COURT OF APPEALS
DECISION
DATED AND FILED

November 25, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3196-CR **Cir. Ct. No. 2006CF868**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY JEAN-PAUL,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Gregory Jean-Paul appeals pro se from judgments of conviction for the manufacture or delivery of cocaine and from the order denying his motion for postconviction relief in which he contended that his trial

counsel was ineffective for failing to investigate pretrial discovery of alleged controlled drug buys. We affirm the judgments and order and hold that the remaining issues he raises for the first time on appeal are waived.

¶2 The State filed a five-count criminal complaint against Jean-Paul. Counts one, two, four and five alleged the manufacture or delivery of cocaine in varying amounts; count three alleged the manufacture or delivery of GHB, GBL, ketamine. The charges arose from a series of controlled buys through a confidential informant. After a ***Ludwig***[1] hearing, Jean-Paul rejected the State's offer to plead guilty to count four, five to fifteen grams of cocaine, and have the other four counts dismissed and read in, with no specific sentencing recommendation. A jury convicted Jean-Paul on count two, greater than one gram but less than five grams, and count five, greater than forty grams. It acquitted him of the other three charges. The court sentenced him to a withheld sentence of five years' probation on count two and to twenty-five years on count five, bifurcated as thirteen years' initial confinement followed by twelve years' extended supervision.

¶3 Acting pro se,[2] Jean-Paul filed a motion for postconviction relief, raising a single issue. He asserted that trial counsel was ineffective for failing to investigate until the second day of trial audiotapes made during the alleged controlled buys and not playing the tapes for him. Although his trial theory was entrapment, Jean-Paul contended that with an earlier examination of the tapes, the defense could have called a voice analyst as an expert witness to challenge

[1] *See* ***State v. Ludwig***, 124 Wis. 2d 600, 601, 369 N.W.2d 722 (1985).

[2] Prior to this, appointed appellate counsel filed a no-merit notice of appeal. Jean-Paul directed counsel to withdraw, rejected the no-merit appeal and indicated his desire to represent himself. On April 11, 2008, this court permitted counsel to withdraw and dismissed the appeal.

whether it was his voice on the tape. Alternatively, he argued, he might have reconsidered his decision to reject the State's plea offer. He sought either a new trial or a ***Machner***[3] hearing on the ineffectiveness claim.

¶4 At the hearing on Jean-Paul's motion,[4] the trial court observed that counsel's duty to generally share evidence with his client did not oblige him to play the tapes for Jean-Paul. In addition, Jean-Paul had testified at trial he did not commit the acts underlying count four and now claimed he may have accepted the State's offer to plead guilty to that count, of which he was acquitted. The court noted that it had "a real struggle with the proposition that you have some kind of a legal right to plead guilty to a crime that you didn't commit in order to get out of some other charge that the jury found that you did commit." Despite Jean-Paul's response that "a lot of people do that," the court denied his motion without granting an evidentiary hearing on the ineffectiveness claim.

¶5 Here on appeal, Jean-Paul argues that the trial court erroneously exercised its discretion in denying his postconviction motion without a hearing. He also asks that we review whether his counsel rendered ineffective assistance. For this court to review an ineffectiveness claim, however, a postconviction ***Machner*** hearing is required. ***State v. Curtis***, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). The lack of a ***Machner*** hearing here prevents our review of trial counsel's performance. *See* ***Curtis***, 218 Wis. 2d at 555. The only relief

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[4] The transcript of the postconviction motion hearing was filed in this court on June 29, 2009. The State already had filed its respondent's brief on June 2, 2009.

available to Jean-Paul would be for this court to remand for a ***Machner*** hearing. *See* ***Curtis***, 218 Wis. 2d at 555 n.3.

