COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP236 **Cir. Ct. No. 2003CF4939**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STANLEY SMITH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: CARL ASHLEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Stanley Smith, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2009-10),[1] postconviction motion. He argues

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

that the prosecution failed to disclose exculpatory evidence before his jury trial and that his trial counsel was ineffective for not filing a motion to compel the disclosure of the identity of confidential informants. We reject his claims and affirm the circuit court's order.

¶2 Smith was convicted of delivery of cocaine and possession of marijuana based on a sale to an undercover officer. Smith was sentenced to seven years' imprisonment on July 23, 2004. Smith did not appeal. In January 2011, Smith filed a *pro se* postconviction motion under WIS. STAT. § 974.06, seeking a new trial and exclusion of certain evidence, or, in the alternative, dismissal of the prosecution because he was denied a fair trial. The circuit court found Smith's motion entirely conclusory and unsupported because no trial transcripts were produced. It denied Smith's motion without a hearing.

¶3 We review the circuit court's decision not to hold an evidentiary hearing on a postconviction motion using a mixed standard of review. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). We first determine "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required when a defendant presents only conclusory allegations or if the record conclusively demonstrates that the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

¶4 Smith argues that the prosecution violated its duty under ***Brady v. Maryland***, 373 U.S. 83 (1963), by not providing discovery regarding the source of information that caused the police to target Smith and his residence for the controlled buy. To establish a ***Brady*** violation, a defendant must show that the

prosecution suppressed evidence favorable to the defendant and material to the determination of guilt. ***Strickler v. Greene***, 527 U.S. 263, 281-82 (1999). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***U.S. v. Bagley***, 473 U.S. 667, 682 (1985).

¶5 Smith also claims he was denied the effective assistance of trial counsel because counsel did not make a motion under ***State v. Outlaw***, 108 Wis. 2d 112, 321 N.W.2d 145 (1982), to compel the prosecution to disclose the identities of confidential informants that caused the police to target him and his residence. In addition to showing that counsel's representation was deficient, a defendant must also show that the deficiency was prejudicial. ***State v. Cooks***, 2006 WI App 262, ¶33, 297 Wis. 2d 633, 726 N.W.2d 322. Similar to the prejudice component on a claimed ***Brady*** violation, "the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

¶6 Both of Smith's claims rest on the notion that there were confidential informants that the prosecution failed to disclose and whom trial counsel failed to investigate and compel disclosure of. The record belies that notion. The evidence was that two undercover female police officers came to Smith's residence and one asked for "Lil' Stan" and indicated that she wanted to buy "four," meaning four

corner cuts of cocaine.[2] Smith delivered cocaine to the undercover officer in the hallway of his residence. The officer observed Smith for two to three minutes during the transaction and identified him at the time of his arrest and at trial. There was no confidential informant involved in setting up or completing the drug transaction. Thus, the record conclusively demonstrates that there is no evidence supporting either ***Brady*** or ***Outlaw*** claims. *See* ***Nelson***, 54 Wis. 2d at 497-98.

¶7 During the prosecutor's rebuttal closing argument, the prosecutor referred only to "community complaints" and information gathered from anonymous people as the basis for the officers being present in Smith's neighborhood and targeting Smith's residence. Smith objected to the implication that there was specific information about him.[3] A sidebar conference was held. Later, on Smith's motion for a mistrial based on the implication that there was specific intelligence about Smith or his residence, Smith's trial counsel explained that the officers only relied on generic information from people in the neighborhood and citizen complaints. The prosecutor confirmed that there was no specific information about Smith but that the officers acted on citizen complaints

[2] The only portions of the trial transcript produced in the record are the testimony of two undercover officers, the prosecutor's rebuttal closing argument, and a record of a sidebar made on Smith's motion for a mistrial on the last day of trial.

[3] Even if we construe Smith's claim to be that the prosecutor's rebuttal argument was improper because it was not based on facts of record, the error, if any, is harmless because of the direct evidence of the drug transaction and identification of Smith.

and information from all different people. There is no evidence that a confidential informant was used.[4]

¶8 Additionally, Smith cannot demonstrate prejudice from either of his alleged claims that informants were not revealed. Here there was direct evidence of the drug transaction. Whether or not the police utilized a confidential informant to target Smith or his residence is of no consequence to the officers' testimony about the drug transaction and identification of Smith. The record establishes that Smith is not entitled to relief and the circuit court properly denied his WIS. STAT. § 974.06 motion without a hearing.

By the Court.—Order affirmed.

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

[4] Whether or not a confidential informant was used was also explored at a status hearing following Smith's jury trial in this case and prior to trial in a second filed case in which Smith was charged with possession of cocaine and felony bail jumping. Smith's trial counsel indicated, with regard to the second case, that he asked the prosecution in writing to produce information about confidential informants the officers may have relied on. The transcript of the joint sentencing hearing for both cases indicates that Smith entered a guilty plea in the second filed case. Although trial counsel suggested at sentencing that there may have been things said during the jury trial that were not genuine or facts withheld from the defense that "may be dealt with a later time," there was no claim that it was premature to complete either case or that the requested discovery in the second filed case had been withheld.