COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1275-CR **Cir. Ct. No. 2015CF2285**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LONELL ECHOLS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Lonell Echols, *pro se*, appeals the circuit court's order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06

(2015-16).[1] Echols argues that he should be allowed to withdraw his guilty plea because he received constitutionally ineffective assistance from his trial counsel.[2] We affirm.

¶2 Echols pled guilty to one count of first-degree recklessly endangering safety and one count of possession of a firearm by a felon. After his conviction, appellate counsel was appointed to represent Echols, but did not pursue postconviction or appellate relief on his behalf because he asked her to "drop the case" and send him his file. Several months later, Echols filed a *pro se* postconviction motion, arguing that he should be allowed to withdraw his plea because he received ineffective assistance of trial counsel. The circuit court denied the motion without a hearing. Echols moved for reconsideration. The circuit court denied the motion.

¶3 To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors,

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] As a general rule, a person who pleads guilty waives the right to challenge his or her conviction, including claimed violations of constitutional rights. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. One exception to this rule is where, as here, a defendant contends that he or she received ineffective assistance of trial counsel. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

the result of the proceeding would have been different.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel if the defendant fails to establish either prong of this test. ***Strickland***, 466 U.S. at 697.

¶4 Echols first argues that his trial counsel ineffectively represented him by failing to request a speedy trial on his behalf. *See* WIS. STAT. § 971.10. Echols was in custody on a parole revocation prior to trial. The remedy for a statutory speedy trial violation is release from custody pending trial. *See* WIS. STAT. § 971.10(4). Because Echols was being held based on a pending parole revocation, however, he would not have been released. Therefore, Echols cannot show that he meets either prong of the ***Strickland*** test.

¶5 Echols next argues that his trial counsel ineffectively represented him by failing to move to suppress his identification in a photo array. Identification evidence will be suppressed if it stems from a procedure that is "'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" ***State v. Benton***, 2001 WI App 81, ¶5, 243 Wis. 2d 54, 625 N.W.2d 923. Minor differences in height or weight do not make a photo array impermissibly suggestive. *See* ***id.***, ¶10. The photocopies of pictures that Echols attached to his motion do not support his bare-bones allegation that the photo array was impermissibly suggestive. Because Echols has not shown that the circuit court would have granted a motion to suppress if his trial counsel had brought one, his claim that he received ineffective assistance of counsel is unavailing. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) ("trial counsel was not ineffective for failing or refusing to pursue feckless arguments").

¶6 Echols next argues that his trial counsel ineffectively represented him by advising him to plead guilty to the charges. Echols contends that his counsel told the circuit court that Echols could have raised a viable claim of self-defense and could have argued that he had been misidentified.[3]

¶7 Echols reads his trial counsel's sentencing comments to the circuit court too broadly. Trial counsel argued that Echols had accepted responsibility for his actions and had chosen not to pursue a self-defense claim or a claim that he had been improperly identified. Trial counsel was not arguing that Echols would have been *successful* at trial; trial counsel was arguing that Echols should be given credit for his positive conduct. Moreover, trial counsel's advice to plead guilty was reasonable given the evidence: the State had three individual witnesses who identified Echols as the shooter, and Echols admitted that he had handled two of the guns involved in the shooting after initially denying that he had anything to do with the guns. Trial counsel did not perform deficiently by advising Echols to plead guilty.

By the Court.—Order affirmed.

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

[3] The comments to which Echols refers were made during the sentencing portion of a joint plea/sentencing hearing, not during a separate plea hearing before the sentencing hearing as Echols appears to suggest.