COURT OF APPEALS DECISION DATED AND FILED

April 21, 2010

David R. Schanker
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP734 — **Cir. Ct. No. 2000CF877**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD W. WOLFE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Ronald W. Wolfe appeals pro se from an order denying his postconviction motion that claimed his "appellate post-conviction" counsel was ineffective for failing to challenge numerous instances of trial counsel

ineffectiveness. The trial court construed Wolfe's filing as a petition for a writ of habeas corpus and denied the motion on grounds it was without authority to address a challenge to appellate counsel. As the motion expressly was brought pursuant to ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), however, we interpret Wolfe's challenge to be to postconviction counsel's conduct. We affirm, but on the alternative ground that the record conclusively demonstrates that Wolfe is not entitled to an evidentiary hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433; *see also* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973) (we may affirm on basis other than that relied upon by trial court).

¶2 Ronald Carter, an acknowledged homosexual, was found dead with twelve stab wounds to the face and neck. Wolfe had stayed with Carter off and on after Carter posted Wolfe's bail, exchanging sexual favors for money and clothing. Wolfe contended that when Carter came at him in a jealous rage, brandishing a knife, he wrestled away the knife and stabbed Carter in self-defense. The State's theory was that Wolfe intended to rob Carter.

¶3 Wolfe was convicted in May 2001 of first-degree intentional homicide and misdemeanor theft. He appealed from the judgment of conviction and the order denying his May 2002 motion for postconviction relief which, among other things, raised four claims of ineffective assistance of trial counsel. *See* ***State v. Wolfe***, 2002AP3076-CR, unpublished slip op. at ¶¶1-2 (WI App Nov. 5, 2003). We affirmed the judgment and order. ***Id.***, ¶1.

¶4 In May 2008, Wolfe filed the postconviction motion at issue here. Wolfe made various requests for discovery and document inspection, and alleged that his "appellate post-conviction counsel" was ineffective for not challenging

trial counsel's effectiveness in numerous respects different than those earlier alleged. The trial court denied Wolfe's motion as untimely, citing no new factors and presenting a petition for habeas corpus, thus depriving it of authority to grant relief. *See* ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992).

¶5 Wolfe then filed a petition for a writ of habeas corpus in this court. *See* ***State ex rel. Wolfe v. Grams***, No. 2009AP870-W, unpublished slip op. (WI App Apr. 15, 2009). We concluded his petition failed to state grounds for relief on the basis of ineffective appellate counsel. ***Id.***, pp. 3-5.

¶6 We turn now to Wolfe's appeal from the denial of his postconviction motion. To entitle a defendant to a hearing, a postconviction motion must allege sufficient material facts that, if true, would entitle him or her to relief. ***Allen***, 274 Wis. 2d 568. The motion essentially must allege "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Id.***, ¶23. Whether the motion on its face alleges sufficient material facts is a question of law that we review de novo. ***Id.***, ¶9. If the motion offers insufficient facts or 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.***

¶7 As noted, Wolfe claims his postconviction counsel was ineffective for not challenging trial counsel's effectiveness. We follow a two-part test for ineffective assistance of counsel claims. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A defendant must prove both that his or her attorney's performance was deficient and that the deficient performance was prejudicial. ***Strickland***, 466 U.S. at 687; ***Johnson***, 153 Wis. 2d at 127. To be entitled to a hearing on his postconviction

motion, therefore, Wolfe had to allege sufficient facts establishing that appellate counsel performed both deficiently and prejudicially.

¶8 Wolfe first asserts that postconviction counsel should have challenged trial counsel's failure to seek to admit into evidence a police report that would have demonstrated or led to proof of Carter's "deviant personality" and violent tendencies. The report contained statements attributed to Carter's daughter regarding his homosexual activities, including an exposure incident at an Illinois wayside and a "marriage" to another man, and regarding his alleged physical abuse of his children and ex-wife.

¶9 As the State observes, counsel's failure or decision not to introduce evidence is not ineffective if the evidence would have been inadmissible. Wolfe does not explain how the "deviant" behaviors he apparently connects to Carter's open homosexuality would have been relevant—*i.e.*, would have made more or less probable Carter's alleged aggression toward him so as to justify his own use of deadly force. *See* WIS. STAT. § 904.01 (2007-08).[1] Such "facts" shed little light on Wolfe's version of events.

¶10 These statements allegedly corroborative of Carter's "deviance" also were hearsay. Furthermore, the statements in the report attributed to Carter's daughter present an additional level of hearsay which do not fall within any other recognized exception. *See* ***State v. Gilles***, 173 Wis. 2d 101, 113-14, 496 N.W.2d 133 (Ct. App. 1992); *see also* WIS. STAT. § 908.05. The claim that Carter beat his wife and children is inadmissible because Wolfe does not show that he knew at the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

time of the killing about these prior specific instances of violence. Accordingly, he was not entitled to use evidence of them to support his self-defense claim. *See* ***State v. McClaren***, 2009 WI 69, ¶21, 318 Wis. 2d 739, 767 N.W.2d 550.

