COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1560 **Cir. Ct. No. 1994CF944720**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DRAZEN MARKOVIC,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. Drazen Markovic appeals, *pro se*, from the order denying his postconviction motion seeking to vacate his no contest pleas to five felonies. Markovic maintains that the trial court erred when it determined that there was no ineffective assistance of counsel by either his trial or postconviction

attorney. He claims the trial court erred: (1) because his postconviction attorney should have raised a claim of trial attorney ineffectiveness due to his trial attorney's failure to inform Markovic of his rights under Article 36 of the Vienna Convention on Consular Relations;[1] and (2) in determining no conflict of interest existed when his trial attorney represented him while also representing Serbian nationals in the International Criminal Tribunal for the Former Yugoslavia (ICTY) who were charged with war crimes against citizens of Croatia, Markovic's native country. Because, at the time of his pleas, the law was uncertain as to whether an individual had standing to assert a violation of Article 36 of the Vienna Convention, Markovic's trial attorney was not ineffective for failing to inform him of his rights under the Vienna Convention, and because no conflict of interest existed between Markovic and his attorney, we affirm.

I. BACKGROUND.

¶2 On September 21, 1995, Markovic entered no contest pleas to one count of first-degree sexual assault while concealing his identity, three counts of second-degree sexual assault while armed and concealing his identity, and one count of burglary.[2] The trial court imposed an aggregate sentence of 115 years, comprised of consecutive sentences of forty-five years for the first-degree sexual assault, twenty years for each of the three second-degree sexual assaults, and ten years for the burglary. Markovic unsuccessfully challenged his pleas and

[1] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 [hereinafter Vienna Convention or Treaty].

[2] A defendant does not claim innocence by entering a no contest plea, but acknowledges the sufficiency of the State's evidence to establish guilt beyond a reasonable doubt. *See* ***Cross v. State***, 45 Wis. 2d 593, 598-99, 173 N.W.2d 589 (1970); WIS. STAT. § 971.06(1)(c) (1995-96).

sentences in a postconviction motion. This court affirmed the judgment of conviction and postconviction order. ***State v. Markovic***, 1996AP2013-CR, unpublished slip op. (Wis. Ct. App. Oct. 2, 1997).

¶3 Later, Markovic sought sentence modification based on a new factor. He argued that the Convention on the Transfer of Sentenced Persons,[3] a treaty that essentially permits, under certain circumstances, the transfer of Croatian nationals serving sentences in the United States to Croatian prisons, was a new factor for purposes of sentence modification. The trial court denied his motion, and this court affirmed in an opinion and order entered on July 31, 2003. ***State v. Markovic***, 2001AP3120-CR, unpublished slip op. (WI App July 31, 2003).

¶4 On May 4, 2004, Markovic filed a WIS. STAT. § 974.06 (2003-04)[4] postconviction motion seeking to withdraw his no contest pleas. He contended that his trial attorney should have advised him of his right, as a Croatian national, to contact his consulate, pursuant to Article 36 of the Vienna Convention, after he was arrested. Consequently, he argued that his postconviction attorney's failure to raise this issue constituted ineffective assistance of counsel. He also argued that he received ineffective assistance of counsel because a conflict of interest existed due to the fact that his trial attorney represented Serbian nationals before the ICTY who were charged with crimes against Croatian nationals at the same time that he was representing Markovic, a Croatian national.

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[3] Council of Europe Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 35 U.S.T. 2867. Both the United States and Croatia have joined the Convention.

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶5 The trial court denied the motion, concluding that ***State v. Navarro***, 2003 WI App 50, 260 Wis. 2d 861, 659 N.W.2d 487, held that "the Vienna Convention does not confer standing on an individual foreign national to assert a violation of the [T]reaty in a domestic criminal case." Thus, his trial attorney had no duty to advise him of any rights under the Treaty. The trial court also determined that Markovic's contention that his trial counsel had a conflict of interest was "unsupported by any evidence linking trial counsel's representation in Serbian war crimes cases with any aspect of the representation in [Markovic's] case." Therefore, the trial court concluded that neither attorney rendered ineffective assistance. Markovic now appeals those determinations.

