COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP48-CR **Cir. Ct. No. 2004CF4134**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMMANUEL ROVON HAMILTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Emmanuel Hamilton appeals from the judgment of conviction entered against him and the orders denying his motion for postconviction relief and supplemental motion for postconviction relief. He raises

many issues in his appeal to this court. Because we conclude that his allegations are either conclusory or waived, we affirm.

¶2 Hamilton pled guilty to two counts of armed robbery, use of force as a party to a crime, one count of armed robbery with the threat of force as a party to a crime, one count of armed robbery with the use of force, one count of first degree reckless injury while armed, and one count of first-degree reckless endangerment while armed, involving four victims in three separate incidents. Two additional counts were dismissed and read in. The court sentenced him to a total of twenty-five years of initial confinement and twenty-four years of extended supervision.

¶3 An attorney was appointed to represent Hamilton in his appeal. After appellate counsel filed a no-merit report under ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2005-06),[1] Hamilton moved this court to dismiss the appeal so that he could represent himself. We granted the motion, the no-merit appeal was dismissed, and Hamilton filed a motion for postconviction relief in the circuit court. The circuit court denied the motion. Hamilton appealed from that order, but then moved to dismiss the appeal so that he could file a supplemental motion for postconviction relief. We dismissed the appeal, Hamilton filed a supplemental motion for postconviction relief, and the circuit court denied that motion, too. The circuit court denied both motions without holding a hearing. Hamilton once again appeals.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 Hamilton raises a litany of issues in this appeal. He claims that he received ineffective assistance of trial and appellate counsel, that the circuit court erroneously exercised its discretion and subjected him to prejudicial error, that his plea was coerced, that the circuit court was involved in the plea negotiations, that he has newly discovered evidence and his trial counsel was ineffective for not finding it, that the evidence was insufficient to convict him, that the police acted improperly, and that the circuit court erred when it denied his supplemental motion for postconviction relief. "An appellate court is not a performing bear, required to dance to each and every tune played on appeal." ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147, *cert. denied*, 439 U.S. 865 (1978). To the extent we do not address some of the plethora of issues raised by the appellant, we deem them to lack sufficient merit or importance to warrant individual attention. *See* ***id.***

¶5 Hamilton first argues that he received ineffective assistance of trial counsel, and that the circuit court erred when it did not provide him with a ***Machner*** hearing on his claims.[2] We review an order of the circuit court denying a request for an evidentiary hearing using a two-part test. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996).

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.

Id. at 310 (citations omitted). If the motion does not allege sufficient facts, however, "the circuit court has the discretion to deny a postconviction motion

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

without a hearing based on one of the three factors ...." ***Id.*** at 310-11 (citing ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972)). Under the ***Nelson*** factors, a circuit court may refuse to hold an evidentiary hearing if a defendant does not allege sufficient facts in his or her motion, presents only conclusory allegations, or if the record "conclusively demonstrates that the defendant is not entitled to relief ...." ***Id.*** at 309-10 (citations omitted). We review the circuit court's determination for the erroneous exercise of discretion. ***Id.*** at 311.

¶6 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** To demonstrate prejudice, 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. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶7 Hamilton argues that his trial counsel was ineffective because he either did not read any of the "discovery material," or he gave false information to Hamilton. The circuit court denied Hamilton's first motion for postconviction relief on this ground because Hamilton failed to "provide the court with any inkling of what information counsel gave him or how the discovery materials were at odds with the information provided to him by counsel." The court concluded that Hamilton's claim was "wholly conclusory" and he was not entitled to a ***Machner*** hearing. Hamilton renewed this issue in his supplemental motion and made some additional statements. The circuit court found that the statements were

still conclusory and that the court remained "entirely in the dark" about his specific claims. We conclude that the circuit court properly found that the statements were conclusory, and that Hamilton was not entitled to a hearing.

¶8 Hamilton also argued to the postconviction court that his trial counsel failed to file pretrial motions. Again, the court found that Hamilton's claims were conclusory because he did not identify the factual or legal basis for these motions. His argument to this court is similarly conclusory. Hamilton argues that counsel should have filed a demand for discovery and should have created a record. He further says that had counsel filed such a demand, he then would have discovered the need to file a motion to dismiss or suppress evidence. Hamilton does not explain the specific legal issues or the specific facts that would support these motions. Hamilton also states that counsel should have created a record in this case, and suggests that there was some sort of conflict of interest. Hamilton has again not identified the factual basis for a conflict of interest. We agree that Hamilton is not entitled to a ***Machner*** hearing based on these conclusory allegations.

