

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2008

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. 2007AP2121-CR

STATE OF WISCONSIN

Cir. Ct. No. 2005CF4111
2006CF264

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICKY D. MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Ricky D. Mitchell appeals from a judgment of conviction and from orders denying his postconviction motion and motion to reconsider. Mitchell contends that his trial attorney was ineffective at sentencing. We disagree and affirm.

Background

¶2 Mitchell pled guilty in October 2006, to two counts of misdemeanor theft, two counts of felony forgery, and one count of felony misappropriation of personal identifying information, all arising from crimes committed on July 12 and 15, 2005. In November 2006, the matters proceeded to sentencing.

¶3 During the sentencing hearing, the parties reviewed Mitchell's substantial prior record in both Wisconsin and Illinois and discussed his probationary status in the two states. In reference to the reasons that the July 2005 offenses went unresolved until October 2006, Mitchell's attorney explained: "Mitchell has indicated to me that he was on supervision for an OWI conviction in Illinois where he was in violation of the conditions of his supervision and it was for that that he was taken into custody in August 2005. Served time in Illinois until June 27, 2006." The circuit court later observed that, in January 2004, Mitchell began serving a three-year probationary term for a forgery conviction in Wisconsin. The court asked Mitchell if he was still on supervision; Mitchell replied that he was not.

¶4 The court "infer[red] that [Mitchell] was quite likely still on supervision" when he committed the charged offenses in July 2005. The court explained that it viewed as an aggravating factor "not only your conduct here but the fact that you committed [these offenses] either after recently being terminated on supervision or while you were on supervision [], despite all the other convictions that you had from Illinois." Similarly, the court viewed the crimes as serious "because of the type of crimes, the fact that you may have been on

supervision or recently concluded that [supervision] and the extent of your past criminal record.” Ultimately, the circuit court imposed an aggregate sentence of five years of initial confinement and six years of extended supervision.¹

¶5 Mitchell moved for postconviction relief, contending, as relevant here, that his trial attorney was ineffective by failing to show that Mitchell was not on supervision in July 2005. In support, Mitchell demonstrated that the Wisconsin probation imposed in January 2004 was revoked in August of the same year and that he completed serving the underlying sentence on March 30, 2005.

¶6 The circuit court denied the motion without a hearing. It determined that Mitchell’s probationary status at the time of the offenses was not significant to the court in imposing sentence. Rather, the court was concerned “that the supervision did nothing to curtail [Mitchell’s] criminal behavior.” Further, the court observed that Mitchell was on supervision in Illinois when he committed the new offenses.

¶7 Mitchell moved for reconsideration and submitted an affidavit from his postconviction attorney in support. The affidavit related Mitchell’s belief that he “was absolutely not on any supervision or probation of any kind at the time of his commission of the offenses in this case.” In response, the State submitted certified court documents reflecting that Mitchell was on supervision in Illinois from March 2003 until he was granted a conditional discharge on August 18, 2005. The circuit court concluded that Mitchell was on supervision in Illinois

¹ The circuit court ordered that Mitchell could serve jail sentences for the two misdemeanor thefts concurrently with his initial confinement in prison for the felonies.

during July 2005, and it denied Mitchell's motion for reconsideration without a hearing. This appeal followed.

Discussion

¶8 Mitchell asserts that his trial attorney was ineffective at sentencing.² To establish ineffective assistance of counsel, a defendant must show that his or her attorney's performance was deficient and that such performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance is deficient only if it falls outside of "the wide range of reasonable professional assistance." *Id.* at 689. To show prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The final determinations of whether an attorney's performance was deficient and prejudicial are questions of law that we review *de novo*. *State v. Mayo*, 2007 WI 78, ¶32, 301 Wis. 2d 642, 661, 734 N.W.2d 115, 124. We need not, however, reach both the performance and prejudice elements if the defendant does not make a sufficient showing on one. *See Strickland*, 466 U.S. at 697.

¶9 The circuit court is required to hold a hearing on a postconviction motion claiming ineffective assistance of counsel if the motion alleges facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. If the motion does not allege such facts,

² Mitchell's postconviction motion raised additional grounds for relief that Mitchell does not renew on appeal. We deem them abandoned. *See Adler v. D&H Indus., Inc.*, 2005 WI App 43, ¶18, 279 Wis. 2d 472, 483, 694 N.W.2d 480, 485.

or if the record “conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.” *Ibid.*

¶10 According to Mitchell, the sentencing court relied on an erroneous belief that Mitchell was on supervision when he committed the crimes charged in this case. Building on that contention, Mitchell asserts that his trial attorney performed deficiently, either by failing to correct the circuit court’s misunderstanding during the sentencing proceeding, or by failing to seek a hearing to resolve the question. We are not persuaded.

