COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP1598-CR **Cir. Ct. No. 2003CF216**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM THOMAS HUDSON, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. William Hudson appeals from a judgment convicting him of conspiracy to commit first-degree intentional homicide and conspiracy to commit arson. He also appeals from an order denying his motion for postconviction relief without an evidentiary hearing. Hudson contends that his

convictions were the product of outrageous governmental conduct and that he was denied effective assistance of counsel because his trial attorney failed to seek suppression of statements he made to police, which were the product of outrageous governmental conduct, and failed to request a jury instruction on outrageous governmental conduct. He argues that his postconviction motion contained sufficient facts that, if true, entitle him to relief and that the circuit court thus erred in denying his motion without holding a ***Machner***[1] hearing. He also argues that he is entitled to the reversal of his convictions in the interest of justice based on his claim that his convictions were the product of outrageous governmental conduct. We affirm.

BACKGROUND

¶2 In 2002, Hudson was incarcerated at the Wisconsin Secure Program Facility (WSPF) in Boscobel. Scott Seal, another inmate, was housed in the cell adjoining Hudson's. At the behest of law enforcement officers, including Thomas Fassbender, an agent with the Wisconsin Department of Justice, Seal began to gather information on Hudson and another inmate. After Seal agreed to act as an informant, Seal and Hudson discussed the possibility of Hudson killing certain individuals and committing arson in exchange for money from Seal.

¶3 While discussions were still taking place between Hudson and Seal regarding those proposed illegal acts, Hudson was transferred from the WSPF to the Columbia Correctional Institute in Portage and Seal was transferred to a prison in Racine. It was later arranged for Fassbender to call Hudson from Racine and

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

pretend to be an attorney named Dave Michaels, who was able to facilitate conversations between Hudson and Seal while those men were incarcerated. During one of those conversations, Seal and Hudson agreed that, in exchange for payment from Seal, Hudson would murder one individual and burn down the house of another individual.[2]

¶4 Hudson was released from prison on parole in July 2003. Hudson's parole agent gave Hudson a note with the name "Attorney Dave Michaels" on it, a telephone number, and a date and time that Hudson could call. Hudson called the number on July 17, 2003, and spoke with Fassbender, whom he believed to be Attorney Michaels. They discussed plans for Hudson to meet an agent posing as another member of the conspiracy in order to obtain money and information to carry out the murders and arson. Hudson also told "Attorney Michaels" about his parole conditions, including house confinement and electronic monitoring. Fassbender, posing as Attorney Michaels, expressed sympathy and asked Hudson whether he had asked his parole officer about the restrictions.

¶5 During that conversation, Fassbender and Hudson discussed a plan for Hudson to meet a friend of Seal's, who would provide Hudson with the money and information from Seal about the targets and their locations. Hudson asked "Attorney Michaels" some questions about Seal's legal situation and about a friend's civil suit. Fassbender encouraged the discussion and stated only: "I'll see what I can do and pass it along" to an imaginary legal associate.

[2] Hudson and Seal also discussed the possibility of Hudson killing another individual for Seal. Hudson was charged with conspiracy to kill that person; however, he was not convicted of that offense.

¶6 Hudson was convicted of one count of conspiracy to commit first-degree intentional homicide and one count of conspiracy to commit arson. Hudson sought postconviction relief, arguing the case should be dismissed because his convictions were the result of outrageous governmental conduct. The circuit court denied Hudson's motion without an evidentiary hearing. Hudson appeals.

DISCUSSION

¶7 Hudson contends the circuit court erred in denying his motion for postconviction relief without an evidentiary hearing. A defendant is not entitled to an evidentiary hearing on a postconviction motion as of right. To obtain an evidentiary hearing, the defendant must allege sufficient facts in the postconviction motion that, if true, would entitle the defendant to relief. ***State v. Thornton***, 2002 WI App 294, ¶27, 259 Wis. 2d 157, 656 N.W.2d 45. If the record conclusively demonstrates that the defendant is not entitled to relief, no hearing need be held. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Hudson argues that his postconviction motion contained sufficient facts that, if true, established that his convictions were the product of outrageous governmental conduct and ineffective assistance of counsel based on his trial counsel's failure to seek suppression of statements obtained as a result of the government's outrageous conduct and failure to seek a jury instruction on outrageous governmental conduct.

¶8 We review the sufficiency of the defendant's allegations in a postconviction relief *de novo*, based on the four corners of the motion. ***State v. Allen***, 2004 WI 106, ¶¶9, 27, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the facts alleged in Hudson's motion constitute outrageous governmental conduct requires us to apply a legal standard to a fact situation, which raises an issue of

law that we review de novo. *See* ***State v. Givens***, 217 Wis. 2d 180, 188, 580 N.W.2d 340 (Ct. App. 1998).