¶6 Therefore, we consider only whether the trial court improperly denied Jean-Paul's motion without a hearing. This claim implicates a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We first determine whether Jean-Paul's motion on its face alleges sufficient material facts that, if true, would entitle him to relief. *See* ***id.*** This is a question of law that we review de novo. ***Id.*** If it does, the trial court must hold an evidentiary hearing. ***Id.*** If the motion does not raise sufficient material facts 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. ***Id.*** We review a trial court's discretionary decisions under the deferential erroneous exercise of discretion standard. ***Id.***

¶7 Jean-Paul's postconviction motion alleged that trial counsel was ineffective. He therefore must prove that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if deficient performance is shown, a defendant is not entitled to relief unless prejudice also is proved. ***Id.*** That is, the defendant must demonstrate that counsel's errors "were so serious as to deprive [the defendant] of a fair trial, a trial whose result is reliable." ***Id.*** This analysis presents a mixed question of law and fact. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. We will uphold the trial court's findings of fact unless they are clearly erroneous. ***Id.*** Whether

counsel's performance was defective and prejudicial is a question of law, which we review de novo. ***Id.***

¶8 Jean-Paul's postconviction motion alleged the following prejudicial deficiencies in counsel's performance:

> On … the second day of trial … defense attorney[] inform[ed] the court that he had not examine[d] evidence i.e. (discovery/audio tapes) concerning alleged "controlled buy" … [and] that when he tried to play the tapes, his tape player broke the tape. Mr. Jean-Paul asserts that counsel … never played the audio tapes for him and his counsel was ineffective by failing to examine damaging evidence within his possession prior to the start of trial….
>
> But for counsel['s] unprofessional errors, [the] result of the proceeding would have been different … Mr. Jean-Paul['s] convictions on counts **2** and **5** could be directly attributed to counsel['s] failure to thoroughly investigate evidence readily available to him i.e. (discovery/audio tapes). Due to the ineffectiveness of counsel, Mr. Jean-Paul was unable to make an intelligent and well[-]informed decision about the plea offer … [and was led] to believe that the [S]tate didn't have as much evidence against him and by failing to properly investigate the tapes or playing the tapes for his client, counsel [misled] Mr. Jean-Paul throughout the proceedings.
>
> Mr. Jean-Paul asserts that his defense depended on his account of the recorded drug transaction [and] that if he had known the contents of the tapes [he] could have pled guilty or called [an] expert witness i.e., voice analys[t].

¶9 The allegations of deficient performance are unsupported by material facts, and at least one of the allegations is incorrect. Jean-Paul represents that counsel did not examine the tapes until March 20, 2007, the second day of trial. The March 20 trial transcript reflects, however, that counsel had listened to all of the tapes but one, which then broke as he listened to it at a recess. Jean-Paul fails to explain how the tapes could be "damaging evidence." His defense theory was entrapment, not that he was not involved with the drug transactions.

¶10 Likewise, Jean-Paul's contention that the result of the proceeding would have been different is conclusory. Claims that his convictions "could be directly attributed" to counsel's failure to investigate the tapes, that he was misled as to the strength of the State's case, and that his entrapment defense depended on the tapes are his subjective opinion, not facts. Allegations must be factually objective to warrant an evidentiary hearing. *See* ***State v. Saunders***, 196 Wis. 2d 45, 51-52, 538 N.W.2d 546, 549 (Ct. App. 1995). Nor does he explain how a voice analyst would have helped, when he himself admitted at trial to the acts underlying at least counts two and five. Furthermore, a defendant must show that he or she in fact would have accepted the plea bargain but for counsel's deficient performance. ***State v. Fritz***, 212 Wis. 2d 284, 297, 569 N.W.2d 48 (Ct. App. 1997). Jean-Paul only asserts, however, that he "could have" pled guilty as an alternative to calling an expert. Because he has not raised material facts sufficient to entitle him to the relief he seeks, the trial court did not erroneously exercise its discretion in denying his motion without a hearing.

¶11 Jean-Paul raises three issues on appeal that he did not include in his postconviction motion. He asserts that trial counsel was ineffective for failing to locate "any witness to support [his] defense," and that the trial court erroneously exercised its discretion in denying his request for new counsel and by imposing an unduly harsh or unconscionable sentence. These issues are waived. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

By the Court.—Judgments and order affirmed.

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