

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2012

Diane M. Fremgen
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. 2011AP1864

Cir. Ct. No. 2004CF5907

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE LEE CESAR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS R. CIMPL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Bruce Lee Cesar, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 (2009–10) motion for postconviction

relief without a hearing.¹ Cesar argues that the postconviction court erroneously denied his motion and that the form he used to file his motion denied him due process. He seeks a new trial, an evidentiary hearing, or a competency hearing. We affirm.

BACKGROUND

¶2 Cesar was charged with one count of repeated sexual assault of a child under the age of sixteen, contrary to WIS. STAT. § 948.025(1)(b) (2003–04). The complaint alleged that Cesar had sexual contact on three or more occasions with the fifteen-year-old victim between June 1, 2004, and October 28, 2004.

¶3 Cesar was found ineligible for public defender representation, but the trial court appointed a lawyer for him and ordered that Cesar reimburse the county for his lawyer's fees.

¶4 Cesar pled not guilty and the case proceeded to trial. The jury found Cesar guilty and the trial court sentenced him to ten years of initial confinement and ten years of extended supervision.

¶5 Cesar filed a notice of intent to pursue postconviction relief and requested the appointment of a lawyer, but the public defender informed him that he was not eligible and no lawyer was appointed. Over a year later, Cesar filed a *pro se* motion to extend the deadline for filing a postconviction motion or notice of appeal, but we denied the motion because Cesar did not demonstrate good cause

¹ All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

for the extension. See *State v. Cesar*, No. 2006XX769-CR, unpublished slip order (WI App Aug. 7, 2006).

¶6 Five years later, Cesar filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. His motion alleged three main grounds for relief: (1) ineffective assistance of his trial lawyer; (2) “trial court’s abuse of discretion”; and (3) “denial of due process and equal protection.” The postconviction court denied Cesar’s motion without an evidentiary hearing after concluding that Cesar’s allegations were “conclusory as they lack factual specifics and support.”²

¶7 The postconviction court also commented on the lack of transcripts in the Record, noting: “Even if the defendant’s assertions passed muster from a sufficiency standpoint, the court would have required the transcripts to evaluate the defendant’s claims. His allegations do not raise an issue of fact, however, and therefore, his Sixth Amendment claims are insufficient.”

¶8 Finally, the postconviction court stated that the allegation that the trial court erroneously exercised its sentencing discretion could not be raised in a WIS. STAT. § 974.06 motion.

STANDARD OF REVIEW

¶9 Our review of the denial of a WIS. STAT. § 974.06 motion requires application of a mixed standard of review:

² The postconviction motion was decided by the Honorable Dennis R. Cimpl, who was assigned the case due to judicial rotation. We will refer to Judge Cimpl as the postconviction court. The Honorable Elsa C. Lamelas presided over the jury trial and sentencing and will be referred to as the trial court in this decision.

First, we 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*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. We require the circuit court “to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion.” We review a circuit court’s discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576–577, 682 N.W.2d 433, 437 (citations omitted; italics added).

DISCUSSION

¶10 Cesar argues that his trial lawyer’s performance was constitutionally deficient and that the postconviction court erroneously rejected that claim. He also asserts that he was “denied due process in the [postconviction] court due to the instructions on the standard [WIS. STAT. §] 974.06 form he used.” At the outset, we note that Cesar’s seventeen-page brief is significantly longer and more detailed than his § 974.06 motion, which contained fewer than three pages of allegations concerning his claims for relief. The issue before this court is the adequacy of the § 974.06 motion and the postconviction court’s decision to deny it without holding an evidentiary hearing or providing other relief. We begin our analysis with that issue before addressing Cesar’s individual arguments.

¶11 As noted above, if a postconviction “motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.” *See Allen*, 2004 WI

106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437. To meet the standards discussed in *Allen* and the seminal case of *State v. Bentley*, 201 Wis. 2d 303, 310–311, 548 N.W.2d 50, 53 (1996), a postconviction motion must allege, “within the four corners of the document,” the “five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” *Allen*, 2004 WI 106, ¶23, 274 Wis. 2d at 585, 682 N.W.2d at 441.

