COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2502-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SUSAN TRIGGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.[1] Susan Triggs appeals from a judgment entered after a jury found her guilty of operating a motor vehicle while intoxicated, fifth offense. She also appeals from an order denying her

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

postconviction motion, which alleged that she received ineffective assistance of trial counsel. Triggs claims that her trial counsel was ineffective because he failed to object to her six-person jury trial. Because trial counsel's decision not to object did not constitute ineffective assistance under the circumstances, this court affirms.

I. BACKGROUND

¶2 On November 1, 1996, Triggs was stopped for operating a motor vehicle while intoxicated. The case was tried to a six-person jury, pursuant to WIS. STAT. § 756.096(3)(am) (1995-96), which provided for six-person juries in criminal misdemeanor cases. The trial occurred on June 8 and 11, 1998. Counsel did not make any objection to the six-person jury. The jury convicted.

¶3 On June 19, 1998, our supreme court held that WIS. STAT. § 756.096(3)(am) was unconstitutional. *See* ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998). In June 1999, Triggs filed a motion seeking a new trial, alleging that she was denied her constitutional right to a twelve-person jury or, in the alternative, that trial counsel provided ineffective assistance for failing to raise this issue. The trial court conducted a ***Machner*** hearing,[2] and then denied her motion. Triggs now appeals.

II. DISCUSSION

¶4 Triggs argues that her trial counsel was ineffective for failing to object to the six-person jury. She claims that if counsel had done any research on the issue, he would have concluded that the six-person jury statute violated the

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

constitution and would have objected to preserve the issue. She points out that if counsel had objected, she would be entitled to a new trial based on ***Hansford***. We agree with the trial court that counsel's failure to object under the circumstances of this case did not constitute ineffective assistance.

¶5 In order to establish that she did not receive effective assistance of counsel, Triggs must prove two things: (1) that 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, 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 Triggs can show that her counsel's performance was deficient, she is not entitled to relief unless she can also prove prejudice; that is, she must demonstrate that her counsel's errors "were so serious as to deprive [her] of a fair trial, a trial whose result is reliable." ***Id***. Stated another way, to satisfy the prejudice-prong, Triggs 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).

¶6 In assessing Triggs's claim, this court does not need to address both the deficient performance and prejudice components if 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 this court reviews independently. *See* ***id.*** at 236-37.

¶7 The statute authorizing a six-person jury panel at the time Triggs was tried was good law, and counsel's failure to raise the issue, therefore, did not constitute deficient performance. *See* ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). "Counsel is not required to object and argue a point of law that is unsettled.… ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." ***Id.*** at 84-85.

¶8 Moreover, even if this court assumes that counsel should have raised the issue because the six-person jury statute was being reviewed by the supreme court and challenged as unconstitutional in various legal circles, counsel's failure to do so here was not prejudicial. In ***State v. Huebner***, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727, the supreme court observed that this court "rejected Huebner's argument that he had received ineffective assistance of counsel, because the court found no reasonable probability that a twelve-person jury would have produced a different outcome in Huebner's case." *See* ***id.*** at ¶6.

¶9 The same conclusion applies here. Triggs did not lose her right to a jury trial. *See* ***id.*** at ¶17. She was tried by six jurors, which is not equivalent to no jury trial at all. *See* ***id.*** Triggs received an otherwise fair and error-free trial. *See* ***id.*** The use of a six-person jury rather than a twelve-person jury did not undermine the fundamental integrity of her trial. As noted by our supreme court, this court cannot conclude that "the difference between a six-person jury trial and a twelve-person jury trial is so fundamental that a six-person jury trial, which was

conducted without objection under the express authority of a statute, is automatically invalid." ***Id.*** at ¶19.

¶10 Although it is conceivable that the chances for acquittal or a hung jury is greater with twelve jurors than with six, that possibility, which is purely speculative, is insufficient to establish prejudice. Therefore, even if this court assumes counsel's failure to object constituted deficient performance, such conduct did not prejudice Triggs.

By the Court.—Judgment and order affirmed.

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