II. ANALYSIS.

¶6 Markovic admits that these issues—the failure to advise him of his rights under Article 36 of the Vienna Convention and the conflict of interest—were not raised in the trial court until after his direct appeal and his first postconviction motion were denied. He asserts that his postconviction attorney's failure to raise these issues constituted ineffective assistance of counsel. He posits that, as a result, he has provided a sufficient reason why he did not raise these issues earlier, and the ***Escalona-Naranjo*** bar should not apply.[5]

¶7 The right to the effective assistance of counsel derives from the Sixth Amendment to the United States Constitution, made applicable by the Fourteenth Amendment, and article I, section 7 of the Wisconsin Constitution. In

[5] *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 185, 517 N.W.2d 57 (1994) (barring multiple postconviction motions, absent a showing of a sufficient reason for failing to raise the issue in the original postconviction motion). We have chosen not to apply the ***Escalona-Naranjo*** bar. As will be seen, we nonetheless reject Markovic's arguments.

order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must identify specific acts or omissions of his or her attorney that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We strongly presume counsel has rendered adequate assistance. ***Id.*** at 690.

¶8 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). "The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous." ***State v. Johnson***, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). However, whether counsel's conduct was deficient and whether it was prejudicial to the defendant are questions of law that this court decides without deference to the trial court. ***Pitsch***, 124 Wis. 2d at 634. Our review of the record satisfies us that Markovic has not shown that either his trial attorney's or his postconviction attorney's performance was deficient.

¶9 Markovic first argues that his no contest pleas were not knowingly, voluntarily, and intelligently entered.[6] Markovic's first claim of attorney ineffectiveness is built on his belief that his rights as a foreign national, arrested for a crime in this country, were violated when the police and his attorney failed to inform him that, pursuant to Article 36 of the Vienna Convention, he had a right to consult with the Croatian consulate after his arrest. He states that the West Allis Police Department knew of his status as a foreign national when they interrogated him, as did his trial attorney, who has practiced extensively before the ICTY. Despite this knowledge and a duty to inform him, neither advised him of the rights afforded under the Vienna Convention. While Markovic acknowledges that the holding in ***Navarro*** concludes that the Treaty confers no substantive rights in a state court proceeding, he argues that a recent ruling of the International Court of Justice (ICJ) and a federal case overrule ***Navarro***.

¶10 Markovic submits that a recent case from the ICJ, Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J 128 (Mar. 31, 2004) [hereinafter ***Mexico v. U.S.***], clearly establishes that a foreigner has a right to confer with his or her consulate at the time of his or her arrest, and this right can

[6] With respect to counsel's failure to advise Markovic of his rights under the Treaty, he submits that this matter should be remanded to the trial court for a determination of "whether in making his plea, [he] was prejudiced by the violation of the Vienna Convention." He claims that, "[c]onsular access may very well [have made] a difference to a foreign national in a way that Trial Counsel is unable to provide." As to the conflict of interest claim, as will be discussed, if a conflict exists, prejudice is presumed.

be enforced in a domestic criminal case.[7] He also cites ***United States v. Calderon-Medina***, 591 F.2d 529, 531 (9th Cir. 1979), as support for his position.[8] However, the proper inquiry in deciding whether his attorney was ineffective for failing to advise him of his Vienna Convention rights, is to review the status of the law at the time Markovic entered his pleas, as failing to raise an unsettled point of law does not constitute ineffective assistance of counsel under ***State v. McMahon***, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994). Thus, if the legal issue was unsettled at the time of his pleas, his attorneys cannot be faulted for failing to advise him of his rights or raising the issue. *See* ***id.*** Here, the answer is simple. It was not until 2003, almost eight years after Markovic entered his pleas, that the debate over whether an individual has standing to assert a violation of the rights provided by Article 36 of the Vienna Convention was resolved in Wisconsin. Unfortunately for Markovic, the decision was contrary to his stated position. In ***Navarro***, this court acknowledged that a "split in opinion" existed over whether an individual foreign national can assert a violation of the treaty in a domestic criminal case. 260 Wis. 2d 861, ¶9. This court determined that an individual right did not exist:

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[7] Markovic has also made this court aware of a case, ***Medellin v. Dretke***, 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004), concerning the ICJ ruling pending before the United States Supreme Court. He has also supplied us with a recent executive order requiring the state courts presiding over the named parties in ***Medellin*** to comply with the ICJ ruling concerning the Mexican Nationals who are parties to the case. With respect to ***Medellin***, on the day this case was completed, May 23, 2005, the United States Supreme Court decided that it improvidently granted certiorari, and thus, the court will not be addressing the merits of the case.

