COURT OF APPEALS DECISION DATED AND FILED

March 20, 2007

A. John Voelker
Acting 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 Nos. 2006AP1515
2006AP1516

Cir. Ct. Nos. 1996CF960290
1996CF961761

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUMAR K. JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Jumar K. Jones appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 (2003-04)[1] postconviction motion. Jones claims: (1) the State failed to disclose exculpatory evidence to him in violation of WIS. STAT. § 971.23; (2) he received ineffective assistance of trial and postconviction counsels; and (3) the trial court violated WIS. STAT. § 974.06(3)(b) when it did not refer him to the public defender's office for appointment of counsel. Because the State did not withhold any exculpatory evidence, because Jones fails to establish an ineffective assistance claim, and because Jones was not entitled to have counsel appointed, we affirm.

BACKGROUND

¶2 On April 29, 1996, Jones pled guilty, in two cases, to a total of three counts of armed robbery, one count of armed robbery as party to the crime and while concealing his identity, one count of attempted robbery as party to the crime and while concealing his identity, and one count of felony murder as party to the crime in violation of WIS. STAT. §§ 939.05, 939.32, 940.03 and 943.32(1)(b). Jones pled guilty after admitting to his role in the various crimes and after the other defendants in the crimes made similar statements implicating themselves and Jones. Jones was sentenced to 105 years with a forty-five-year sentence for the felony murder to run concurrent to the other sentences. Jones filed a postconviction motion, which was denied. The court of appeals affirmed the trial court and the supreme court denied review.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 In 2001, Jones made open records requests with the City of Milwaukee Police Department to obtain all documentation of the investigation of him for the armed robberies and homicide of November 26, 1995. Jones attached twenty-two pages of the documents provided by the police to his WIS. STAT. § 974.06 motion. The substance of these documents include Jones's statements from December 4 and 5, 1995, in which he denies involvement in the November 1995 robberies, and police reports of two witnesses claiming to have seen a different car other than the one driven by one of Jones's collaborators from one of the robberies.

¶4 On June 7, 2006, Jones filed a WIS. STAT. § 974.06 motion as well as a motion for the appointment of counsel. The trial court determined that the evidence upon which Jones based his motion was not exculpatory. Therefore, the trial court concluded that this new evidence presented by Jones did not have a reasonable probability of affecting the outcome of the case. The trial court held there was no basis for the withdrawal of Jones's guilty plea, that Jones's counsel was not ineffective, and that Jones was not entitled to have counsel appointed. Jones now appeals.

DISCUSSION

¶5 Jones contends he should be allowed to withdraw his plea because the State failed to disclose exculpatory evidence, his postconviction counsel was ineffective for failing to allege that trial counsel was ineffective in not securing the exculpatory evidence, and he was denied appointed counsel for his WIS. STAT. § 974.06 motion. We are not convinced.

¶6 Jones argues that he should be permitted to withdraw his plea because the State failed to disclose the exculpatory evidence he uncovered during his open records request. We are not persuaded.

¶7 When a defendant seeks to withdraw a plea after sentencing, he or she must demonstrate by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A plea will be considered manifestly unjust if it was not entered knowingly, voluntarily, and intelligently. *See* ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995). A trial court's decision on a motion seeking plea withdrawal is discretionary and will be reviewed subject to the erroneous exercise of discretion standard. *See* ***State v. Spears***, 147 Wis. 2d 429, 434-35, 433 N.W.2d 595 (Ct. App. 1988).

¶8 Wisconsin courts consider six factual scenarios that could constitute "manifest injustice":

> (1) ineffective assistance of counsel; (2) the defendant did not personally enter or ratify the plea; (3) the plea was involuntary; (4) the prosecutor failed to fulfill the plea agreement; (5) the defendant did not receive the concessions tentatively or fully concurred in by the court, and the defendant did not reaffirm the plea after being told that the court no longer concurred in the agreement; and, (6) the court had agreed that the defendant could withdraw the plea if the court deviated from the plea agreement.

State v. Krieger, 163 Wis. 2d 241, 251 n.6, 471 N.W.2d 599 (Ct. App. 1991).

¶9 Jones claims that he was denied exculpatory evidence, specifically, several statements of his denying involvement in the crime and police reports showing two witnesses who gave statements that they saw a dark Toyota, that had a license plate different from any car Jones or his collaborators had, drive away

from one of the robberies. Jones now asserts he would have not pled guilty had he known of these facts.

