COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 98-2018-CR
98-2019-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RONALD H. GILPIN,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed.*

EICH, J.[1] Ronald H. Gilpin was convicted, after a jury trial, of driving while intoxicated (fourth offense). He argues on appeal that: (1) his trial counsel was ineffective for failing to file a motion in limine prior to trial stipulating to his prior convictions, and thus avoiding the introduction of evidence

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

of the convictions at trial; (2) the trial court erred when it allowed such evidence after defense counsel's mid-trial offer to stipulate to the convictions; and (3) the court erred in instructing the jury that a sample of the defendant's blood was taken within three hours after he was operating a vehicle. Gilpin has not persuaded us that his counsel was ineffective, or that any claimed error in admitting evidence could possibly be prejudicial. As to his claim of instructional error, Gilpin waived his right to challenge the jury instruction on appeal by failing to object to it at trial. We therefore affirm his convictions.[2]

I. Ineffective Assistance of Counsel

For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish that counsel's actions constituted deficient performance, *and* that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). And because representation is not constitutionally ineffective unless both elements of the test are satisfied, ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992), we may dispose of an ineffective assistance of counsel claim where the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

On appeal, the issues are both of fact and law. ***Strickland***, 466 U.S. at 698. The trial court's findings as to what the attorney did, what happened at trial, and the basis for the challenged conduct, are factual and will be upheld

[2] Gilpin states at several points in his brief that his "convictions" should be overturned. The record shows that, in addition to driving while intoxicated, he was also convicted of resisting or obstructing an officer, and the notice of appeal refers to both convictions. However, he makes no discernible argument in his brief with respect to the resisting/obstructing charge, and we therefore assume he is challenging only his DWI conviction. We affirm both convictions.

unless they are clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). However, whether counsel's actions were deficient and, if so, whether they prejudiced the defense, are questions of law which we review independently. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992)

An attorney's performance is not deficient unless it is shown that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***Guck***, 170 Wis.2d at 669, 490 N.W.2d at 38 (quoted source omitted). We thus assess whether such performance was reasonable under the circumstances of the particular case, ***Hubanks***, 173 Wis.2d at 25, 496 N.W.2d at 105; and to prevail in the argument the defendant must show that counsel "made errors so serious that [he or she] was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." ***Guck***, 170 Wis.2d at 669, 490 N.W.2d at 37-38. And in assessing counsel's conduct, we pay great deference to his or her professional judgment and make every effort to avoid making our determination based on hindsight. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847. We consider the claim from counsel's perspective at the time of trial, and the burden is on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id***. at 127, 449 N.W.2d at 847-48.

As we indicated above, even if deficient performance is found, we will not reverse unless the defendant proves that the deficiency actually prejudiced his defense: that counsel's errors were so serious as to deprive the defendant of a fair trial—a trial whose result is reliable. ***Id.*** at 127, 449 N.W.2d at 848. In other words, errors of counsel actually had an adverse effect on the defense, for not every error that conceivably could have influenced the outcome undermines the

reliability of the result in the proceeding. "There must be 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." ***Id.*** at 129, 449 N.W.2d at 848.

During Gilpin's trial, the State introduced a certified copy of Gilpin's driving record—showing three prior DWI convictions—for the purpose of establishing the prior violations, and Gilpin's counsel offered to stipulate that the record would show three priors. The prosecutor stated: "Your Honor, I would just like to go quickly through that," and, with the court's permission, had Gilpin briefly verify the existence of the convictions in his testimony. Gilpin claims his counsel was ineffective for failing to file a motion in limine prior to trial, stipulating to the earlier convictions and thus avoiding having to acknowledge them before the jury.

Gilpin begins by citing us to ***State v. DeKeyser***, 221 Wis.2d 435, 585 N.W.2d 668 (Ct. App. 1998), where we found counsel to be ineffective for failing to stipulate that the defendant's acts of touching his young granddaughter were for the purpose of sexual gratification (an element of the offense with which he was charged) in order to avoid the introduction of "other acts" evidence that he had engaged in similar conduct with another granddaughter in the past. Specifically, we faulted counsel for failing to be aware of our opinion in ***State v. Wallerman***, 203 Wis.2d 158, 552 N.W.2d 128 (Ct. App. 1996) stating that a defendant may concede elements of a crime in order to avoid the introduction of other acts evidence. ***DeKeyser***, 221 Wis.2d at 443, 585 N.W.2d at 672. He also points to an article in a Wisconsin legal periodical suggesting that a United States Supreme Court decision, ***Old Chief v. United States***, 519 U.S. 172 (1997), which allowed such a procedure in federal criminal cases, might be arguably extended to cover

DWI cases in state courts. And he says that if his attorney had known of ***Wallerman***, the journal article and ***Old Chief***, he could have made such a motion and possibly kept the actual evidence of his prior convictions from the jury.

