

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

**Nos. 98-1935-CR
98-2741-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE IVERSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: DANE MOREY, Judge. *Affirmed.*

MYSE, P.J. Dale Iversen appeals a judgment of conviction and an order denying his postconviction motion for a new trial.¹ Iversen contends the

¹ The notice of appeal in No. 98-1935-CR sought appeal of the judgment of conviction and order denying postconviction relief. Because the record failed to contain a written postconviction order, this court ordered appellant to file a new notice of appeal from the postconviction order once it was entered. That appeal was designated No. 98-2741-CR. The appeals have been consolidated.

trial court erred by denying his ineffective assistance of counsel claim. Iversen also contends the trial court erred by allowing him to be represented by an out-of-state attorney not licensed in Wisconsin without retained local counsel's presence at his criminal proceedings. This court rejects Iversen's claims and affirms the trial court's judgment of conviction and order denying postconviction relief.

Dale Iversen was charged with two counts of contributing to the delinquency of a minor. For a period of time, Iversen represented himself. Iversen eventually retained attorney Douglas Thomson. Thomson was not licensed to practice law in Wisconsin, but was licensed to practice law in Minnesota. Thomson arranged to have attorney Deborah Ellis serve as local counsel. Ellis is licensed to practice law in Wisconsin. Ellis did not make any appearances in Iversen's case. Thomson appeared with and represented Iversen through the course of the criminal proceeding.

During the trial, the defense presented no witnesses. At the conclusion of the State's case, the defense also rested. The court then conducted a colloquy with Iversen on the record concerning his right to testify or not testify. Iversen was convicted of both counts of contributing to the delinquency of a minor. Through new counsel, Iversen sought postconviction relief. He filed a motion for a new trial claiming that the evidence failed to support the verdict and that he was denied the effective assistance of counsel. The trial court denied Iversen's motion for a new trial on both grounds. Iversen now appeals raising the ineffective assistance of counsel claim. He additionally claims the trial court erred by allowing his representation by an out-of-state attorney not licensed in Wisconsin without retained local counsel's presence at the proceedings.

Iversen first claims that the trial court erred by denying his postconviction motion claiming ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant must satisfy both components to receive a new trial. *Id.* Under the first component, the defendant must demonstrate that counsel made serious errors that could not be justified under an objective reasonable standard. *Id.* at 688. Judicial scrutiny is highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable trial strategy. *Id.* at 689. Under the prejudice component, a defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* The focus is on the reliability of the proceedings. *State v. Pitsch*, 124 Wis.2d 628, 642, 369 N.W.2d 711, 718 (1985). If this court concludes either that counsel's performance is not deficient or that there was no prejudice, it is unnecessary to address the other component. *Strickland*, 466 U.S. at 697.

Whether counsel's actions constitute ineffective assistance of counsel is a mixed question of law and fact. *Id.* at 698. This court will not reverse the trial court's underlying findings of fact unless they are clearly erroneous. *Pitsch*, 124 Wis.2d at 633, 369 N.W.2d at 714. Whether counsel's performance was deficient and prejudicial is a question of law this court reviews de novo. *State v. Johnson*, 153 Wis.2d 121, 127-28, 449 N.W.2d 845, 848 (1990).

Among the allegations of deficient performance, Iversen asserts counsel: (1) failed to interview the State's witnesses; (2) failed to renew Iversen's

request for the juvenile records of the State's witnesses; (3) failed to review the jury list with Iversen; and (4) failed to discuss the jury instructions with Iversen. Iversen also contends that: (5) his right to testify was infringed by counsel's performance; and (6) counsel's performance was deficient because counsel failed to have local counsel present during the course of the criminal proceedings.

Iversen did not raise the first four allegations of deficient performance within the context of his postconviction ineffective assistance of counsel claim. Instead, Iversen based his ineffective assistance of counsel claim on allegations that counsel infringed on his right to testify and failed to have local counsel present. Nevertheless, trial counsel testified regarding these four issues at the postconviction motion hearing.

Failure to raise an argument in the trial court waives any objection on appeal. *State v. Dietzen*, 164 Wis.2d 205, 212, 474 N.W.2d 753, 755 (Ct. App. 1991). This court concludes Iversen waived these arguments because he failed to direct the trial court's attention to them. Although conflicting testimony appears in the record on these issues, Iversen failed to raise these four allegations of deficient performance in his postconviction motion and then failed to raise them once more at the motion hearing by calling the court's attention to the testimony. The burden is upon the party alleging error to establish by reference to the record that the error was specifically called to the trial court's attention. *Allen v. Allen*, 78 Wis.2d 263, 270, 254 N.W.2d 244, 248 (1977). "A failure to make a timely objection constitutes a waiver of the objection." *Id.* While waiver is a rule of administration and this court is not bound by waiver, this court sees no reason not to apply it here.