¶9 "The concept of outrageous governmental conduct originates from the Due Process Clause of the Fifth Amendment." ***Id.*** Outrageous governmental conduct may arise where the government's conduct is so enmeshed in the criminal activity that prosecution of the defendant would be repugnant to the American criminal justice system. ***State v. Steadman***, 152 Wis. 2d 293, 301, 448 N.W.2d 267 (Ct. App. 1989). To successfully assert the defense of outrageous governmental conduct, "the defendant must show that 'the prosecution … violate[s] fundamental fairness [and is] shocking to the universal sense of justice [] mandated by [due process].'" ***State v. Albrecht***, 184 Wis. 2d 287, 297, 516 N.W.2d 776 (citation omitted). Hudson is entitled to a hearing only if he asserts sufficient facts to demonstrate that the conduct violated a specific constitutional right. *See* ***Steadman***, 152 Wis. 2d at 302.

¶10 Hudson asserts that the government's conduct in this case, an undercover agent impersonating a lawyer, violated two specific constitutional rights: (1) his right against self-incrimination, and (2) his "right to consult in private with counsel."

¶11 Hudson's assertion that his right against self-incrimination was violated is conclusory and not supported by further argument. We therefore do not consider that argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-67, 492 N.W.2d 633 (Ct. App. 1992) (we will not decide issues that are inadequately briefed). The resolution of the question of whether Hudson alleged sufficient facts establishing that the government engaged in outrageous conduct, therefore, turns on whether or

not Hudson's right to counsel was violated by virtue of Agent Fassbender's impersonation of an attorney.

¶12 Hudson claims that, although he was not represented in court by the faux lawyer Fassbender/Michaels, he nonetheless consulted with "Attorney Michaels" about legal matters. Hudson does not detail in the argument section of his brief what consultation he is referring to, and therefore does not appear to present a developed argument on this issue. However, we infer from the fact section of the brief that he is referring to two specific conversations he had with "Attorney Michaels."

¶13 Hudson asserts in his brief that, in the first conversation with "Attorney Michaels," he discussed the conditions of his then probation. This conversation is not in the appellate record and therefore, we do not consider it as support for Hudson's motion.[3] Hudson argues that the faux attorney asked questions and expressed sympathy, however, he does not assert that "Attorney Michaels" offered him any legal advice. The closest thing to legal advice that he claims "Attorney Michaels" offered was: "You got an attorney you can ask about that?" Even if this conversation were in the record, we would conclude that asking someone whether they have an attorney to talk to about the topic certainly does not constitute legal advice.

[3] In his brief, Hudson references Exhibit 41 for the transcript of this conversation, but the trial exhibits are not included in the record on appeal. Likewise, the State in its responsive brief includes the transcript of this conversation as part of a brief it filed in the circuit court on the postconviction motion. That brief likewise is not part of the record on appeal. It is the parties' responsibility to have any part of the circuit court record upon which they intend to rely included in the record on appeal. Anything not included in the appellate record will not be considered. ***State Bank of Hartford v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986) (the burden is on the appellant to provide an appellate record sufficient for us to review this issue).

¶14 In the second conversation, Hudson asked "Attorney Michaels" about a civil suit that involved a friend of his, but that did not involve Hudson. It can be inferred from the transcript of that conversation that Hudson believed at the time that "Michaels" was a lawyer. However, it appears clear that Hudson believed that "Michaels" did not do civil legal work. As a result, not only did "Michaels" not offer any advice, but Hudson did not seem to expect any. In the end, all "Michaels" did was to say that he would "pass it along" to someone. Moreover, the civil suit alluded to in the second conversation did not even involve Hudson himself.

¶15 As Hudson acknowledges in his brief, in investigating crime, the police are generally permitted to use tricks, misrepresentations, and deception to obtain evidence. In ***Albrecht***, we noted that, while courts have recognized the outrageous governmental conduct defense, it has not often been successful, absent extreme circumstances. ***Albrecht***, 184 Wis. 2d at 299. In ***Albrecht***, we considered the application of the outrageous governmental conduct doctrine in a case in which an undercover police officer pretended to recruit Albrecht into the criminal organization that the officer pretended to head, eliciting incriminating statements from Albrecht about a prior crime in the process. The supreme court concluded that tactics used by the police, while deceitful, were not outrageous, but instead were "within the bounds of acceptable police practice." ***Id***. at 300.

