say that he didn't." The trial court, noting that the letter "could be taken so many different ways," agreed with the State's contention and, therefore, denied Montgomery's motion.

DISCUSSION

¶12 In order to successfully raise an ineffective assistance of counsel argument, trial counsel must appear and testify at a ***Machner*** hearing. ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). The hearing "is important not only to give trial counsel a chance to explain his or her actions, but also to allow the trial court, which is in the best position to judge counsel's performance, to rule on the motion." ***Id.*** When trial counsel is unavailable "to explain or rebut the defendant's contentions because of death, insanity or … for other reasons, then the defendant should not, by uncorroborated allegations, be

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

allowed to make a case for ineffectiveness. The defendant must support his allegations with corroborating evidence." ***Lukasik***, 115 Wis. 2d at 140. There is a strong presumption that the attorney rendered effective assistance and made all significant decisions exercising reasonable professional judgment, *see* ***Strickland v. Washington***, 466 U.S. 668, 689 (1984), and "the defendant cannot by his own words rebut this presumption." ***Lukasik***, 115 Wis. 2d at 140.

¶13 Because Langford was unavailable, the issue becomes whether Montgomery had sufficient corroborating evidence of Langford's alleged ineffectiveness. Montgomery relies on two items—the July 9, 2002 letter and Langford's failure, while responding to Montgomery's complaints about his representation, to produce written proof from his file of when discovery material were given to Montgomery.[4]

¶14 We agree with the circuit court's determination that Montgomery did not present sufficient corroborating evidence. As noted, Montgomery complained about Langford's representation at the outset of the sentencing hearing. Langford told the court that Montgomery believed that Langford "did nothing for his case, … did no investigation, … answered no questions, [and] … had no

[4] The pertinent transcript excerpt reads:

> [THE COURT]: Just one second. I'm asking Mr. Langford right now. You must have a record [of giving the discovery to Montgomery] in your file.
>
> [LANGFORD]: I'm not sure it's accurately noted in the file. I know it was pre-plea.
>
> [THE COURT]: So some time in June?
>
> [LANGFORD]: Actually I'm almost certain that it would have been some time in June, Judge.

discussions [with him] about the case." When Montgomery told the court that he had not received "the statements and everything" and "the papers," Langford said, "He got everything, Judge. I sent him everything that I had gotten from the State." The court asked when the discovery was given to Montgomery, and Langford said that he was "almost certain that it would have been some time in June, Judge."[5] After describing his discussions with the assistant district attorney, Langford also told the court that he sent "the packet of information" to Montgomery "[s]ome time in June" although he "d[id]n't have an exact date." Langford said, "[e]verything was sent to [Montgomery and] [w]e discussed what was in there." Langford described his discussions with Montgomery during which Montgomery explained "his version" of the shooting, and he again told the court that Montgomery "was given the material."

¶15 The July 9, 2002 letter must be considered against the above-described evidentiary backdrop of Langford's repeated statements that he gave the discovery material to Montgomery before Montgomery pled guilty.[6] The letter merely states: "Enclosed please find a copy of the discovery regarding this matter." The July 9, 2002 letter is ambiguous. The enclosed discovery could have been a second copy of discovery material previously given to Montgomery or it could have been additional discovery material over and beyond previously-

[5] The broader context for Langford's reply is set forth in Note 4.

[6] After the discussion with Langford about whether he had given the discovery materials to Montgomery, the court expressly found that "there's not anything in this record that supports [Montgomery's claim] that Mr. Langford didn't provide you—him with the police reports and witness statements and other discovery." In Montgomery's direct appeal, this court held that the trial court's finding of fact was not clearly erroneous and, accordingly, we rejected Montgomery's ineffective assistance of counsel claim. ***State v. Montgomery***, No. 2004AP2398-CR, unpublished slip op., ¶13 (WI App Jan. 31, 2006).

provided discovery. In light of the statements made by Langford before sentencing that indicated that he gave discovery materials to Montgomery before he pled guilty, the July 9, 2002 letter is not sufficient corroborating evidence.

¶16 Montgomery also relies on Langford's failure to provide, from his file, written proof of the date on which he gave discovery materials to Montgomery. Langford, however, repeatedly told the court that he gave the material to Montgomery before the plea. The apparent absence of written proof in the file is not corroborating evidence. The law presumes that Langford had a reasonable basis for his conduct, and Montgomery cannot rely on negative evidence such as the lack of written documentation in the file to rebut the presumption. *See* ***Lukasik***, 115 Wis. 2d at 340.

¶17 Because Montgomery did not present evidence that met the corroboration requirement of ***Lukasik***, the trial court properly denied Montgomery's postconviction motion.

By the Court.—Order affirmed.

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