[8] This case is not on point. There, the issue arose over a possible prosecution for illegal entry into the United States after deportation. The trial court remanded the matter to see if any prejudice occurred due to the fact that government agents previously violated the INS rule requiring that "'[e]very detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality.'" ***United States v. Calderon-Medina***, 591 F.2d 529, 530 (9th Cir. 1979) (citation omitted).

> While we acknowledge this split in opinion, in light of the well-established principles of international law that guide judicial construction of a treaty, we are convinced that the Vienna Convention does not confer standing on an individual foreign national to assert a violation of the treaty in a domestic criminal case.

Id. Thus, neither his trial attorney nor his postconviction attorney provided ineffective assistance of counsel because the issue was "unsettled" at the time of their representation. After all, as noted in ***Lilly v. Gilmore***, 988 F.2d 783, 786 (7th Cir. 1993), "[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law[.]"

¶11 Moreover, although ***Mexico v. U.S.*** may support his contention that his rights under Article 36 of the Vienna Convention were violated, and that such rights were intended to be individually enforceable, until such time as the United States Supreme Court says so, this case does not have precedential value in our court. This court cannot overrule ***Navarro***, even if we were to agree with Markovic that his rights under the Vienna Convention were violated, and we are not so deciding, because we may not overrule, modify or withdraw language from a previously published decision of the court of appeals. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). In ***Breard v. Greene***, 523 U.S. 371 (1998), the Supreme Court held:

> [W]hile we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.

Id. at 375. Thus, until such time as the United States Supreme Court or the Wisconsin Supreme Court overrule ***Navarro***, Markovic does not have the requisite standing.

¶12 Next, Markovic contends that he should be allowed to withdraw his pleas because his trial attorney rendered ineffective assistance of counsel due to an alleged conflict of interest. Markovic claims that because his attorney was representing people charged with committing war crimes against Croatian nationals, and he is a Croatian national, his attorney had a conflict of interest. To establish ineffective assistance of counsel by reason of a conflict of interest, "[t]he defendant must show by clear and convincing evidence that an actual conflict of interest existed; it is not sufficient that he show a mere possibility or suspicion that a conflict could arise under hypothetical circumstances." ***State v. Franklin***, 111 Wis. 2d 681, 686, 331 N.W.2d 633 (Ct. App. 1983). If a defendant meets this burden, however, "then it is not necessary to prove actual prejudice or resulting adverse effect." ***Id.*** at 686-87. We are not persuaded that any conflict of interest existed.

¶13 A conflict of interest exists if there is intolerable risk that an attorney "might sacrifice the goals of his client to serve selfish ends or the interests of another." ***Id.*** at 687. Stated differently, "[a]n actual conflict of interest exists when the defendant's attorney was actively representing a conflicting interest, so that the attorney's performance was adversely affected." ***State v. Love***, 227 Wis. 2d 60, 71, 594 N.W.2d 806 (1999). The Rules of Professional Conduct caution lawyers that:

> A lawyer shall not represent a client if the representation of that client will be *directly adverse* to another client, unless … (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other

> client; and (2) each client consents in writing after consultation.

SCR 20:1.7(a) (emphasis added).

¶14 Here, the fact that Markovic's attorney may have been representing Serbian nationals accused of crimes against Croatian nationals in the ICTY does not create a conflict of interest. Markovic has not pointed to any action or omission taken by his trial attorney during his representation of him that was affected by his representation of others in a separate venue. Perhaps Markovic would have preferred another lawyer had he known of his attorney's Serbian heritage or his defense of Serbian nationals accused of committing crimes against Croatian nationals, but his personal preferences do not create a conflict. Potential antagonism between clients does not make it improper to represent both clients in unrelated matters. Moreover, there needs to be more than a mere possibility of an adverse effect to establish a real conflict; the potential risk must be significant and plausible. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(iii) (2000). As a result, we conclude that representing Serbian nationals in the ICTY was not adverse to representing Markovic, a Croatian national, in a Wisconsin criminal court. Inasmuch as no impediment existed, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.