Further, Iversen has failed to persuade this court that these allegations have merit. In reviewing an ineffective assistance of counsel claim, this court may avoid the deficient performance analysis if the defendant has failed to show prejudice. *Johnson*, 153 Wis.2d at 128, 499 N.W.2d at 848. The defendant must affirmatively prove prejudice. *Pitsch*, 124 Wis.2d at 641, 369 N.W.2d at 718. Under the prejudice analysis, Iversen must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different or that the result of the proceeding is unreliable thus undermining confidence in the outcome. *See id.* at 642, 369 N.W.2d at 718.

Upon this court's review of the record, Iversen has failed to make the necessary affirmative showing of prejudice. He has not set forth proof as to how interviewing any of the State's witnesses, when counsel possessed their statements, would have altered the trial result or why the failure to do so makes the result of the proceeding unreliable. Iversen fails to specifically demonstrate how information in the juvenile records he sought to obtain would have created a reasonable probability of a different outcome or why counsel's failure to renew the motion for the records, a motion the trial court previously denied, made the trial result unreliable. Iversen's allegation of counsel's failure to discuss the juror list identifies no specific error which impacted this proceeding; he only broadly contends that the alleged error violated his right to a jury trial. Finally, Iversen makes no affirmative showing demonstrating that counsel's alleged failure to discuss the jury instructions with him affected his decision about testifying other than to broadly assert that such omission made the verdict unreliable. In sum, this court concludes Iversen's first four allegations of deficient performance do not go far enough toward demonstrating a reasonable probability of a different outcome

but for counsel's errors or that the result of the proceeding was rendered unreliable as a result of those errors.

This court does address Iversen's preserved claim that counsel's performance somehow infringed upon Iversen's right to testify. Iversen claims that Thomson did not discuss with him the implications of his right to testify or not testify at trial. There was conflicting testimony at the postconviction motion hearing. Iversen testified that he assumed he would be testifying, that during a morning trial break he and counsel had a disagreement about his testimony, and that after a lunch break counsel did not want Iversen to testify because Iversen would not be a good witness. Thomson testified that he discussed the decision about testifying with Iversen several times before trial and during the course of the trial. The trial court determined that the decision whether to call Iversen was a strategic decision. The court also relied upon its own colloquy conducted with Iversen upon the close of evidence to conclude that Iversen knew about his right to testify and decided against testifying. The following exchange took place at trial:

THE COURT: All right, please be seated. Both parties have at least tentatively rested, and the Court is concerned that the record reflect that the defendant on the record acknowledges that he has the right to testify in this case, as well as the right not to testify in this case, *and that's been explained to him, Mr. Thomson, just for the record.*

MR. THOMSON: Yes, it has, Your Honor.

THE COURT: *Do you confirm that, Mr. Iversen?*

DEFENDANT IVERSEN: *Yes.*

THE COURT: Nobody has used any force or any threats or undue influence of any kind to get you to decide not to testify in this case?

DEFENDANT IVERSEN: No. (Emphasis added.)

Despite Iversen's contrary testimony at the postconviction hearing, the colloquy conducted by the trial court during the trial specifically inquires whether Iversen's attorney explained the right to testify to Iversen. Not only does counsel respond affirmatively, but Iversen further confirms he was so informed on the record. It is readily apparent that the trial court's factual finding that Iversen had been informed of his right to testify and that he decided not to testify was not clearly erroneous. This court concludes, based on this finding, that Iversen has failed to demonstrate that counsel's performance was deficient in infringing on Iversen's right to testify.

Next, this court addresses Iversen's preserved allegation that counsel's performance was deficient for failing to have local counsel present during the proceedings in this matter. Iversen cites no authority for the proposition that representation by an out-of-state attorney without local counsel present is per se ineffective assistance of counsel.² Iversen has not identified a specific act by counsel during the proceedings which required the presence of local counsel. Further, Iversen has not demonstrated a reasonable probability that but for counsel's failure to secure local counsel's presence at the trial, the result of the trial would have been different or that the result of the proceeding is unreliable because local counsel was not present. Therefore, this allegation of deficient performance fails. This court rejects all of Iversen's allegations of ineffective assistance of counsel and concludes that the trial court did not err by denying Iversen's motion for a new trial.

² This court will not consider arguments unsupported by legal authority. See *State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

Finally, Iversen contends that the trial court erred by allowing him to be represented by an out-of-state attorney unlicensed in Wisconsin without local counsel present. Iversen claims the trial court erred because such representation constitutes the unauthorized practice of law in violation of § 757.30, STATS., and further violates Wisconsin Supreme Court ethical standards and local court rules. This argument was not raised at the trial, by postconviction motion, or brought to the court's attention at the postconviction motion hearing. This court will not consider issues not raised in the trial court but raised for the first time on appeal. *County of Columbia v. Bylewski*, 94 Wis.2d 153, 171, 288 N.W.2d 129, 138-39 (1980).

This court rejects Iversen's claims on appeal and accordingly affirms the trial court's judgment of conviction and order denying postconviction relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

