

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2323-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BOOKER T. SHIPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Booker T. Shipp appeals from a judgment entered after a jury found him guilty of one count of first-degree intentional homicide, as party to a crime, and two counts of armed robbery, as party to a crime, contrary to §§ 940.01(1), 943.32(1)(a) & (2) and 939.05, STATS. He also appeals from an order denying his postconviction motion. Shipp claims that: (1) the trial court

erred when it failed to conduct a hearing to consider whether his “right to compulsory process” was violated, and whether trial counsel was ineffective in failing to ensure that Shipp received “compulsory process;” (2) the trial court erred in summarily denying his ineffective assistance claim relative to his trial counsel’s failure to request severance; and (3) his due process rights were violated because the State failed to provide him with all exculpatory evidence, and his trial counsel’s failure to obtain all exculpatory evidence constituted ineffective assistance of counsel. Because Shipp’s due process rights were not violated, and because Shipp’s postconviction motion was insufficient to warrant a hearing, we affirm.

I. BACKGROUND

Shipp was charged with three counts of armed robbery, as party to a crime, and one count of first-degree intentional homicide, as party to a crime. He was convicted on two counts of armed robbery and the homicide. The homicide involved the shooting of Police Officer Ronald Hedbany on October 28, 1994, as the defendant fled the scene of a bank robbery that he had committed. The other armed robbery occurred on January 28, 1995, at a liquor store.

Following his conviction, Shipp filed a postconviction motion asserting eight grounds for relief. The first seven raised errors in court rulings before and at trial and asserted that the State had failed to provide the defense with unspecified exculpatory evidence. The eighth ground for relief asserted: “Trial counsel for defendant was constitutionally deficient in his performance, at and prior to trial, and such deficient performance was prejudicial to defendant’s case, in violation of the Sixth and Fourteenth Amendment[s] to the United States Constitution, and Article I, Sections 7 and 8 of the Wisconsin Constitution.”

The trial court denied the postconviction motion without granting an evidentiary hearing. Shipp now appeals.

II. DISCUSSION

Although Shipp raised eight issues in his postconviction motion, he only makes three claims on appeal. We reject each claim *seriatim*.

A. *Compulsory Process*.

Shipp first asserts that the trial court should not have denied his “compulsory process” claim without conducting a hearing. Shipp also asserts that a hearing should have been conducted on his claim that trial counsel was ineffective for failing to ensure that he receive “compulsory process.” Although not entirely clear, this contention involves a witness that Shipp wanted to have testify on his behalf, George Groves. Groves did not testify, however, asserting his Fifth Amendment privilege. Shipp contends that the trial court should not have released Groves from testifying without ascertaining the basis for Groves’s claim that testifying would incriminate him. Shipp alleges that Groves’s testimony was needed to defend the case because LaRon Bourgeois, the other defendant implicated in these crimes, told Groves that someone named “Tony” committed the crimes, but that Bourgeois was going to frame another individual.

Shipp’s ineffective assistance claim relative to Groves is that counsel should have required the court to inquire as to Groves’s basis for asserting the privilege. Shipp argues that Groves’s testimony would not have been incriminatory and, therefore, if the trial court would have inquired as to the basis for the privilege, Groves would not have provided any reason to justify releasing him from testifying.

Standards governing a defendant's contention that the trial court should not have denied the request for a hearing on postconviction motions were set forth in *State v. Bentley*, 201 Wis.2d 303, 308-10, 548 N.W.2d 50, 52-53 (1996). A defendant is not entitled to an evidentiary hearing on a postconviction motion unless the motion alleges facts which, if proven, would entitle the defendant to relief. *See id.* at 310-11, 548 N.W.2d at 53. The trial court has the discretion to summarily deny the motion if: (1) the motion fails to allege sufficient facts to raise a question of fact; (2) the motion presents only conclusory allegations; or (3) the record conclusively demonstrates that the defendant is not entitled to relief. *See id.* at 309-10, 548 N.W.2d at 53. It is only when the motion alleges sufficient facts which, if proven, would entitle the defendant to relief that the trial court does not have any discretion and must hold an evidentiary hearing. *See id.* at 310, 548 N.W.2d at 53.

Whether the motion alleges sufficient facts is a question of law that we review independently. *See id.* However, when the motion does not raise sufficient facts, the trial court's decision is reviewed under the erroneous exercise of discretion standard. *See id.* at 310-11, 548 N.W.2d at 53.

