COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2962 **Cir. Ct. No. 2006CM2253**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM M. O'DONNELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] William O'Donnell appeals from a circuit court order denying his postconviction motion without a hearing. O'Donnell was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

convicted upon his plea of no contest to misdemeanor battery as an act of domestic abuse, contrary to WIS. STAT. §§ 940.19(1) and 968.075(1). In his postconviction motion, O'Donnell requested dismissal of the charge or plea withdrawal on the ground that the State failed to disclose exculpatory evidence. We conclude the circuit court properly denied O'Donnell's motion. We affirm.

BACKGROUND

¶2 The events underlying O'Donnell's conviction for battery are set forth in the criminal complaint filed December 1, 2006. On November 26, 2006, Roxanne Kaye and William O'Donnell were traveling through Pleasant Prairie, Wisconsin, when O'Donnell allegedly battered Kaye and engaged in disorderly conduct. Kaye reported that while returning from a function in Mundelein, Illinois, O'Donnell "horrifically battered and repeatedly threatened to kill [her] for about 50 minutes while intoxicated." According to Kaye, O'Donnell was "screaming [she] was 'going to die tonight' and he was 'going to kill [her] tonight.'" Kaye recorded "the last ten minutes" on a concealed recording device, and also dialed 911 from her cell phone. While she could not speak to the operator, she was "hoping the police could locate [her] through its GPS and rescue [her]."

¶3 Upon arriving home, Kaye ran to her own car and left. She proceeded to meet Deputy Hasselbrink of the Kenosha sheriff's department who had been dispatched to a nearby Marathon gas station. Hasselbrink reported that Kaye repeatedly told him, "I can't talk to you. I can't tell you what happened or he'll kill me." Based on Hasselbrink's encounter with Kaye, O'Donnell was charged with misdemeanor battery and disorderly conduct, both as acts of domestic abuse.

¶4 On February 7, 2007, O'Donnell's attorney, Terry Constant, contacted the Kenosha County District Attorney's Office suggesting the case be dismissed because the conduct occurred in Illinois, not Wisconsin. Accompanying his correspondence was an affidavit by Kaye, stating that "virtually everything has been blown completely and unnecessarily out of proportion." She also stated that what had occurred was "simply extremely strange, weird, bizarre behavior" and that she "feared what '*could*' have happened but, ultimately did not." Furthermore, she claimed the "[c]onflict occurred in Illinois" and all that had happened was O'Donnell had "repeatedly, weirdly, 'scratched [her] in the head.'" She wished to "save the District Attorney's office a lot of further time and effort" and hoped the charges would be dismissed. The Kenosha County District Attorney's Office chose to proceed with the charges despite Kaye's recantation. On June 20, 2007, Kaye contacted the court, referred to herself as the "supposed victim," and requested resolution of the matter or, at the least, a lifting of the "strict no-contact order."

¶5 A jury trial was ultimately set for September 10, 2007. O'Donnell sought to have the trial adjourned on the basis of a letter sent on February 21, 2007, from Assistant District Attorney Dooley to Kaye, stating that he had advised the Internet technicians for the district attorney's office "to reject and immediately delete any further emails you send to designated members of this office so that we have no duty to provide them as discovery to the defense." O'Donnell wished to be given time to find out if Dooley "ever sent them that request" or "if they actually ever carried out that request." He claimed there was a potential issue under ***Brady v. Maryland***, 373 U.S. 83 (1963), regarding the withholding of

potentially exculpatory evidence.[2] The circuit court, however, felt that O'Donnell already had the recanting affidavit from Kaye that offered "a detailed outline of her position concerning the incident that evening." Therefore, the court found nothing to indicate a "***Brady*** violation that would require this court to delay this trial."

¶6 After the denial of an adjournment, the court took a brief recess to prepare the seats for the jury. Upon resuming, O'Donnell notified the court of his decision to plead guilty to battery with the disorderly conduct charge being dismissed. During the plea colloquy, the court and the defense engaged in the following exchange:

> The Court: Are you satisfied with your attorney's representation?
>
> [O'Donnell]: Yes.
>
> ….
>
> The Court: Will you stipulate that the Criminal Complaint contains an ample factual basis to warrant my accepting the plea?
>
> [Defense Counsel]: Your Honor, the only thing that I would disagree with in the Criminal Complaint is the reference in the Criminal Complaint that Mr. O'Donnell repeatedly struck the victim…. [B]ut there is other ample information in the Complaint to support the battery conviction.
>
> The Court: All right. The Court will accept that. And, Mr. O'Donnell, you heard what your lawyer has told me. Is there anything you wish to disagree with or ask questions about?

[2] In ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor."

[O'Donnell]: No, sir.

The court accepted O'Donnell's plea and proceeded directly to sentencing.

¶7 On January 30, 2008, O'Donnell's postconviction counsel filed a motion to compel discovery, specifically requesting all written and email correspondence from Kaye to the district attorney's office. The motion was premised on Dooley's February 7, 2007 letter to Kaye, which had been the basis of O'Donnell's request to adjourn the trial on ***Brady*** grounds, prior to his plea entry. While examining O'Donnell's file at the district attorney's office in May 2008, O'Donnell's postconviction counsel discovered a December 6, 2006 email sent by Kaye to Assistant District Attorney Jennifer Pierce. Kaye states in the email that "much of the information in the Complaint is inaccurate and outright wrong." In an affidavit signed and dated July 2, 2008, and filed on October 3, 2008, Kaye explains the intent of that email and also the circumstances surrounding her earlier affidavit in which she recanted the allegations set forth in the criminal complaint. Kaye averred that the recanting affidavit was the product of coercion and intimidation by O'Donnell and his attorney at that time. Kaye also averred that she did not at any time send a recanting email to anyone at the district attorney's office and, in any event, all of the emails sent by her to the district attorney's office had been sent from her work computer and had been turned over to the defense in October 2007 by her employer during discovery.