¶9 Hamilton also alleges that his trial counsel coerced him into accepting a plea by saying that the evidence against him was overwhelming, and that he would receive a lengthy sentence if he went to trial. Hamilton suggests that these statements were misleading, but does not explain why these statements were coercive. Further, the record shows that the evidence against Hamilton was overwhelming, and that his maximum prison exposure was over 200 years.

¶10 Hamilton separately argues that alleged deficiencies in the plea colloquy show that his plea was coerced. He asserts that he did not understand the consequences of the plea, he was confused about the options, and he did not

understand the role of the court. Hamilton, however, did not challenge the plea colloquy in the circuit court and, therefore, the issue is waived. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). Moreover, the record belies his assertions.

¶11 The record shows that the court conducted a very thorough plea colloquy with Hamilton. The court asked Hamilton all of the appropriate questions. The court explained to him the potential term of imprisonment for each count, as well as his total potential maximum sentence.[3] The court also explained that it was not bound by the plea agreement. Hamilton answered that he understood. On the occasions when Hamilton stated he did not understand a particular question or issue, the court carefully explained the question or issue to him. Further, Hamilton stated that his attorney had done a good job for him, and the record shows that his counsel negotiated a favorable plea agreement.

¶12 While Hamilton now argues that his counsel misled him, the statements Hamilton attributes to his counsel about the evidence against him and his potential prison exposure were not misleading, but true. Hamilton also asserts that his counsel told him he would get fifteen years in prison. The transcript of the plea hearing shows that the State said that as part of the plea agreement, it would

[3] Hamilton suggests in his Reply Brief that the court misstated the potential maximum sentence during the plea colloquy. During the plea colloquy the court said: "And if I totaled it correctly, it's a maximum of 207 years—seven and a half years." Hamilton's argument on this issue is not clear. At one point he suggests that the correct total was 207 years and not 214-1/2 years. At another point he suggests that the correct total was 214-1/2 years, and that if he had known that 214-1/2 was the potential maximum, as opposed to 207 or 207-1/2, he would not have entered his guilty plea. Hamilton does not state what he believes the correct total to be. The plea questionnaire, which Hamilton signed, states that the total maximum was 207-1/2 years. The court stated that the total amount was 207-1/2 years, not 214-1/2 years. Hamilton did not express any confusion about the length of the potential sentence during the plea colloquy, nor has he shown that the total as stated by the court was incorrect. We reject this argument.

recommend a total of thirty-nine years in prison, with twenty-years of initial confinement and nineteen years of extended supervision. Hamilton was present when this was put on the record. The record also shows that the circuit court asked Hamilton if he understood that the court was not bound by the plea agreement and could impose whatever sentence it thought was appropriate. Hamilton answered: "Yes." The record establishes that Hamilton knowingly, intelligently, and voluntarily entered his plea, and Hamilton has not alleged any facts that would support his claim that his counsel coerced him into entering his plea, or that the plea colloquy was deficient. We reject all of the claims Hamilton makes on this basis.

¶13 Hamilton also alleges that his counsel falsified his time records that he submitted to the Office of the State Public Defender. To the extent such an allegation may be true, this is an issue for the State Public Defender and does not, by itself, constitute ineffective assistance of trial counsel.

¶14 Hamilton also argues that he received ineffective assistance of appellate counsel because his counsel filed a no-merit report. First, such an allegation must be raised by a petition for a writ of *habeas corpus* under ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). More importantly, however, Hamilton has not established that he received ineffective assistance of counsel. Even if Hamilton could prove that counsel erred by filing a no-merit report, Hamilton cannot establish that he was prejudiced. The no-merit appeal was dismissed and Hamilton's right to a direct appeal was reinstated.

¶15 Hamilton next argues that the circuit court erred because it did not follow the required plea colloquy. As we have already discussed, Hamilton

waived this issue because he did not challenge the plea colloquy in the circuit court.

¶16 Hamilton also complains that the circuit court erred when it made part of his sentence consecutive. Sentencing lies within the sound discretion of the circuit court, and a strong policy exists against appellate interference with the discretion. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996). The circuit court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. ***Id.*** "The primary considerations in imposing a sentence are the gravity and nature of the offense (including the effect on the victim), the character of the defendant and public safety." ***State v. Carter***, 208 Wis. 2d 142, 156, 560 N.W.2d 256 (1997). The discretion of the sentencing judge must be exercised on a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The weight to be given the various factors is within the circuit court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). The circuit court considered the appropriate factors and imposed a sentence that was well within the maximum of more than 207 years that Hamilton faced. We reject Hamilton's claim that the circuit court abused its discretion when it sentenced him.[4]