¶11 First, Mitchell has not shown that the circuit court relied on Mitchell’s supervisory status when imposing sentence. Rather, the court acknowledged that Mitchell’s precise status was uncertain. In discussing aggravating factors, the court observed that Mitchell committed new crimes “either after recently being terminated on supervision or while [] on supervision.” Similarly, in discussing the seriousness of the offense, the court remarked that Mitchell “may have been on supervision or recently concluded that [supervision].”

¶12 The court had an opportunity to explain its remarks during postconviction proceedings. See *State v. Fuerst*, 181 Wis.2d 903, 915, 512 N.W.2d 243, 247 (Ct. App. 1994). The court clarified its understanding that Mitchell’s supervision might have ended before Mitchell committed new crimes in 2005. The court stated that the significant fact, and the fact on which the court relied, was that Mitchell “committed these offenses despite having been placed on supervision for a prior forgery offense and that [] supervision did nothing to curtail his criminal behavior.”

¶13 The sentencing court must resolve only those disputed facts that are relevant to the sentencing decision. See *State v. Anderson*, 222 Wis. 2d 403, 412,

588 N.W.2d 75, 79 (Ct. App. 1998). Here, the court had no need to resolve any uncertainty as to whether Mitchell was in fact on supervision or recently terminated because Mitchell's precise status at the time of the offenses was simply not a basis for the sentence. A sentencing court may properly rely on accurate and relevant information while disregarding disputed information that is not relevant to its decision making. See *State v. Coolidge*, 173 Wis. 2d 783, 789–790, 496 N.W.2d 701, 705 (Ct. App. 1993) (court appropriately considered defendant's presence in tavern as inconsistent with treatment for alcoholism while disregarding disputed allegation of defendant fighting in the tavern), *overruled on other grounds by State v. Tiepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 181–182, 717 N.W.2d 1, 2. Because the court relied only on accurate and relevant information, Mitchell's attorney did not perform deficiently by failing to offer a correction as to ancillary matters.

¶14 Second, the record on appeal reflects that Mitchell was in fact on supervision in July 2005. During postconviction proceedings, the State filed certified Illinois court records reflecting that Mitchell was placed on conditional discharge, a form of Illinois probation, in March 2003.³ Mitchell's anticipated release date was August 14, 2004, but, on May 6, 2003, an Illinois warrant issued when Mitchell failed to appear in court. The final entry in the certified records reflects that the Illinois circuit court terminated Mitchell's conditional discharge on August 18, 2005.

³ Mitchell raised no objection to the circuit court's consideration of the certified documents.

¶15 A hearing to prove that Mitchell was no longer on supervision in July 2005 would ultimately have been unsuccessful. An attorney does not perform deficiently by failing to pursue a meritless motion. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994).⁴

¶16 Our conclusion that Mitchell’s attorney did not perform deficiently obviates the need to determine whether Mitchell was in any way prejudiced by the performance. *Mayo*, 2007 WI 78, ¶61, 301 Wis. 2d at 674, 734 N.W.2d at 131. We nonetheless consider the issue for the sake of completeness, and conclude that Mitchell cannot show prejudice.

¶17 An attorney’s performance at sentencing is prejudicial if there is a reasonable probability that the result would have been different but for the attorney’s deficiencies. *See Anderson*, 222 Wis. 2d at 408, 588 N.W.2d at 78. Here, Mitchell has failed to show that he would have received a lesser sentence had his trial attorney performed differently.

¶18 The circuit court’s sentencing remarks and its postconviction decision reflect the court’s concern that Mitchell committed new crimes notwithstanding prior grants of supervision. The court’s postconviction order specifically concluded that “had trial counsel informed the court that [Mitchell’s Wisconsin] probation had been revoked and that [Mitchell] had served the

⁴ Mitchell asserts in his reply brief that “the Illinois supervision is not without dispute.” There is no dispute. Mitchell’s motion for reconsideration included his denial that he was on supervision in July 2005. The denial is conclusory and unaccompanied by discharge records or similar evidentiary support. Based on the certified documents submitted in opposition to Mitchell’s motion, the circuit court found that Mitchell was not discharged from supervision until August 2005. The circuit court’s finding is not clearly erroneous and, accordingly, we accept it. *See State v. Mayo*, 2007 WI 78, ¶32, 301 Wis. 2d 642, 661, 734 N.W.2d 115, 124.

underlying sentence before committing these offenses, the sentence would have been no different.” Accordingly, Mitchell’s trial attorney did not prejudice the sentencing outcome by failing to clarify Mitchell’s precise probationary status at the time of the offenses.

¶19 The record conclusively demonstrates that Mitchell is not entitled to relief. Therefore, the circuit court properly exercised its discretion in denying his postconviction motion without a hearing. *See Allen*, 2004 WI 106, ¶9, 274 Wis. 2d at 576, 682 N.W.2d at 437.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

