COURT OF APPEALS
DECISION
DATED AND RELEASED

March 12, 1997

No. 96-1157-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MAURICE W. CARPENTER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Maurice W. Carpenter appeals from a judgment of conviction of party to the crime of battery, armed robbery and operating a motor vehicle without the owner's consent. He also appeals from an order denying his postconviction motion seeking a new trial on the ground of ineffective assistance of trial counsel. The sole issue is whether Carpenter was

properly denied a ***Machner***[1] hearing on his postconviction motion. We conclude, as did the trial court, that no factual basis was supplied to justify an evidentiary hearing on the claim of ineffective assistance of trial counsel. We affirm the order and the judgment.

Before a trial court must grant an evidentiary hearing on a claim of ineffective counsel, the defendant must raise factual allegations in the motion or affidavits that raise a question of fact for the court. *See* ***State v. Washington***, 176 Wis.2d 205, 214-15, 500 N.W.2d 331, 335-36 (Ct. App. 1993). "A conclusory allegation of ineffective assistance of counsel, unsupported by any factual assertions, is legally insufficient and does not require the trial court to conduct an evidentiary hearing." ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). The information provided in the motion must be "factual-objective" as opposed to "opinion-subjective." *See* ***State v. Saunders***, 196 Wis.2d 45, 51, 538 N.W.2d 546, 549 (Ct. App. 1995).

We review the trial 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, 53 (1996). We determine de novo whether the motion alleges facts sufficient to demand a ***Machner*** hearing. *See* ***State v. Tatum***, 191 Wis.2d 547, 551, 530 N.W.2d 407, 408 (Ct. App. 1995) (we

[1] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim and serves to preserve trial counsel's testimony. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). In order to obtain appellate review of an ineffective assistance of counsel claim, trial counsel must testify in the trial court and explain his or her conduct in the course of the representation. *See* ***State v. Krieger***, 163 Wis.2d 241, 253, 471 N.W.2d 599, 603 (Ct. App. 1991).

review a trial court's denial of a motion for a ***Machner*** hearing de novo); ***Toliver***, 187 Wis.2d at 360, 523 N.W.2d at 118. *Cf.* ***Bentley***, 201 Wis.2d at 310, 548 N.W.2d at 53 (whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law to be reviewed de novo). If the motion fails to allege sufficient facts, the trial court has the discretion to deny the postconviction motion without a hearing. *See* ***Bentley***, 201 Wis.2d at 310-11, 548 N.W.2d at 53. We review that determination under the deferential erroneous exercise of discretion standard. *See* ***id.*** at 311, 548 N.W.2d at 53.

The trial court held a hearing on Carpenter's motion. Although it is not readily apparent from the record that trial counsel had been subpoenaed to appear, Carpenter asserts in his reply brief that trial counsel was present and he was prepared to preserve trial counsel's testimony.[2] Another witness, Angela Dixon, also was present at the hearing. It became obvious at the beginning of the hearing that it would first be determined whether it was necessary to conduct the requested evidentiary hearing. We examine Carpenter's motion and memorandum in support to determine whether they contain factual allegations to support the dual-pronged ineffective assistance of counsel standard.[3]

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[2] In support of his assertion, Carpenter makes reference to the point in the hearing transcript where apologies were made to trial counsel for apparent misrepresentations about counsel's performance. It would appear that trial counsel was present.

[3] The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)**.** The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***State v. Pitsch***, 124 Wis.2d 628, 636-37, 369 N.W.2d 711, 716 (1985). Under the second prong of the test, the question is whether counsel's errors were so serious that the defendant was

Carpenter's first claim of ineffective counsel was that trial counsel failed to challenge the photographic identification by the victim,[4] did not request a line-up identification, and did not object to the in-court identification. Carpenter did not assert one objective fact as to what was wrong with the photographic identification. He did not assert one objective fact on which trial counsel could have challenged the in-court identification. Indeed, the existence of such objective facts was necessary before trial counsel could have obtained an evidentiary hearing on an identification suppression motion. *See* ***State v. Garner***, No. 96-0168-CR, slip op. at 13 (Wis. Ct. App. Dec. 17, 1996, ordered published Jan. 28, 1997) ("On an identification suppression motion, however, a defendant is not entitled to an evidentiary hearing simply to search for *something* based on *nothing* but hope or pure speculation.").