¶16 The police tactics that produced the evidence used against Hudson are very similar to those used in ***Albrecht***. That is, while Agent Fassbender posed as an attorney, he used that role only to act as a coconspirator to obtain evidence of Hudson's willingness to commit murder, and did not use that role to violate Hudson's constitutional rights. While the persona that was utilized was that of a lawyer, no compromise of Hudson's right to counsel took place, as no illusion of

representation of Hudson was created. Throughout, "Michaels" was just a go-between, a coconspirator, just as in ***Albrecht***. *See* ***id.***

¶17 We cannot pretend not to be disturbed by the use of a lawyer as the persona in this conspiracy. Because there is a constitutional right to counsel and confidentiality is an inherent part of that right, we have examined the record on appeal very closely to determine that no reasonable expectation of representation was created. We find none. The conversations that Hudson relies on reveal only that Fassbender adopted the "Attorney Michaels" persona to enhance his credibility, not to utilize the persona to do anything that had an impact on Hudson's constitutional right to counsel. Hudson has pointed us to nothing in the record to the contrary.[4]

¶18 We therefore conclude that this sting operation, while utilizing deception, did no more than give Hudson the opportunity to commit crimes and was not outrageous governmental conduct. Having concluded that the claim of outrageous governmental conduct is not established through the allegations in the motion, even assuming that every assertion in Hudson's motion is true, we affirm the circuit court's conclusion that no hearing was required. *See* ***Allen***, 274 Wis. 2d 568, ¶¶9, 36.

¶19 Because we conclude that Hudson has failed to set forth sufficient facts, that if true, established outrageous governmental conduct in this case, we

[4] Hudson points us to ***State v. Athan***, 158 P.3d 27, 45-46 (Wash. 2007), which notes that the officers who impersonated lawyers in that case "walked perilously close to the line of permissible police ruses." We agree, but we conclude that in this case the police did not cross that line.

conclude that he has likewise failed to set forth sufficient facts establishing ineffective assistance of counsel.

¶20 To prevail on his ineffective assistance of counsel claim, Hudson must have alleged sufficient facts to establish that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). *See also* ***State v. Taylor***, 2004 WI App 81, ¶13, 272 Wis. 2d 642, 679 N.W.2d 893. "To prove deficient performance, the defendant must identify specific acts or omissions of counsel that fall 'outside the wide range of professionally competent assistance.'" ***Taylor***, 272 Wis. 2d 642, ¶13 (citation omitted). To prove prejudice, the defendant must show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). If this court concludes that the defendant has failed to prove one prong, we need not address the other. ***Strickland***, 466 U.S. at 697.

¶21 Hudson himself recognizes in his brief that counsel cannot be ineffective for failing to assert a position that is futile. *See* ***Quinn v. State***, 53 Wis. 2d 821, 827, 193 N.W.2d 665 (1972) (counsel not ineffective for failing to raise motions, when to do so "would have been an exercise in futility.") Hudson's claim of ineffective assistance of counsel was premised on his claim that his convictions were the product of outrageous governmental conduct. Because he has not established that the government's conduct in this case was outrageous, he therefore cannot satisfy the first prong of the ***Strickland*** standard. Counsel cannot be ineffective for failing to bring motions based upon outrageous governmental conduct if there was no outrageous governmental conduct. *See* ***Taylor***, 272 Wis. 2d 642, ¶13.

¶22 Hudson also asks this court to reverse his convictions in our discretion based on the government's conduct in this case. Hudson has given us no reason to do so other than his assertion of outrageous governmental conduct, and we have decided that there was no outrageous conduct. We therefore do not further address this issue. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not address other issues raised).

CONCLUSION

¶23 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶24 BLANCHARD, J. (*concurring*). I respectfully concur with most of the majority's analysis and would affirm the circuit court on essentially the same grounds. I write separately regarding ¶17 of the majority opinion.

¶25 I would not include this sentence in that paragraph: "We cannot pretend not to be disturbed by the use of a lawyer as the persona in this conspiracy." I agree with the majority to the extent that this sentence represents a caution that there is a real danger, in virtually any investigation in which an agent of the government tells others falsely that he or she is an attorney, that potentially disturbing events *may* occur, including events that undermine genuine attorney-client relationships and violate constitutional provisions. The majority passingly cites, in Footnote 4, the extreme example of a Washington case in which investigating officers created a fictitious law firm and a fictitious class action lawsuit, held themselves out as counsel in a lawsuit, and solicited the defendant as a "client" in order to obtain his DNA. ***State v. Athan***, 158 P.3d 27, 45-46 (Wash. 2007) (Alexander, C.J., concurring). This was the factual context in which the State of Washington conceded police came "perilously close to the line of permissible police ruses." However, in my view, neither Hudson nor the majority has identified a feature of police conduct here that this court has a basis to label as "disturbing."