¶10 The United States Supreme Court held in ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), that the suppression of evidence favorable to the defendant violates the defendant's rights if the evidence is material to guilt. Moreover, the Supreme Court added, in ***Strickler v. Greene***, 527 U.S. 263, 281-82 (1999), that for there to be a constitutional violation under ***Brady***, the defendant must be prejudiced by the failure to disclose. Under Wisconsin law, the test for whether there is a violation of ***Brady*** for purposes of plea withdrawal is if "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." ***State v. Sturgeon***, 231 Wis. 2d 487, 503-04, 605 N.W.2d 589 (Ct. App. 1999). ***Sturgeon*** laid out five factors which may bear upon the standard:

> (1) the relative strength and weakness of the State's case and the defendant's case; (2) the persuasiveness of the withheld evidence; (3) the reasons, if any, expressed by the defendant for choosing to plead guilty; (4) the benefits obtained by the defendant in exchange for the plea; and (5) the thoroughness of the plea colloquy.

Id. at 504.

¶11 In assessing these factors, three favor the State and two are neutral: (1) the State had a strong case against Jones and his defense was weak; (2) the withheld evidence was not persuasive as Jones's initial denial was self-serving and contradicted by his later admissions and the witnesses' statements relative to the car were based on human perception and contradicted the getaway driver's admission; (3) Jones did not state his reasons for pleading guilty; (4) the benefits Jones received in exchange for the plea are not clear; and (5) the plea colloquy

was thorough, and Jones declined the chance to withdraw his plea when represented by new counsel.

¶12 Based on our review, Jones has failed to demonstrate that any constitutional violation occurred. In addition, even if the withheld evidence was exculpatory, it was not material and did not prejudice Jones. The "exculpatory" statements in which Jones denied any involvement in the November robberies, were not material because all of Jones's subsequent statements admitted his guilt and involvement. All of the accomplices identified Jones's involvement and part in the crimes. Jones reiterated his guilt and the truthfulness of his inculpatory statements in the plea colloquy. Jones's initial denial of culpability, especially when later contradicted by himself and his collaborators, had no "reasonable probability" of affecting the outcome of the case or Jones's decision to plead guilty. ***Sturgeon***, 231 Wis. 2d at 503-04.

¶13 Likewise, the witnesses' statements claiming to have seen another getaway car are also not material. The value of these statements is undermined by the testimony of Jones's accomplice, Wayne Hollins, who drove the getaway car. Moreover, except for the license plates, the witnesses' statements in the withheld police report are generally consistent with the getaway car description given by the defendants. At most, evidence of conflicting witnesses' testimony to one portion of the crime would give defense counsel basis to further investigate the matter. For a ***Brady*** violation to be material, the evidence must do more than merely give defense counsel further basis to investigate. ***State v. Harris***, 2004 WI 64, ¶16, 272 Wis. 2d 80, 680 N.W.2d 737.

¶14 Based on the foregoing, we conclude that the trial court was correct in ruling that the evidence Jones discovered via the open records request does not

constitute exculpatory evidence sufficient to support a ***Brady*** violation. Accordingly, there is no basis for this court to grant Jones's motion seeking to withdraw his guilty plea.

¶15 Jones also contends his postconviction counsel was ineffective for failing to allege trial counsel was ineffective for not discovering the allegedly exculpatory evidence. We reject this contention. To establish ineffective assistance of counsel, the defendant must prove that his lawyer's performance was deficient and that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). As Jones must satisfy both elements, we need not address both components if Jones cannot make an adequate showing on one. *See* ***Strickland***, 466 U.S. at 697. Because the withheld evidence was not material and Jones was not prejudiced by it being withheld, he was not prejudiced by trial counsel's failure to discover this evidence.

¶16 It logically follows then, that if trial counsel was not ineffective, then postconviction counsel did not err in failing to assert that trial counsel provided ineffective assistance. Counsel is not ineffective for failing to bring a meritless motion that would have been denied. *See* ***State v. Maloney***, 2006 WI 15, ¶37, 288 Wis. 2d 551, 709 N.W.2d 436.

¶17 Lastly, Jones contends he was denied his right to counsel for his WIS. STAT. § 974.06 motion because the trial court did not refer him to the public defender's office for appointment of counsel. Jones has the right to appointed counsel on his first direct appeal of right. However, "'the right to appointed counsel extends to the first appeal of right, and no further.'" ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 648, 579 N.W.2d 698 (1998) (quoting

Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)). A motion "pursuant to Wis. Stat. § 974.06 is not a direct appeal from a conviction." ***Warren***, 219 Wis. 2d at 648. A defendant does not have a constitutional right to counsel when mounting a collateral attack, such as a WIS. STAT. § 974.06 motion, on a conviction. ***Warren***, 219 Wis. 2d at 649. Because Jones was not entitled to the appointment of counsel for handling his postconviction motion, the trial court did not err in denying his request.

By the Court.—Order affirmed.

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