Moreover, Carpenter made conclusory allegations that he was prejudiced by the unchallenged identification. A defendant must allege facts which allow the court to meaningfully assess a claim of prejudice when ineffective assistance of counsel is alleged. *See* ***Bentley,*** 201 Wis.2d at 318, 548 N.W.2d at 57. Carpenter was charged and convicted as a party to the crime. It made little difference that at the photographic identification the victim merely identified Carpenter as one of the three perpetrators and at the preliminary hearing the victim identified Carpenter as the man who hit him. Both

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deprived of a fair trial and a reliable trial outcome. *See* ***id.*** at 640-41, 369 N.W.2d at 718. An error is prejudicial if it undermines confidence in the outcome. *See* ***id.*** at 642, 369 N.W.2d at 719.

[4] Carpenter was accused as one of three men who assaulted a man who had stopped to render roadside assistance.

identifications show Carpenter involved in the assault. The so-called "leap of confidence" that Carpenter attributes to the victim's identification and which he claims prejudiced him is without a factual basis considering the victim's admission at trial that he has "a lot of difficulty remembering, except for bits and pieces[,] the incident."

Carpenter also claims that trial counsel failed to investigate "issues of importance," failed to interview potential witnesses, failed to investigate Carpenter's story, and failed to call any witnesses at trial. With the exception of Dixon, Carpenter's motion did not indicate what information would have resulted from interviewing the listed witnesses.[5] He alleged that interviewing witnesses "may have produced information to refute the State's account about the events of the night of the attack" or "may have produced information to challenge the reputation and character of the State's witnesses." Carpenter never indicated what witnesses should have been called at trial or the nature of their testimony in supporting Carpenter's story. These conclusory allegations are insufficient to raise a question of fact and do not demand an evidentiary hearing on the claim of ineffective assistance of counsel.[6] *See* ***Saunders***, 196 Wis.2d at 51-52, 538 N.W.2d at 549.

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[5] The memorandum in support of Carpenter's motion complained that trial counsel did not "interview any witnesses in preparation for trial including, but not limited to, the arresting and investigating officers, the attending physicians and staff at the hospital where the victim, Beck, was taken after the result, Angela Dixon, Robert Grigsby, Beck, the co-defendants or members of their families, or witnesses present at the defendant's house when he was arrested."

[6] The inconsistencies in the testimony which Carpenter suggests could have been explored more fully in interviews with witnesses was brought out at trial. One of the co-actors testified that he was looking under the hood of the disabled car. The victim testified

With respect to Dixon, Carpenter alleged that she would have provided information that Robert Grigsby, a principal witness for the prosecution, dislikes Carpenter. Dixon was at the postconviction motion hearing, but the trial court did not allow her testimony because no affidavit had been provided by her indicating what her testimony would have been. We note that in order to justify a ***Machner*** hearing, it is not always necessary for an affidavit to set forth the potential witness's testimony if there is sufficient specificity in the motion papers to alert the trial court to a potential factual question on which testimony may be necessary. However, the motion papers must allege sufficient facts as to both prongs of the ineffective assistance of counsel test.

Carpenter alleged that Dixon's testimony about Grigsby would have provided an explanation for Grigsby's allegedly fabricated testimony.[7] Although the personal animosity between Grigsby and Carpenter may have provided an additional motive for Grigsby to fabricate Carpenter's involvement in the assault,[8] there is no explanation as to why Grigsby would implicate Carpenter's cohorts. There was no suggestion that Dixon's testimony would have provided that information. Carpenter's motion failed to make sufficient

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that only Carpenter, the man who hit him, was outside the disabled car.

[7] Grigsby testified that Carpenter told him the story of assaulting a man who had stopped to render roadside assistance. Grigsby related that Carpenter said he had hit the man with the jack and that the other two co-actors had hit the man with their fists.

[8] On cross-examination, Grigsby admitted that the first he told anyone of Carpenter's admissions to him was when he was in jail and being questioned by a police detective. We reject Carpenter's blanket assertion that the credibility of the State's witnesses was not attacked.

factual allegations on the prejudice prong with respect to trial counsel's alleged failure to interview Dixon. This is particularly true in light of the other evidence of Carpenter's guilt.[9]

Our de novo review leads us to conclude that Carpenter did not state sufficient facts to entitle him to a ***Machner*** hearing. Since a hearing was not compelled, the trial court did not erroneously exercise its discretion in denying Carpenter's postconviction motion without a hearing.

By the Court.—Judgment and order affirmed.

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

[9] In addition to the victim's identification, one of Carpenter's co-actors testified that Carpenter hit the victim. The victim's car was found outside the home of Carpenter's girlfriend, Dixon, the victim's ring was found in Carpenter's possession, and Carpenter gave a statement placing himself at the scene of the assault.