¶12 In this case, Cesar’s motion alleged that his trial lawyer was ineffective for eight reasons, such as “failing to engage in meaningful communication and consultation with me” and “failing to investigate the times that specific incidents occurred.” His motion offered one, two, or three sentences in support of each allegation. We agree with the postconviction court that Cesar’s assertions were conclusory and did “not raise facts sufficient to entitle the movant to relief.” *See id.*, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437. For instance, Cesar’s motion did not explain what information his trial lawyer could have discovered, what specific evidence should have been presented, and how trial counsel’s performance prejudiced Cesar.³ *See id.*, 2004 WI 106, ¶26, 274 Wis. 2d at 587, 682 N.W.2d at 442–443 (A defendant alleging that he or she was provided constitutionally deficient representation “must prove both that his or her attorney’s performance was deficient and that the deficient performance was prejudicial.”) (A lawyer’s performance is prejudicial when there is “reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.”) (citation omitted).

³ The State’s brief addresses many of Cesar’s allegations in detail and we will not repeat those arguments here. We agree with the State and the postconviction court that the allegations in the postconviction motion were conclusory and lacked sufficient factual details.

¶13 In addition to being conclusory, at least one of the allegations was also refuted by the sentencing transcript that was part of the trial court Record. Cesar's motion asserted that his trial lawyer should have investigated Cesar's mental health status and determined that Cesar was incompetent to stand trial. At sentencing, Cesar's lawyer noted that Cesar was taking numerous medications, including "some antipsychotic medications" and that Cesar said "he has been experiencing some hallucinations at the House of Corrections." When the State asked for clarification whether the medications affected Cesar's ability to understand the proceedings or communicate with his lawyer, Cesar's lawyer replied: "Judge, as this case has progressed, I've never felt that I had an inability to communicate with Mr. Cesar or that I ever felt that there was a problem with him assisting in the defense of the case." Cesar's lawyer offered to seek more information on the medication Cesar was taking, which led the trial court to address Cesar's competency:

THE COURT: I've never noted any problem with Mr. Cesar's behavior, or demeanor, or anything that would make me think that he has difficulty understanding what goes on in the courtroom or behaving appropriately [*sic*].

[Cesar's lawyer]: He has also ... indicated to me that he's never had a history of mental health issues.

THE COURT: Mr. Cesar, have you ever had a problem communicating with [your lawyer]?

MR. CESAR: No.

THE COURT: Or understanding what we're doing in the courtroom?

MR. CESAR: No.

THE COURT: At least none that a lay person wouldn't have [*sic*].

MR. CESAR: Right.

THE COURT: Okay. All right. [Your lawyer] has been attentive to you and has kept you apprised of what we do in the courtroom when you did have a problem understanding something?

MR. CESAR: Yes.

THE COURT: Okay. All right. I don't see any point in delaying the proceedings today.

No one objected and the sentencing proceeded as scheduled.

¶14 Cesar's motion suggested that his lawyer should have determined that he was incompetent, but he offered no specific allegations about his mental health to dispute the on-the-record discussion and trial court's finding that there was no reason to delay the sentencing. Cesar's postconviction motion was inadequate and his allegation was refuted by the sentencing transcript.

¶15 Next, Cesar's motion raised two issues besides the performance of his trial lawyer. First, Cesar alleged that the trial court "abused its discretion by opting not to wait for medical records regarding my mental health and medication before determining my competency to stand trial." For the reasons discussed above, Cesar's allegations about his competency were inadequate, because Cesar did not provide specific facts to suggest that he was incompetent during the trial proceedings. Moreover, to the extent Cesar's motion was challenging the trial court's exercise of sentencing discretion (since the competency discussion occurred during the sentencing hearing), that claim is not properly raised in a WIS. STAT. § 974.06 motion. See *State v. Balliette*, 2011 WI 79, ¶34 n.4, 336 Wis. 2d 358, 375 n.4, 805 N.W.2d 334, 342 n.4 ("[A] defendant may raise only constitutional or jurisdictional issues in a [] § 974.06 motion.").

