**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 21, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP296** **Cir. Ct. No. 1999CF3775**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TRAVIS S. WIMPIE,**

**DEFENDANT-APPELLANT.**

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

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

¶1 PER CURIAM. Travis S. Wimpie appeals from an order summarily denying his postconviction motion alleging the ineffective assistance of counsel. The issues are whether postconviction counsel was ineffective for failing to raise trial counsel's alleged ineffectiveness regarding the trial court's instructing and

reinstructing the jury, and trial counsel's alleged failure to investigate the facts critical to Wimpie's defense theory, which precluded its presentation at trial. We conclude that our decision on direct appeal procedurally bars our (re)consideration of the jury instruction issue, and insofar as the failure to investigate issue is not procedurally barred, it is insufficiently alleged to maintain an ineffective assistance claim. Therefore, we affirm.

¶2 A jury found Wimpie guilty of armed robbery as a party to the crime, in violation of WIS. STAT. §§ 943.32(2) and 939.05 (1999-2000). The trial court imposed a twenty-year sentence. Wimpie moved for a new trial, which the trial court denied. On direct appeal, Wimpie alleged trial court error when it rejected his request for lesser-included offense instructions on "unarmed" robbery and theft, and when the trial court rejected trial counsel's request to re-argue the evidence following the trial court's modification of a jury reinstruction. This court similarly rejected Wimpie's challenges, and affirmed the judgment and postconviction order denying Wimpie's new trial motion. *See* ***State v. Wimpie***, No. 2001AP1634-CR, unpublished slip op. at 2 (WI App Feb. 19, 2002) ("***Wimpie I***").

¶3 We rejected variations of the jury instruction issue Wimpie again attempts to raise on its merits. *See* ***id***. at 2-10. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). We will not revisit our decision.

¶4 Wimpie challenged his postconviction counsel's effectiveness for failing to raise trial counsel's alleged ineffectiveness for not conducting an adequate factual investigation, which would have allegedly provided him with a

defense. Wimpie and his accomplice, Frederick Martin, robbed a Baymont Inn while two women, Eshekiah Winters, the night auditor, and Dora Holloway, a breakfast server, were working. Wimpie and Martin posed as prospective guests shortly after 5:00 in the morning.

¶5 Wimpie claims that Martin "set up this crime with [Holloway] and that this was never an [a]rmed-robbery but instead a planned robbery. [Wimpie] also told [his trial] counsel that [Holloway] was the person on the inside that set up the robbery with Martin." Wimpie claims that had trial counsel investigated his theory, he would have been able to defend the armed robbery charge (as an "unarmed robbery"). Wimpie filed correspondence from a private investigator (to predecessor trial counsel) indicating that Holloway resided at the Salvation Army Lodge for over five months, and that Martin had also resided there for a three-week period during that same time (which was four months prior to the armed robbery), and that the manager of the Salvation Army Lodge told the private investigator that "she [wa]s certain that Dora [Holloway] would have known him [Martin]." Wimpie is thus convinced that Martin planned the robbery with Holloway, who was not actually a victim but complicit in the offense.

¶6 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria.

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. 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. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts

> sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." ***Nelson***, 54 Wis. 2d at 498. *See* ***Bentley***, 201 Wis. 2d at 318-19 (quoting the same).

***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

> As an assistance to defendants and their counsel, we propose that postconviction motions sufficient to meet the ***Bentley*** standard allege the five "w's" and one "h"; that is, who, what, where, when, why, and how. A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity we describe above will necessarily include sufficient material facts for reviewing courts to meaningfully assess a defendant's claim.

***Id.***, ¶23 (footnote omitted).

¶7 To maintain an ineffective assistance claim, the defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶8 "'[A] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted). Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466

U.S. at 690-91. Specifically, "[w]e will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment." ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983).