¶11 Wolfe also claims the police report would have shown Carter's state of mind toward him in the days leading up to Carter's death. The report ascribed statements to Carter's cousin that he told her a week before he was killed that he was upset with Wolfe for having sex with another man in front of him. These statements also are hearsay which fall outside recognized exceptions.

¶12 Wolfe's reply contends trial counsel should have used the police report information as a springboard to an investigation that might have yielded admissible evidence. The hope of discovery does not establish ineffective assistance. Simply put, Wolfe's motion does not sufficiently allege who, what, where, when, why and how the police report would have bolstered his claim of self-defense. Without a firm basis to admit the police report into evidence for the purposes Wolfe advocates, postconviction counsel was not ineffective for failing to argue that trial counsel was ineffective for not seeking its admission.

¶13 Wolfe next asserts that counsel ineffectively failed to challenge evidence supporting the State's theory that Wolfe planned to rob Carter. For example, police officer Eric Levenhagen testified that jail inmate Herschel Knighton gave police a statement to the effect that, while in jail with Wolfe and Kris Borchardt, he overheard Borchardt tell Wolfe that Carter had a lot of money around his house, that Carter might bail Wolfe out of jail and that he overheard them plotting to rob Carter's house.

¶14 Wolfe argues that Knighton's statement about how long his, Wolfe's and Borchardt's confinements overlapped was false and that a challenge to it

would have showed that Knighton could not have overheard Wolfe and Borchardt making plans to rob Carter. Wolfe claims the error was compounded by allowing the statement to come in through Officer Levenhagen, giving it greater credibility.

¶15 The record is clear that the three shared the same cellblock for at least one week. In addition, Knighton testified at trial. The jury heard that he acknowledged giving a statement but denied being able to recall what he said in it and, as Wolfe himself observes, that Knighton testified reluctantly. It was for the jury to decide whether it believed that Knighton, according to the police statement, overheard a plot or, according to his trial testimony, could not recall saying that. Inconsistencies in, and the motives for, a witness' testimony are for the jury to consider in determining credibility. ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978).

¶16 Furthermore, we already have decided the Knighton issue adversely to Wolfe in his petition for a writ of habeas corpus. We concluded that Wolfe failed to demonstrate a reasonable probability that he would have prevailed on appeal had counsel raised the issue. *See* ***State ex rel. Wolfe***, No. 2009AP870-W, unpublished slip op., pp. 6-7. That decision is law of the case. *See* ***State v. Moeck***, 2005 WI 57, ¶18, 280 Wis. 2d 277, 695 N.W.2d 783.

¶17 In the same vein, Wolfe also claims that counsel ineffectively failed to object to the testimony of Faye Shelton, who testified that Wolfe took three diamond rings and a checkbook from Carter's body after stabbing him. Shelton, a friend of Wolfe's, testified that Wolfe showed up at her house acting "very nervous," and in possession of the checkbook and rings. He told her Carter had pulled a knife on him when he told Carter he had a girlfriend, that they "tussled," and that he got hold of the knife and stabbed Carter twice in the neck.

¶18 Wolfe also claims that counsel's failure to object to Shelton's testimony gave credence to other testimony that he and Borchardt planned to rob Carter, thereby undermining Borchardt's value as a defense witness.[2] As with the Knighton matter, we decided the Shelton issue against Wolfe when we denied his petition. *See* ***State ex rel. Wolfe***, No. 2009AP870-W, unpublished slip op., pp. 5-6 (referring to evidence regarding theft of rings from Carter's body). Thus, it, too, is law of the case.

¶19 Lastly, Wolfe complains of error in regard to the testimony of Joseph Jones, another inmate. Jones testified that he heard Wolfe tell Borchardt Wolfe was going to get Carter to bail him out of jail; that when he encountered Wolfe in jail again after Carter's death, Wolfe told him Carter had been paying him for sexual favors; that Wolfe said he had asked Carter for a ride to his girlfriend's house and Carter came at him with a knife saying, "If I can't have you, no one can"; and that, fearing for his life, Wolfe wrestled the knife away and stabbed Carter twice in the neck. Wolfe contends he was prohibited at trial from gaining access to Jones' cellblock assignment records which, when Wolfe later obtained them on his own, show Jones was not assigned to the same cellblock as Wolfe and Borchardt, thus proving Jones' testimony false.

¶20 Wolfe has not established that the testimony was false. He offered nothing to show that inmates housed in different cellblocks are never in proximity to each other such that Jones could not have overheard the conversation. Even assuming it was false, however, Wolfe has not established prejudice. Jones

[2] Borchardt testified that he, too, had stayed with Carter briefly and that Carter once had threatened him with a knife when he rebuffed Carter's sexual demands.

claimed he overheard Wolfe say he was going to get Carter to bail him out of jail. Wolfe himself acknowledged both saying this and that Carter bailed him out. The remainder of Jones' testimony supported Wolfe's version of the events. Without a showing of prejudice, postconviction or trial counsel's failure to challenge Jones' testimony could not have constituted ineffective assistance. Accordingly, Wolfe was not entitled to an evidentiary hearing.

By the Court.—Order affirmed.

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