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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2009AP1362-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS K. UHDE,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING UHDE
POSTCONVICTION RELIEF ENTERED IN THE
ADAMS COUNTY CIRCUIT COURT, THE
HONORABLE CHARLES A. POLLEX, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND
PUBLICATION

The State requests neither oral argument nor
publication.

ARGUMENT

I. THE STATE ASKS THIS COURT TO REMAND UHDE'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FOR AN EVIDENTIARY HEARING.

A. Relevant Facts

On February 16, 2009, Uhde, acting *pro se*, filed an initial motion for postconviction relief on direct appeal (74). The motion included claims involving ineffective assistance of counsel, prosecutorial misconduct, sufficiency of the evidence, and jury instructions. The State responded to Uhde's motion, asking the circuit court to deny the motion without holding an evidentiary hearing, arguing the allegations were "conclusory" and "without a factual basis" (75). Uhde filed a supplemental motion on March 30, 2009 (76).

The circuit court denied Uhde's motion in all respects except two. The court ordered an evidentiary hearing on Uhde's claims of ineffective assistance of counsel and his claim that trial counsel refused to turn over Uhde's case file to Uhde. The court denied the remaining claims because the motion contained only conclusory allegations and did not provide a "sufficiently specific basis for conducting an evidentiary hearing" (77:2).

The court held a scheduling conference. Uhde appeared at the conference *pro se* and by telephone. Trial counsel and the prosecutor appeared in person (82:1). At the conference, the court scheduled the evidentiary hearing for April 30, 2009, after determining that trial counsel would be available on that date (82:4).

Specifically, the court stated with respect to the appearance of Uhde and trial counsel on that date:

THE COURT: I am going to order then that an Order to Produce issue. I will sign it directing that Mr. Uhde be present commencing at 1:00 p.m. And, Mr. Weiland [trial counsel], you will be present at 1:00 p.m.

(82:4.) Trial counsel responded that he was putting it on his calendar (82:4).

Uhde told the court that he had subpoenas to be issued for the people who needed to be at the evidentiary hearing (82:5). The court responded:

THE COURT: The only part of your Motions which is being considered at the evidentiary hearing on April 30th commencing at 1:00 o'clock are those two items which I mentioned, specifically whether you were denied the effective assistance of counsel for the reasons specified in your Motions or as a second issue, whether or not Mr. Weiland should be directed to turn over your file to you for purposes that you may choose to use it for post conviction or appeal matters. Those are the only issues that will be considered on April 30th. There is a written Order that has been issued and will be provided clarifying what I have stated orally on the record here today. . . . April 30th then at 1:00 p.m. That's all for today.

(82:5-6.)

On the April 30, 2009, evidentiary hearing, trial counsel did not appear (83:2). Uhde believed that, at the scheduling conference, the court had ordered trial counsel to appear at the evidentiary hearing (83:2-3). Uhde also believed that the court had told him there was no need to issue the subpoenas that Uhde had prepared (83:3). The court responded that it was Uhde's responsibility to ensure that his witnesses were present at the evidentiary hearing (83:3). The court denied Uhde's ineffective assistance of counsel claims for lack of evidentiary support based on

the fact that Uhde did not subpoena trial counsel and counsel failed to appear (81).

- B. It was reasonable for Uhde, acting *pro se*, to believe the court had ordered trial counsel to appear at the *Machner* hearing.

The State is asking this court to remand Uhde's case to the trial court for the sole purpose of conducting a *Machner* hearing on his ineffective assistance of counsel claims. A *Machner* hearing is a prerequisite to succeeding on any ineffective assistance of counsel claim brought in the trial court. A properly pleaded claim of ineffective assistance of trial counsel triggers an evidentiary hearing at which counsel testifies regarding his challenged conduct. See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979); see also *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App.), review dismissed, 584 N.W.2d 125 (1998). A *Machner* hearing is a prerequisite to a claim of ineffective representation.

The hearing is important not only to give trial counsel a chance to explain his or her actions, but also to allow the trial court, which is in the best position to judge counsel's performance, to rule on the motion. This dual purpose renders the hearing essential in every case where a claim of ineffective assistance of counsel is raised. Here, a lack of a *Machner* hearing prevents our review of trial counsel's performance.

Curtis, 218 Wis. 2d at 554-55. Thus, this court may not review Uhde's ineffective assistance of counsel claims in the absence of a *Machner* hearing.

It is true that a defendant is not automatically entitled to an evidentiary hearing on a postconviction motion. A circuit court's decision to summarily deny a motion must be measured against the standard set in

Nelson v. State, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972), and reaffirmed in *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). A hearing is required only if the motion alleges facts which, if proved true, would entitle the defendant to relief. *See Bentley*, 201 Wis. 2d at 310; *Nelson*, 54 Wis. 2d at 497; *see also Curtis*, 218 Wis. 2d at 555 n.3. If the defendant's motion on its face fails to allege sufficient facts to raise a question of fact, or if the motion presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court may summarily deny the motion. *See Bentley*, 201 Wis. 2d at 309-10, citing *Nelson*, 54 Wis. 2d at 497-98. The facts supporting the claim of ineffective assistance must be alleged in the moving papers. The defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing. *See Bentley*, 201 Wis. 2d at 313.