¶9 Wimpie is not entitled to a ***Machner*** (evidentiary) hearing to determine trial counsel's effectiveness because his postconviction allegations do not meet the specificity ***Allen*** requires, nor do they allege ineffectiveness; they are conclusory allegations about defense strategy.[1] *See* ***Allen***, 274 Wis. 2d 568, ¶23. His allegations are principally conclusory, and his theory is that Holloway was complicit with Martin in facilitating the robbery because they must have known each other from when they both resided at the Salvation Army Lodge during the same three-week period approximately four months before the armed robbery.[2] Attached as a postconviction exhibit is a memorandum seemingly memorializing the substance of a telephone conversation with Wimpie's trial counsel investigating a potential ineffective assistance of trial counsel claim. According to that memorandum, trial counsel admitted that Wimpie told her that Martin "set up this incident with one of the women [Holloway]." Trial counsel then conferred with Martin's counsel because she knew that this defense theory would be of similar assistance to Martin. Martin's trial counsel "told her that he had personally

[1] An evidentiary hearing to determine trial counsel's effectiveness is known as a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[2] Wimpie's postconviction allegations are simply that Martin and Holloway must have known one another because they both resided at the Salvation Army Lodge during the same three weeks several months before the armed robbery, and the lodge manager allegedly told the private investigator that "it is a very close group staying at the lodge and that because Frederick Martin stayed there for almost one month, she [the lodge manager] is certain that Dora [Holloway] would have known him."

interviewed the two women and that they were unwavering in their positions that this was an armed robbery and that neither of them was in any way involved. [Martin's trial counsel] also told her that he found the women to be quite credible" and concluded that presenting this (complicity) defense would "not be advisable." Wimpie's trial counsel also concluded that this defense theory was not believable, nor could it "be corroborated in any meaningful way."

¶10 Furthermore, Holloway's trial testimony does not support Wimpie's complicity defense theory. At trial, Holloway recalled the incident and testified that Martin grabbed her, told her that he had a gun, and "pointed something sharply in [her] back." She further testified that "[t]he other guy kept hollering, [g]ive me purses, and stuff. He kept saying, [c]ome on, man. That's all. Mr. Wimpie kept telling him to come on because they don't got no purse, but he grabbed the other girl's purse." She concluded by testifying that she was handled rather roughly, and that she watched Wimpie "grab[]" money, microphones, video tapes, and "grabbed the [video]camera, too, and snatched it off the wall." She explained that this occurred "in [her] view, but [she] wasn't really looking. [She] was standing there shaking and scared. [She] wasn't really looking to see after they had – he let [her] go. [She] just stood there and shook and started crying."

¶11 Wimpie does not demonstrate that trial counsel was ineffective. Wimpie criticizes trial counsel for relying on the assessment of Martin's trial counsel, rather than interviewing Holloway or Winters personally, and for failing

to obtain their employment records from the Baymont Inn.[3] Her reliance on the investigation by Martin's trial counsel (whose interest in the potential complicity defense was allied with that of Wimpie) was a reasonably sound trial strategy under these circumstances, and thus, not challengeable as ineffective assistance. *See* ***Strickland***, 466 U.S. at 690-91. Although Wimpie's trial counsel was allegedly unaware that Martin and Holloway both resided at the Salvation Army Lodge at the same time, that fact does not warrant further investigation.[4] Wimpie's allegations are insufficiently specific to establish his entitlement to a ***Machner*** hearing for his trial counsel's failure to investigate the unknown (or even presumed) connection between Martin and Holloway, particularly with the (hindsight) benefit of Holloway's testimony. More significantly, that potential connection would not negate Wimpie's conviction for armed robbery against Winters as a party to the crime with Martin, who told Winters he had a gun. *See* ***Allen***, 274 Wis. 2d 568, ¶23; ***Flynn***, 190 Wis. 2d at 48. Trial counsel's assessment was reasonable and thus, unchallengeable in an ineffective assistance context. *See* ***Strickland***, 466 U.S. at 690-91.

*By the Court.*—Order affirmed.

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[3] It is unclear why Wimpie's trial counsel should have obtained the victims' employment records. Wimpie also claims that trial counsel should have interviewed Martin. Assuming that Martin's trial counsel would have allowed such an interview, Wimpie has not shown a reasonable probability that anything Martin may have told her would have changed the result. Wimpie also complains that the State amended the original, less serious theft charge to armed robbery. The record does not support an amended charge, but even if it did, such an amendment would be immaterial; Wimpie was (ultimately) charged with, tried for, and convicted of armed robbery.

[4] The lodge manager told the private investigator that Holloway had numerous seizures during her stay at the lodge, and described her as being "slow." It is plausible that Martin discovered (during his lodge stay) that, in addition to Holloway's limited intellect, she was (presumably) a third-shift employee at the Baymont Inn, rendering a third-shift robbery a potentially low risk proposition.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).