

**COURT OF APPEALS
DECISION
DATED AND FILED**

MAY 30, 2007

David R. Schanker
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 No. 2006AP2027

Cir. Ct. No. 2000CF1148

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CURTIS EUGENE GALLION,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID A. HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Curtis Eugene Gallion appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2005-06)¹ postconviction motion. He claims his

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

guilty plea was unconstitutional because he was not properly advised that one of the charges would be dismissed by operation of law at the time of conviction; that trial counsel provided ineffective assistance for failing to move to dismiss the complaint as defective; that trial counsel failed to present positive factors during the sentencing hearing; and that the trial court erroneously exercised its sentencing discretion by putting too much weight on the community protection factor. Because Gallion's counsel was not ineffective with respect to the first three contentions and because the last contention is procedurally barred as it was raised in his direct appeal, *see State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), we affirm.

BACKGROUND

¶2 On March 7, 2000, a complaint was filed charging Gallion with one count of homicide by intoxicated use of a vehicle (prohibited alcohol concentration), following an incident on March 3, 2000, wherein Gallion ran a red light and struck a car being driven by Omar Qaasim. Qaasim's passenger, Vanessa Brown, was declared dead at the scene. Gallion's blood alcohol count was .237. Subsequently, the State filed an Information, charging Gallion with one count of homicide by intoxicated use of a vehicle, contrary to WIS. STAT. § 940.09(1)(a) (1999-2000), and one count of homicide by intoxicated use of a vehicle (prohibited alcohol concentration), contrary to § 940.09(1)(b) (1999-2000).

¶3 In May 2000, Gallion entered a guilty plea to homicide by intoxicated use of a motor vehicle, and the second count was dismissed by operation of law. He was sentenced to thirty years, consisting of twenty-one years of initial confinement, followed by nine years of extended supervision. After

conviction, he filed a postconviction motion challenging the trial court's sentencing discretion. The trial court denied the motion and Gallion appealed to this court. We affirmed the judgment of conviction and postconviction order. Gallion petitioned for review to our supreme court and it accepted the case for review. The supreme court affirmed the decision of this court, concluding that the trial court did not erroneously exercise its sentencing discretion when it imposed Gallion's sentence.

¶4 In July 2006, Gallion filed a WIS. STAT. § 974.06 motion, seeking to withdraw his guilty plea on the basis that he received ineffective assistance of counsel. The trial court summarily denied the motion. Gallion now appeals.

DISCUSSION

¶5 Gallion's first three claims—that his plea was constitutionally infirm, the complaint was defective and positive factors were not presented at sentencing—can only be reviewed in the context of ineffective assistance of counsel as these claims were not raised during Gallion's direct appeal.

¶6 Defendants are not permitted to pursue an endless succession of postconviction remedies:

We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185. Thus, claims which were raised previously, or could have been, but were not, raised in a prior postconviction motion or on direct appeal, are procedurally barred unless a sufficient reason for

failing to raise the issue is presented. *Id.* “[D]ue process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error” *State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Ineffective assistance may constitute a “sufficient reason” to avoid the procedural *Escalona-Naranjo* bar. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶7 Without a sufficient reason, Gallion would be procedurally barred from raising these claims because he could have, but did not, raise them during his direct appeal. Because Gallion contends, however, that his reason for failing to raise these claims is due to ineffective assistance of counsel, they are not procedurally barred and we will address the claims in that context. In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer’s performance was deficient; and (2) 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). A lawyer’s performance is not deficient unless he or she “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Even if a defendant can show that his or her counsel’s performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel’s errors “were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable.” *Id.* Stated another way, to satisfy the prejudice-prong, “[a] defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is

a probability sufficient to undermine confidence in the outcome.” *Sanchez*, 201 Wis. 2d at 236 (citation omitted).

¶8 In assessing the defendant’s claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See Strickland*, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See Sanchez*, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *see id.*, and the questions of whether counsel’s performance was deficient or prejudicial are legal issues we review independently, *see id.* at 236-37.

¶9 Here, Gallion’s first claim is that trial counsel provided ineffective assistance by failing to adequately explain to him the two charges in the information with respect to dismissal of one by operation of law upon conviction and why the State could charge both counts. The record belies this claim. The record demonstrates both that Gallion knew one of the charges would be dismissed upon conviction, and that he could not be convicted of both charges. This was clearly stated before Gallion entered his plea. Moreover, defense counsel noted on the record that she had explained to Gallion that the statute allows different ways of proving the offense, which was the reason for the two counts. Thus, there is nothing to support Gallion’s contention that trial counsel provided ineffective assistance with respect to this issue.

¶10 Gallion next contends that trial counsel provided ineffective assistance for failing to challenge the complaint because it did not contain the “prerequisite evidence of one or more prior convictions, suspensions or revocations.” We reject Gallion’s contention. The complaint in this case was not required to contain evidence regarding prior convictions because the two statutes

with which Gallion was charged, WIS. STAT. § 940.09(1)(a) & (b) (1999-2000), did not require proof of other convictions, suspensions or revocations. Section § 940.09(1) provided:

Homicide by intoxicated use of vehicle or firearm. (1)

Any person who does any of the following is guilty of a Class B felony:

- (a) Causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.
- (b) Causes the death of another by the operation or handling of a vehicle while the person has a prohibited alcohol concentration, as defined in s. 340.01(46m).

Although proof of previous convictions, suspensions, or revocations is referenced in § 940.09(1d)(a) (1999-2000), this subsection applies only if the court is going to order an ignition interlock device, the immobilization of the motor vehicle, or the seizure of the vehicle. Such was not the case here. Accordingly, because the complaint was not defective, there would be no basis for trial counsel to seek dismissal of the complaint. Thus, Gallion has failed to demonstrate that trial counsel provided ineffective assistance in this regard.

¶11 Next, Gallion argues his trial counsel provided ineffective assistance at sentencing for failing to provide the court with the positive, mitigating factors. Specifically, Gallion complains that trial counsel did not advise the court that a booking document noted that Gallion's demeanor was "cooperative" at the time of arrest. We are not convinced. The sentencing transcript demonstrates that trial counsel argued for leniency and emphasized Gallion's extreme remorse. This argument carried more persuasiveness than the notation Gallion relies on now. Trial counsel's failure to reference the notation on the booking document would not have made a difference in this case. Moreover, as the State points out, at the

time of the arrest, Gallion was extremely intoxicated, had hit his head and was conveyed to the hospital. Gallion did not even have a clear memory of what had occurred during the incident. In addition, the same booking document that Gallion relies on also listed “resisting, obstructing an officer” as a possible charge. Such renders the “cooperative” notation ambiguous.²

¶12 Gallion’s last contention is that the trial court erroneously exercised its discretion when it imposed sentence. He argues that the trial court put too much weight on the community protection factor. Gallion is procedurally barred from raising this sentencing claim as he previously litigated this issue both in this court and the supreme court. His direct appeal resulted in a significant sentencing decision in this state. *See State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. In that case, our supreme court held that the trial court did not erroneously exercise its sentencing discretion. *Id.*, ¶62. Thus, this issue, which Gallion attempts to re-raise in the instant appeal, has already been decided. We will not address it again.

By the Court.—Order affirmed.

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

² Because we have rejected Gallion’s contention that his trial counsel provided ineffective assistance, it logically follows that postconviction counsel was not ineffective for failing to challenge trial counsel’s conduct. Thus, any contention that postconviction counsel was ineffective is hereby rejected.