¶16 Finally, Cesar's motion asserted that his "right to due process and equal protection was violated due to the fact that the jury sat through the entire

trial (of credibility), without knowing what credibility is. During deliberation the jury sent a note to the court asking, ‘What is credibility?’” We conclude that Cesar’s allegation was insufficient under *Allen* and *Bentley*. Cesar’s motion did not indicate whether his trial lawyer raised any concerns with the trial court about the jury’s question and it did not discuss the trial court’s written response to the jury, which Cesar included in the appendix.⁴ In short, Cesar’s allegation lacked specificity and was conclusory. Furthermore, to the extent his claim implicated the jury instructions that were given, that claim was outside the scope of a WIS. STAT. § 974.06 motion. See *Balliette*, 2011 WI 79, ¶34 n.4, 336 Wis. 2d at 375–376 n.4, 805 N.W.2d at 342 n.4 (“[A] § 974.06 motion may not be used to raise challenges to sufficiency of the evidence, *jury instructions*, evidentiary rulings, or procedural matters.”) (citation omitted; emphasis added).

¶17 For the foregoing reasons, we conclude that the postconviction court did not erroneously exercise its discretion when it denied Cesar’s motion without a hearing because the allegations in his motion were conclusory and failed to raise sufficient facts that would entitle Cesar to relief. See *Allen*, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437.

¶18 On appeal, Cesar offers several arguments in support of his request for relief. Cesar argues that his trial lawyer provided constitutionally deficient assistance in at least four ways. Cesar repeats allegations he made in his motion and provides further support for each. As noted, this court must consider the motion that was before the postconviction court. We have concluded that the

⁴ The transcript of the final afternoon of trial, which included the jury deliberations, has never been filed.

allegations were insufficient and conclusory and, therefore, Cesar's challenge to the postconviction court's order fails.

¶19 Cesar also contends that he was "denied due process in the [postconviction] court due to the instructions on the standard [WIS. STAT. §] 974.06 form he used." He explains that the prison library gave him a § 974.06 form to fill out. He notes that one section of the form stated: "state facts fully and clearly; arguments, citations are not included." He complains that he "never had an opportunity to present his complete claim with case law and his arguments." We are not convinced that Cesar is entitled to relief.

¶20 The form that Cesar used is not a required form, and it is not clear who created it. While Cesar was free to use such a form, he was also required, even as a *pro se* litigant, to conform with case law requirements concerning the sufficiency of WIS. STAT. § 974.06 motions. Cases such as *Allen*, *Bentley* and others provide specific guidance to litigants about what must be alleged in a postconviction motion, and Cesar's motion was properly evaluated consistent with those cases. "The right to self-representation is '[not] a license not to comply with relevant rules of procedural and substantive law.'" *Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16, 20 (1992) (citation omitted; bracketing supplied by *Graf*). "While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law." *Ibid.*

¶21 Further, as the State points out, the form itself directed Cesar to "state all claimed grounds for relief under [WIS. STAT.] § 974.06," so Cesar's suggestion that the form constrained his ability to identify his grounds for relief and the facts that support the alleged errors is without merit.

¶22 Finally, Cesar asserts in his appellate brief that the postconviction court's finding that the trial transcripts were not prepared was erroneous. This issue was resolved after appellate briefing in this case, when Cesar moved to correct or supplement the appellate Record with a transcript from the trial. In response to an order from this court, it was determined that Cesar did, in fact, order and pay for two trial transcripts in 2009. According to the court reporter who provided a duplicate copy to the circuit court clerk, the transcripts were originally filed in 2009 but apparently were not made a part of the trial court file. The trial transcripts from the afternoon of April 25, 2005, and the morning of April 26, 2005, are now part of the appellate Record.

¶23 We have reviewed those transcripts and they do not change the outcome of this appeal. While the postconviction court noted that the transcripts were missing, it also made clear that it was denying Cesar's motion because his assertions were conclusory and not supported by sufficient facts. The postconviction court stated: "Even if the defendant's assertions passed muster from a sufficiency standpoint, the court would have required the transcripts to evaluate the defendant's claims. His allegations do not raise an issue of fact, however, and therefore, his Sixth Amendment claims are insufficient." We agree with this analysis. Even if the transcripts had been in the Record at the time the postconviction court considered Cesar's motion, that would not have altered the fact that Cesar's motion failed to meet the legal standards outlined in *Allen* and *Bentley*. The postconviction court did not erroneously exercise its discretion when it denied Cesar's motion without a hearing.

By the Court.—Order affirmed.

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