¶17 Hamilton asserts that the circuit court erred when it labeled the allegations in his motions for postconviction relief "conclusory." He also states

[4] Hamilton also asserts that the circuit court used incorrect case citations in its order dated June 13, 2006. We fail to see any relevance whatsoever to such a claim. Further, it is not true: the citations are correct. We assume that Hamilton states that the citations are incorrect because the circuit court cited to official Wisconsin Reports (Wis. 2d) and not the Northwestern Reports (N.W.2d). Citation to either or both reporters, however, is acceptable.

that if the circuit court required more information, it could have asked for it. As we have already discussed, however, it is Hamilton's burden to establish that he is entitled to a hearing on his claims. Further, we agree with the circuit court's conclusion that these allegations were conclusory. We reject any of Hamilton's claims that suggest the circuit court erred when it denied his motion for postconviction relief and supplemental motion for postconviction relief without a hearing.

¶18 Hamilton also argues that the court became involved in the plea negotiations. Hamilton offers nothing to support his assertion that the circuit court participated in the negotiations, and there is nothing in the record that suggests this occurred. We reject this argument.

¶19 Hamilton next argues that there is newly discovered evidence. He qualifies this statement by saying that the evidence had been available to his trial counsel, but only recently became available to him. He argues that statements made by his co-defendants to the police, and on which the criminal complaint was based, contain falsehoods and inconsistencies. He also argues that the identification of him by one of the victims was invalid and hence inadmissible. Hamilton is, in essence, arguing that his trial attorney was ineffective for not challenging these statements and the identification.

¶20 Hamilton's arguments on both points are difficult to understand and not supported by pertinent legal authority. He asserts, without citation to the record, that in one of the statements, his co-defendant identified both him and another person as being the perpetrator before ultimately identifying Hamilton. He does not explain, however, why he believes this makes the statement invalid. He also quotes a statement from the police report in which one of the victims

identified him. In that quoted statement, the victim's husband was not able to identify him, but the victim was. He then states that the identification was invalid, again without explaining why. We will not decide issues that are not, or are inadequately, briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Hamilton has not supported his assertion that his trial counsel was ineffective for not challenging the statements and identification.

¶21 Hamilton next argues that the evidence did not support his conviction. Hamilton pled guilty to the crimes charged. By doing so, he waived his right to challenge the sufficiency of the evidence. *See* ***State v. Princess Cinema of Milwaukee, Inc.***, 96 Wis. 2d 646, 651, 292 N.W.2d 807 (1980).

¶22 Hamilton argues that there was police misconduct because he alleges that the statements taken from his co-defendants mirror each other, and he suggests that the statements were coerced. In his brief to this court, he states that he is raising the issue because the statements were used to support the criminal complaint. He does not make a specific legal argument based on these facts. In his supplemental motion for postconviction relief, Hamilton argued that these facts showed that the criminal complaint was not supported by evidence and consequently was invalid. The circuit court found that his allegations again were conclusory, and stated that it had reviewed the record and found nothing that would support Hamilton's claim of insufficient evidence to support the complaint. If Hamilton is renewing his argument that there was insufficient evidence to support the complaint, we agree with the circuit court's decision. If he is using these facts to support a different argument, we reject it either for not being properly briefed, or being waived because he did not raise it before the circuit court.

¶23 Hamilton's final argument is that the circuit court erred when it denied his motion and supplemental motion for postconviction relief. He argues that Judge Dugan should not have heard the postconviction motions because he was the judge who took his plea and some of the allegations in the postconviction motions involved him. He argues that Judge Dugan should have known to disqualify himself. In support of this argument, Hamilton cites to two local rules. The rules cited by Hamilton explain only the process for substitution or disqualification of a judge. Hamilton does not cite to any authority to support his argument that the judge who conducts the plea hearing and sentencing shall not also hear a motion for postconviction relief in the same case.

¶24 Hamilton also takes issue with the circuit court's characterization of many of his arguments as conclusory, and argues that the court erred when it refused to hold a hearing on these issues. We have reviewed the allegations by Hamilton and we agree with the circuit court that many of these allegations are conclusory. Hamilton must do more than merely state that a fact is true. For example, he must do more than say his co-defendants' statements were coerced. He must point to the evidence in the record that supports his argument, and then cite to the legal authority that supports his conclusion that these facts show coercion. We conclude that the circuit court did not err when it denied Hamilton's motions for postconviction relief without holding a hearing. Consequently, we affirm the judgment and orders of the circuit court.

By the Court.—Judgment and orders affirmed.

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