¶8 On September 9, 2009, O'Donnell gave his Notice of Motion for a New Trial[3] based on his discovery of Kaye's December 2006 email. O'Donnell

[3] While O'Donnell's motion is entitled Motion for New Trial, it is actually a motion for plea withdrawal.

contends he was unaware of this particular email prior to his September 10, 2007 plea. O'Donnell alleged in his motion that had he "known of the existence of the [December 6, 2006] email, he would not have changed his plea and he would have continued to trial despite the court denying counsel's request for an adjournment." The circuit court denied the motion without a hearing, finding that O'Donnell had "set forth facts regarding these alleged errors, that are conclusory in nature." O'Donnell appeals.

DISCUSSION

¶9 O'Donnell contends that the circuit court erroneously exercised its discretion in denying his postconviction motion without a hearing. He asserts that the failure of the State to disclose the email is a ***Brady*** violation. Alternatively, he argues that his counsel was ineffective for failing to adequately examine the State's file. O'Donnell claims that the email, in which Kaye states that "much of the information in the Complaint is inaccurate and outright wrong," demonstrates that Kaye challenged the accuracy of the allegations early on—long before O'Donnell or his defense counsel allegedly coerced her into requesting dismissal of the charges. O'Donnell claims that the email could have been used to attack Kaye's credibility, thereby aiding him in his defense by showing that Kaye's latest affidavit (favorable to the State) was contrary to her earlier affidavit (favorable to the defense) and December 6 email to Pierce.

¶10 A circuit court, in its discretion, may deny a postconviction motion without holding a hearing if the defendant fails to allege sufficient facts in his or her motion to raise a question of fact or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). In

addition, when a defendant seeks to withdraw a guilty plea on the ground that the prosecutor withheld exculpatory evidence, he or she must demonstrate that (1) exculpatory material in the possession of the prosecutor was withheld, (2) this constitutional violation caused him or her to plead guilty, and (3) he or she was unaware of the potential constitutional challenge at the time he or she entered the guilty plea. *See* ***State v. Sturgeon***, 231 Wis. 2d 487, 496, 605 N.W.2d 589 (Ct. App. 1999). Thus, "the relevant inquiry is whether there is a reasonable probability that, but for the failure to disclose, the defendant would have refused to plead and would have insisted on going to trial." ***Id.*** at 503-04.

¶11 Here, O'Donnell asserts two facts that he believes are sufficient and material and entitle him to relief: (1) his counsel failed to find the email in the State's file thus depriving him of due process and (2) the State failed to disclose the email, creating a ***Brady*** violation. Both of these assertions are premised on the email being exculpatory; however, the email is, at best, ambiguous. Moreover, as the circuit court noted prior to O'Donnell's plea entry, it was O'Donnell who submitted Kaye's original affidavit contradicting the criminal complaint and detailing a version of events favorable to his defense. Thus, even if one could attribute any exculpatory innuendo to the December 6 email, at the time of his plea, O'Donnell possessed knowledge of Kaye's initial concerns regarding the allegations in the criminal complaint. Further, O'Donnell's postconviction motion fails to set forth with any specificity why his lack of knowledge as to the existence of this ambiguous email caused him to enter a plea, especially when he was aware of the potential existence of email evidence *prior* to his plea entry.

¶12 While O'Donnell complains that he was not afforded a hearing on his postconviction motion, the circuit court was aware of, and expressly addressed, the alleged ***Brady*** violation prior to O'Donnell's plea colloquy. The court found

that even if there existed undisclosed email correspondence from Kaye to the district attorney's office, it would add nothing new in light of Kaye's recanting affidavit which already contradicted the information in the criminal complaint in detail. At the time of O'Donnell's postconviction motion for plea withdrawal, the only new information provided was the actual content of the email which fails to shed any light on Kaye's specific challenges to the information in the criminal complaint.[4]

¶13 Finally, we reject O'Donnell's argument that the email "was important to the defense because it would have discredited the testimony of Ms. Kaye." O'Donnell argues that since Kaye stated that her first affidavit, favorable to the defense, was a result of "extreme coercion and intimidation," the email provides him with an opportunity to discount her credibility because she had written the email prior to the alleged coercion. However, at the time of O'Donnell's plea, Kaye had not yet alleged that she recanted as a result of coercion. That affidavit, signed in July 2008 and filed in October 2008, came long after O'Donnell's September 10, 2007 plea. Thus, at the time of O'Donnell's plea, the December 2006 email was simply cumulative to the information he already possessed in the form of Kaye's recanting affidavit. Further, O'Donnell conceded to the factual basis in the complaint during his plea colloquy, save for the allegation that he struck Kaye "repeatedly." We uphold the circuit court's determination that O'Donnell's postconviction motion failed to demonstrate that he is entitled to the relief requested.

[4] We note that Judge Wilk presided over the entirety of O'Donnell's case from the December 2006 filing of the complaint through the October 2009 denial of postconviction relief. Thus, the circuit court had a full appreciation of the sequence of events and significance of evidence in light of the proceedings as a whole.

CONCLUSION

¶14 Under these circumstances, we conclude that O'Donnell failed to establish that he was entitled to either a hearing or postconviction relief. Nothing in his motion provided a basis to conclude that exculpatory material was withheld or that the withholding of Kaye's December 2006 email caused him to plead guilty.[5] We therefore affirm the circuit court's order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] Based on our conclusion that the December 2006 email was not exculpatory, we need not address O'Donnell's claim that he received ineffective assistance of trial counsel.