However, in this case, the circuit court determined that Uhde had alleged sufficient facts to support his ineffective assistance of counsel claims to warrant an evidentiary hearing. The State will not second-guess that determination. The sole reason for denying Uhde's ineffective assistance of counsel claims was the court's determination that Uhde was required by means of a subpoena to ensure his trial counsel's appearance at the evidentiary hearing (81).

The State believes that it was reasonable for Uhde, acting *pro se*, to believe that the court had ordered trial counsel to appear at the evidentiary hearing. After all, the court directly stated to trial counsel at the scheduling conference, "And, Mr. Weiland [trial counsel], you will be present at 1:00 p.m." (82:4). Moreover, it was reasonable for Uhde to believe that he did not have to issue a subpoena for his counsel's appearance. At the scheduling conference, Uhde indicated that he had subpoenas to issue. The court's response made it appear that it would not be necessary (82:5-6).

Whether or not Uhde had a technical responsibility to issue the subpoena to ensure his trial counsel's appearance, the State believes that fairness requires Uhde be given another opportunity. The State asks this court to remand Uhde's case for the sole purpose of holding a *Machner* hearing at which trial counsel will be ordered to appear.

II. THE CIRCUIT COURT PROPERLY DENIED UHDE'S CLAIMS OF PROSECUTORIAL MISCONDUCT WITHOUT HOLDING AN EVIDENTIARY HEARING BASED ON THE CONCLUSORY NATURE OF THE ALLEGATIONS.

A. Standard of Review.

If the postconviction motion is deficient, the circuit court has the discretion to deny it without an evidentiary hearing because it fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is not entitled to any relief. *Bentley*, 201 Wis. 2d at 309-10. If a motion is deficient, the circuit court's decision to deny an evidentiary hearing will be subject to deferential appellate review. *Id.* See *State v. Allen*, 2004 WI 106, ¶¶ 9, 12, 274 Wis. 2d 568, 682 N.W.2d 433.

B. Legal Principles.

The motion for postconviction relief must allege the facts supporting the claims, and the defendant cannot rely on conclusory allegations hoping to supplement them at a hearing. *Bentley*, 201 Wis. 2d at 313. This prescreening procedure is fair to the petitioner and necessary for the court because of the vast amount of

work in the circuit courts. *Id.* at 317-18 (citing *Levesque v. State*, 63 Wis. 2d 412, 421-22, 217 N.W.2d 317 (1974)).

To be sufficient to require an evidentiary hearing in the circuit court, the motion must allege material facts. *Allen*, 274 Wis. 2d 568, ¶ 22. It also needs to allege with specificity who, what, when, where, why, and how the defendant would prove that he is entitled to vacation of his conviction and a new trial. *Id.*, ¶ 23. *See State v. Love*, 2005 WI 116, ¶¶ 26-28, 284 Wis. 2d 111, 700 N.W.2d 62.

C. The Circuit Court Acted Within Its Discretion.

The circuit court reviewed Uhde's postconviction motion, the court's file, and the transcripts of the trial and determined that Uhde was not entitled to an evidentiary hearing on his claims of prosecutorial misconduct. Specifically, the court determined that Uhde had "failed to set forth in said motions a sufficiently specific basis for conducting an evidentiary hearing" (77:2).

Uhde claims that the prosecutor planted evidence and encouraged false testimony. Uhde's brief at 13. Specifically, he challenges the credibility of certain exhibits the State submitted at trial. Uhde's brief at 14. Uhde alleges that law enforcement planted a "phantom vehicle" on an "unidentified parcel of land" and depicted it in exhibits in order to incriminate Uhde. Uhde's brief at 15. Uhde offers no support for these claims—as to whom, when, and where this was allegedly accomplished. His challenges to photographic exhibits, which he argues have some discrepancies with testimony elicited at trial, were issues for cross-examination at trial. *See* Uhde's brief at 14.

Prosecutorial misconduct, in this context, occurs if the prosecutor relied on evidence known to be false or later found to be false. *State v. Nerison*, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987), citing to *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). Due process requires a new trial if there is a reasonable likelihood the knowing use of false evidence affected the judgment. *Id.*

In *Nerison* the court of appeals had reversed the conviction upon concluding that inducements by the prosecution to the witnesses had "irreparably tainted" their testimony and denied the defendant due process. *Id.* at 45. The supreme court **reversed** the court of appeals and reinstated the conviction, stating that the proper antidote was reliance upon cross-examination and:

As the Supreme Court put the matter in *Hoffa v. United States*, 385 U.S. 293, 311, 87 S. Ct. 408, 418, 17 L.Ed.2d 374 (1966), '[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.'

Nerison, 136 Wis. 2d at 48-49.

Here, the trial court properly instructed the jury that it was the sole judge of the credibility of the evidence. The court instructed the jury to use common sense and experience to determine the reliability of the evidence (69-2:352-53). It was the jury's obligation to compare the photographic exhibits with the testimony and determine the credibility of each. Allegations of discrepancies between testimony and exhibits do not support a claim of prosecutorial misconduct. The court properly determined that Uhde had not alleged sufficient specific factual support of his generalized claims of prosecutorial misconduct to warrant an evidentiary hearing.

CONCLUSION

The State asks this court to affirm the circuit court's order denying Uhde's claims of prosecutorial misconduct without holding an evidentiary hearing. With respect to Uhde's ineffective assistance of counsel claims, the State asks this court to remand this case for the sole purpose of conducting a *Machner* hearing.

Dated this 22nd day of October, 2009.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,992 words.

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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of October, 2009.

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Assistant Attorney General