COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2012

A. John Voelker
Acting 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. 2010AP971

Cir. Ct. No. 2004CF2846

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY A. HORTON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Tony A. Horton, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2009-10)[1] motion without a hearing. Horton

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[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

claimed that trial counsel had been ineffective for failing to turn transcripts over to Horton after his case concluded, failing to argue a suppression motion, and failing to investigate. The circuit court denied the motion because no postconviction proceedings were commenced so there were no transcripts; Horton had entered a guilty plea, thereby abandoning the suppression motion; and the claim that counsel had failed to investigate was conclusory. We agree and affirm.

¶2 In 2004, Horton was charged with one count of manufacture or delivery of less than one gram of cocaine and one count of possession with intent to deliver between one and five grams of cocaine after selling drugs to an undercover police officer. Trial counsel evidently filed a motion to suppress, apparently on the grounds that the officers who arrested Horton had no basis for a warrantless entry into his home.[2]

¶3 The plea questionnaire form indicates that Horton would plead guilty to the manufacture/delivery count. It appears the second count was dismissed and read in, along with an obstruction charge from another case. In October 2004, the circuit court sentenced Horton to thirty-six months' initial confinement and thirty-six months' extended supervision, imposed and stayed in favor of four years' probation. Horton's probation was revoked in February 2007; the record does not indicate why.

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[2] Docket entries reflect that a motion to suppress was filed in July 2004, but a copy of the motion itself is not part of the record. Horton included a copy of the motion, which bears file stamps from both the clerk of the circuit court and the district attorney, in his appendix. A docket entry from August 2004 states that the parties "indicate case will not proceed to a motion hearing on today's date, but will instead resolve with a plea."

¶4 In March 2010, Horton filed the underlying WIS. STAT. § 974.06 motion, seeking to withdraw his plea. He complained his conviction was based on evidence obtained from an unlawful search, violations of constitutional rights, and ineffective assistance of counsel. More specifically, he alleged that trial counsel had failed to give him transcripts, failed to argue the suppression motion, and failed to investigate.[3] The circuit court denied the motion for the reasons stated above; Horton appeals.

¶5 At the outset, we note that Horton's appellate brief has headings for at least eleven issues. The actual substance of his arguments, however, is difficult to discern: the briefs are primarily a collection of paragraphs copied from police reports and reference printouts, including headnote and page numbers, only occasionally interspersed with Horton's own narrative. The brief is arranged in no particular order and makes no particular sense, demonstrating little connection to the facts of this case.[4] As to issues we *can* discern, we will not permit Horton to raise new issues on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). We limit our review to issues raised in the four corners of his original motion. *See* ***State v. Allen***, 2004 WI 106, ¶27, 274 Wis. 2d 568, 682 N.W.2d 433.

[3] Horton additionally alleged that trial counsel failed to inform the circuit court that he had been incarcerated at the time he was charged with bail jumping, which he also references in his notice of appeal. However, there is absolutely nothing to indicate that Horton was ever charged with, much less convicted of, bail jumping in Milwaukee County Circuit Court case No. 2004CF2846.

[4] The reply brief is more than twice as long as allowed by WIS. STAT. RULE 809.19.

¶6 To obtain a hearing on his motion, Horton had to allege sufficient facts which, if true, would entitle him to relief.[5] ***Id.***, ¶14. Conclusory allegations are insufficient. ***Id.***, ¶15. A defendant alleging ineffective assistance of counsel must show that counsel performed deficiently and that the deficiency was prejudicial. ***Id.***, ¶26.

¶7 There is no ineffective assistance of counsel for failure to turn over transcripts. As the circuit court noted, no transcripts were prepared because postconviction proceedings were not commenced, and Horton does not allege that he ordered counsel to do so.[6] Counsel is under no obligation to produce non-existent documents from his files. Moreover, whether counsel gave Horton transcripts *after* his conviction has no bearing on the circumstances surrounding Horton's entry of a plea.

¶8 It is true that counsel did not argue Horton's suppression motion, but Horton has not alleged sufficient facts to show this was deficient *or* prejudicial. The record suggests that Horton abandoned the motion in order to enter into a plea negotiation.[7] Further, Horton did not attempt to show that he would have

[5] This is not a motion under ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), as Horton has not alleged the plea colloquy was procedurally defective.

[6] We observe that even Horton's *pro se* attempts at relief did not begin until after his probation was revoked.

[7] In his appendix, Horton included a copy of an offer letter from the State, sent after it received the motion to suppress. In this letter, the district attorney tells counsel, "I am in receipt of your motion and your request that I review the State's offer in this case. After further review of the facts and your client's previous record, I am prepared to change the State's offer in this case[.]" The letter then sets forth a new offer and concludes by saying, "Also, if this new offer removes the need for a motion, please let me know as soon as possible." It thus appears that trial counsel used the suppression motion in the plea bargaining process. We are hard-pressed to deem such a strategy to be ineffective assistance.

succeeded on his suppression motion—in fact, his WIS. STAT. § 974.06 motion never alleges any particular constitutional violations at all.[8] Also, Horton's guilty plea subsequently waived any constitutional challenges to his stop, search, seizure, or arrest. *See **State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994).

¶9 Finally, Horton's contention that counsel "failed to investigate" is, as the circuit court noted, too conclusory to warrant relief. Horton does not allege what counsel failed to investigate, nor does he allege why any of the non-investigated facts would have made any difference in Horton's case. *See **Allen***, 274 Wis. 2d 568, ¶23. In short, Horton's motion is conclusory and alleges neither deficient performance nor prejudice. The circuit court properly denied the motion without a hearing.

By the Court.—Order affirmed.

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

[8] Horton's claims of an unlawful search and constitutional violations are not elaborated on any further than that and, thus, are too conclusory to warrant relief. In any event, it is also not evident that Horton would have prevailed on the motion to suppress.