STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2018AP000802-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

VICTOR YANCEY, JR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
and Order Denying Postconviction Relief Entered
in the Milwaukee County Circuit Court, the
Honorable William S. Pocan, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Is Victor Yancey entitled to an evidentiary hearing to prove he was denied effective assistance of counsel before entering his guilty plea such that he should be allowed to withdraw his plea?

Circuit Court Answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.[1] Instead, the State will present additional facts in the "Argument" portion of its brief as needed.

STANDARD OF REVIEW

If a 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 entitled to no relief. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Whether the motion alleges sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is not entitled to relief is a question this court reviews independent of the circuit court. *See State v. Allen*, 2004 WI 106, ¶¶ 9, 12, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is not entitled to relief, the circuit court decision to deny an evidentiary hearing will be subject to deferential appellate review. *Bentley*, 201 Wis. 2d at 310-11.

"A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true,

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2015-16 edition.

would entitle the defendant to relief." *Allen*, 2004 WI 106, ¶ 14 (citations omitted). The motion must allege facts that allow the reviewing court to meaningfully assess the defendant's claim. *Id.* ¶ 21. The facts must be material to the issue presented. *Id.* ¶ 22. In this case, Mr. Yancey claims his attorney provided ineffective assistance of counsel. A sufficient postconviction motion alleges the "five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Id.* ¶ 23.

Whether counsel was ineffective is a mixed question of fact and law. *State ex rel. Flores v. State*, 183 Wis.2d 587, 609, 516 N.W.2d 362 (1994). The circuit court's findings of fact will not be disturbed unless shown to be clearly erroneous. *State v. McDowell,* 2004 WI 70, ¶ 31, 272 Wis. 2d 488, 681 N.W.2d 500. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law. *Flores*, 183 Wis. 2d at 609, 516 N.W.2d 362.

ARGUMENT

I. Yancey did not allege facts sufficient to require an evidentiary hearing on his ineffective assistance of counsel claim.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that "were outside the wide range of professionally competence assistance." *Id*. at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id*. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. at 689. A lawyer's performance is

not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id*. at 687.

In *Harrington v. Richther*, 131 S.Ct. 770 (2011), the Supreme Court emphasized that "'[s]urmounting *Strickland*'s high bar is never an easy task."' *Id*. at 788 (quoted source omitted). With respect to the deficient performance prong of the *Strickland* test, the Court explained:

> Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether is deviated from best practices or most common custom."

Id. at 788 (citations omitted).

A. Yancey did not make a prima facie showing that his attorney performed deficiently as the trial court correctly determined.

The trial court determined that Yancey did not receive any incorrect advice from his trial attorney. (R34). The trial court dealt with the issue of Yancey's trial attorney allegedly telling him that he could raise his concerns regarding police misconduct at sentencing and found that Yancey "did just that in five pages of sentencing transcript." (R34:4). With respect to Yancey's claim that counsel told him that the court could conduct an *in camera* inspection or order a John Doe proceeding, the trial court found that "there is no allegation that counsel *assured* the defendant that the court would take specific action on his claims" and also found that "there is no indication that counsel's advice amounted to a promise upon which the defendant could reasonably have relied when deciding to accept the State's plea offer." (R34:4) The trial court found, in other words, that the defendant did not make a prima facie showing that his trial attorney acted deficiently. The court correctly applied the law relating to ineffective

assistance of counsel to the facts of this case and determined that Mr. Yancey's attorney was not ineffective.

The trial court's finding with regard to whether Yancey received effective assistance of counsel on the performance prong of the *Strickland* test was not an erroneous exercise of discretion. The trial court appropriately outlined both its findings and reasons for those findings and both were rational and well-reasoned.

B. Yancey's postconviction motion did not make a prima facie showing of prejudice.

To demonstrate prejudice, a defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693; *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant cannot meet his burden merely by showing that the error had some conceivable effect on the outcome. *Strickland*, 466 U.S. at 693. Rather, he must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

The Supreme Court has described the showing of prejudice required under *Strickland* as follows:

> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonable likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and the more-probable-than-not standard is slight and matters "only in the rarest case." The likelihood of a different result must be substantial, not just conceivable.

Harrington, 131 S.Ct. at 791-92 (citations omitted).

Simply put, Mr. Yancey did not suffer any prejudice with respect to his decision to plead guilty in this case resulting from his trial counsel's alleged errors. His issues, if his allegations are true with regard to this trial counsel's advice, related to police misconduct that he wanted investigated. Yancey's postconviction claim, that he would not have pled guilty but for trial counsel's advice, flies in the face of his statements at both the plea hearing and sentencing hearing in this case. He stated, under oath at the plea hearing, that he was entering his guilty plea freely and voluntarily, that he was giving up his right to call witnesses, his right to present evidence at trial, the right to raise certain defenses, and, most importantly, he stated that no one had made any threats or promises to get him to admit his guilt. (R61:15-19). At his sentencing, Yancey stated, "I take full responsibility for what they call the battery." (R62:12). He continued on by stating that he "roundhouse kicked" the victim twice. (R62:12). He never requested a John Doe proceeding or an *in camera* inspection of any kind. Yet, he now claims, these were critical things he was relying on when he pled guilty.

Yancey did not suffer any prejudice of any kind, even if his attorney advised him as he now claims his attorney did, because the record is clear that Yancey did not rely, in any meaningful sense of that word, on any such alleged advice. He pled guilty and was sentenced (after five pages of rambling about the facts of the case) without ever mentioning the alleged "promises" that his lawyer made.

II. The trial did apply the incorrect legal standard in its prejudice analysis.

The trial court found, "There is no reasonable probability that a defense strategy based upon unsupported allegations and rank speculation would have resulted in an acquittal of the charges, and therefore, the court finds that the defendant has not made the requisite showing." (R34:5). The State agrees that the trial court misconstrued the appropriate standard. As outlined in Yancey's brief, the standard is: Did Yancey establish a reasonable probability that he would not have pled [guilty] and would instead have gone to trial" had he not received the advice he alleges he received from trial counsel. Defendant-Appellant's Brief, p. 25.

Nonetheless, even applying the correct standard, there is nothing in the record, other than Yancey saying it, to support the idea that he relied on any advice from his trial counsel in deciding to plead guilty. Furthermore, Yancey has failed to allege sufficient facts, has presented only conclusory allegations, and the record conclusively shows that he is entitled to no relief in that he fails to establish any nexus between his decision to plead guilty and this alleged advice from counsel. *See Bentley*, 201 Wis. 2d 303, 309-10.

CONCLUSION

The record from this case shows that, while Yancey had concerns about the police, he knowingly, voluntarily, and intelligently pleaded guilty to a misdemeanor while having two felony offenses dismissed. He aired his grievance(s) with the police at his sentencing. He now claims he pled guilty due to what he describes as bad advice from trial counsel wholly unrelated to his decision to "take full responsibility" (his own words) for the offense to which he pled guilty.

Therefore, the circuity court's decision to deny Yancey's postconviction motion without a hearing should be affirmed.

Dated this _____ day of October, 2018.

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 word count of this brief is 1,896.

_____ _____

Date James C. Griffin
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CERTIFICATE OF COMPLIANCE WITH 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 s. 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.

_____ _____

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