The State responds that controlling Wisconsin authority at the time of Gilpin's trial specifically held that prior DWI convictions may be introduced into evidence where, as here, the number of convictions is an element of the charged offense. *See* ***State v. Ludeking***, 195 Wis.2d 132, 140-41, 536 N.W.2d 392, 396 (Ct. App. 1995). We agree with the State that it is indeed difficult to declare counsel ineffective for following established applicable Wisconsin precedent. Gilpin has offered no authority suggesting that counsel must anticipate and urge on the court every conceivable argument for departing from established precedent in order to provide effective representation. Indeed, as the Supreme Court stated in ***Strickland***, "[r]eview of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." ***Id***., 466 U.S. at 687. Gilpin has not persuaded us that his counsel was ineffective for failing to file a pretrial motion stipulating to his prior convictions.[3]

[3] We also agree with the State that the substantial evidence of Gilpin's intoxicated driving—including erratic diving, slurred speech, coordinational difficulties, a strong odor of intoxicants, an admission that he had been drinking "[q]uite a little," failure of the field sobriety test, belligerent, resistive conduct toward the officers, and a .117 blood test three hours later—defeats any possible claim of prejudice from counsel's alleged failures. And, as we have indicated above, both deficient representation *and* prejudice must be shown in order to establish ineffective assistance of counsel.

I. Erroneous Admission of Gilpin's Prior Convictions

Gilpin next argues that the court erred when it declined to permit him to stipulate to the prior convictions during the trial. When the prosecutor began questioning Gilpin about his driving record, in order to establish the prior convictions, defense counsel stated: "Your Honor, we would stipulate that the record shows … three prior convictions for operating a motor vehicle while intoxicated within the statutory time period." As indicated, the prosecutor stated that he would "like to go quickly through that," and the court agreed, permitting him to ask Gilpin to verify the date of each conviction and related license suspension. Gilpin argues on appeal that the trial court erroneously exercised its discretion in allowing the questioning in the face of his offered stipulation, citing ***State v. Alexander***, 214 Wis.2d 628, 651, 571 N.W.2d 662, 672 (1997), where the supreme court held that:

> [W]hen the sole purpose of introducing any evidence of a defendant's prior convictions, suspensions or revocations … is to prove the status element and the defendant admits to that element, its probative value is far outweighed by the danger of unfair prejudice to the defendant. We hold that admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury in this case was an erroneous exercise of discretion.[4]

Even if we were to assume error under ***Alexander***, however, we are satisfied that any error would be harmless. The test for harmless error is:

> whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state. The state's

[4] ***Alexander*** was decided after Gilpin's trial.

> burden, then is to establish that there is no reasonable possibility that the error contributed to the conviction.

Alexander, 214 Wis.2d at 652-53, 571 N.W.2d at 672 (citations omitted). The analysis focuses on whether the error "undermines confidence in the outcome" of the trial. ***Id***. (quoted source omitted).

In ***Alexander***, the supreme court found the admission of the defendant's prior convictions to be harmless because, on the facts of the case, there was "no reasonable possibility that the error [could have] contributed to the conviction." ***Id.*** at 653, 571 N.W.2d at 672. And the court made that determination on a record establishing the defendant's erratic driving, a "strong smell of intoxicants" about his person, red eyes and slurred speech, his admission that he had been drinking and his "You got me" statement to the arresting officer, his failure of three field sobriety tests, and a .24% breath test. ***Id***. Those facts—which the ***Alexander*** court stated constituted "overwhelming evidence" of guilt—are essentially identical to the facts of this case, as we have summarized them above.[5] Like the supreme court in ***Alexander***, we conclude that, even if it was error to allow the questions (which we do not here decide), any error was harmless because, on the record before us, there is no reasonable possibility that those few questions and answers contributed to Gilpin's conviction.[6]

[5] *See* note 3, *supra*.

[6] Our conclusion in this regard is buttressed by the fact that defense counsel himself stated to the jury that Gilpin acknowledged that he had "three prior convictions for operating a motor vehicle while intoxicated…." Allowing the prosecutor to ask a handful of questions verifying that information adds little to counsel's own statement.

III. The Jury Instruction

Gilpin argues that because he put on evidence "suggest[ing] that the [blood] sample was not taken within three hours" of the incident, it was error for the court to give the pattern DWI jury instruction which states in part that "evidence has been received that, within three hours after the defendant's alleged operating of a motor vehicle, a sample of the defendant's blood was taken." *See* WIS J I—CRIMINAL 2663. He also refers to the pattern instruction on prohibited blood-alcohol levels, also given by the trial court, contending that its reference to the timing of the blood test, when considered with the DWI instruction, must have misled the jury.

We don't reach these arguments, however, because Gilpin never objected to the instructions on that basis; and the failure to object waives any alleged error. ***State v. Schumacher***, 144 Wis.2d 388, 401, 424 N.W.2d 672, 677 (1988).[7] And while we may reverse and order a new trial in the interest of justice under § 752.35, STATS., if, as a result of the unobjected-to error, (a) the real controversy has not been tried, or (b) it is probable that justice has for any reason miscarried, ***Vollmer v. Luety***, 156 Wis.2d 1, 16, 456 N.W.2d 797, 804 (1990), Gilpin makes no such argument.[8]

By the Court.—Judgments affirmed.

[7] Indeed, the State points out that defense counsel specifically stated to the court that the three-hour language "is relevant and can be used in [Instruction] 2663, operating a motor vehicle under the influence of an intoxicant."

[8] Indeed, any such argument would likely be unavailing in light of the State's representation that there was evidence before the jury that samples of Gilpin's blood were received within the three-hour limit.

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