Having reviewed Shipp's motion relative to this issue, we conclude that it does not satisfy the standard requiring a hearing. The motion fails to allege any specific details and is purely conclusory in nature. Therefore, the trial court had the discretion to deny the motion for any of the three reasons listed above. The trial court did not erroneously exercise its discretion in ruling that the record conclusively refutes Shipp's claims.

As pointed out by the trial court, even absent any specific inquiry, there was a reasonable basis to conclude that Groves had "a real and appreciable

apprehension that the information requested could be used against him in a criminal proceeding.” *Grant v. State*, 83 Wis.2d 77, 81, 264 N.W.2d 587, 590 (1978). Regardless, however, the absence of Groves’s testimony was harmless given the overwhelming evidence in the case. The trial court’s postconviction motion decision summarizes this evidence and we adopt that portion of the decision as our own.

Moreover, because we have concluded that Groves’s absence was not prejudicial, trial counsel’s failure to force the trial court to make a more specific inquiry before excusing Groves cannot constitute ineffective assistance.

B. Severance.

Shipp next claims that the trial court should have conducted a hearing on his claim that counsel was ineffective for failing to request that the charges be severed.¹

This issue is reviewed under the same rules set forth above. *See Bentley*, 201 Wis.2d at 310-11, 548 N.W.2d at 53. The motion must allege specific facts as to both the performance and prejudice prongs required to sustain an allegation of ineffective assistance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Our review again reveals that Shipp’s postconviction motion fails to allege specific facts which would entitle him to relief. There is no contention that if trial counsel had moved to sever, the motion would have been granted or that

¹ In one sentence, he also argues that the trial court should have severed the charges. He fails to provide any authority or argument on this issue, however, and therefore, we decline to address it. *See State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

separate trials would have resulted in different verdicts. Moreover, the record demonstrates that trial counsel strategically chose to try the charges together in an effort to support the defense theory. The theory involved admitting to involvement in the liquor store robbery and then arguing that Shipp was not involved in another crime charged, as demonstrated by the fact that the method of the admitted crime was entirely inconsistent with that of the subsequent robbery. Reasonable strategic decisions do not constitute deficient performance. *See State v. Vinson*, 183 Wis.2d 297, 307-08, 515 N.W.2d 314, 318-19 (Ct. App. 1994).

C. Exculpatory Evidence.

Shipp's final claim is that the State failed to provide the defense with exculpatory information, namely surveillance tapes from the day of the robbery/homicide. He also argues that trial counsel's failure to obtain the tape prior to trial constituted ineffective assistance. Shipp argues that the jury should have viewed the tape. It is undisputed that Shipp does not appear on the tape. He argues, however, that the tape may contain the "Tony" who, Shipp alleges, actually committed the armed robbery/homicide and, therefore, could have exculpated him. The trial court determined that this claim was legally insufficient because counsel was not deficient as demonstrated by the record, and because Shipp failed to show how the tape would have assisted the defense. We agree.

The record demonstrates that the jury was informed that Shipp did not appear on the tape. This specific fact was argued by the defense. Due process requires that the government "disclose[] ... evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985) (quoted source omitted). Evidence is material if there is

a reasonable probability that if the evidence had been disclosed, the result of the trial would have been different. *See id.* at 682.

Here, the fact that Shipp does not appear on the surveillance tape on the day of the robbery is favorable to the defense. However, the jury was informed of this fact. Therefore, showing the tape to the jury for this purpose would be cumulative. Moreover, Shipp's contention that "Tony" may appear on the tape is insufficient to warrant relief. This contention, alone, is pure speculation and insufficient to demonstrate materiality. Accordingly, any failure to disclose the tape in a timely manner did not violate Shipp's due process rights to a fair trial.

Further, we reject Shipp's claim that trial counsel was ineffective for failing to secure the tape prior to trial. The record demonstrates that trial counsel acknowledged that the State had disclosed all exculpatory evidence, and the fact that certain photographs were not disclosed until the trial was underway did not thwart the defense. Trial counsel argued to the jury that the tape clearly demonstrated the Shipp was not present at the time of the robbery. This argument having been aptly made to the jury rendered any failure to actually secure the tape irrelevant. The jury was presented with the exculpatory information. Shipp has failed to demonstrate any prejudice connected to trial counsel's failure to timely secure the tape and/or have the jury view it.

By the Court.—Judgment and order affirmed.

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

