COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 98-2578-CR
98-2579-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAXIE W. HARVEY, JR.,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

VERGERONT, J.[1] Maxie Harvey appeals the judgments of conviction for two counts of operating a motor vehicle after revocation (OAR) in violation of § 343.44(1), STATS., and the order denying his motion for postconviction relief. Harvey, who was convicted by a six-person jury pursuant to

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

§ 756.096(3)(am), STATS. (providing for six-person juries in criminal misdemeanor cases), contends the trial court erred when it refused to grant him a new trial because our supreme court declared in ***State v. Hansford***, 219 Wis.2d 226, 230, 580 N.W.2d 171, 173 (1998), after he was convicted, that § 756.096(3)(am) is in violation of the Wisconsin Constitution. Although Harvey did not object to the six-person jury, he argues waiver should not apply. Harvey alternatively contends that his trial counsel was ineffective for not requesting a twelve-person jury. We conclude Harvey waived his right to a twelve-person jury and he has not established that his trial counsel's failure to request a twelve-person jury was outside the range of professionally competent assistance. We therefore affirm.

Harvey was charged in two separate cases for OAR, second offense, on two separate dates. Under § 756.096(3)(am), STATS., a jury of six people was selected for his trial on December 17, 1997. Harvey did not object to the six-person jury or request a twelve-person jury. The jury convicted him on both counts after hearing the testimony of the arresting officer and three defense witnesses.

On June 19, 1998, the Wisconsin Supreme Court declared that § 756.096(3)(am), STATS., which provides for six-person juries in criminal misdemeanor cases, violates Article I, Section 7 of the Wisconsin Constitution. *See* ***Hansford***, 219 Wis.2d at 230, 580 N.W.2d at 173. Harvey subsequently filed a postconviction motion for reversal of his conviction and a new trial because his jury had only six members and, in the alternative, because his trial counsel was ineffective for not objecting to the six-person jury. The trial court denied the motion, ruling that Harvey waived his right to a twelve-person jury and his trial counsel's performance was neither deficient nor prejudicial.

Except for unusual circumstances, even constitutional issues must be raised in the trial court before they will be considered on appeal. *See* ***State v. Caban***, 210 Wis.2d 597, 604, 563 N.W.2d 501, 505 (1997). Even though Harvey did not raise the issue of a twelve-person jury at his trial, he urges us to review it because, he contends, it is in the interests of justice to do so and there are no factual issues that need resolution. He cites ***State v. Benzel***, 220 Wis.2d 588, 591, 583 N.W.2d 434, 436 (Ct. App. 1998). In ***Benzel***, we reversed a conviction based on the tax stamp law, which was declared unconstitutional after Benzel's conviction. *See* ***id.*** at 592-93, 583 N.W.2d at 436-37. We do not agree that the facts in this case are as compelling as in ***Benzel***, where the conviction was based on an unconstitutional statute. Here, there was no constitutional infirmity in the statutes upon which Harvey's convictions were based, or in the trial proceedings, apart from the number of jurors. We see no compelling reason to review Harvey's constitutional claim regarding the number of jurors.[2]

Harvey alternatively argues that his trial counsel was ineffective for not objecting to the six-person jury at his trial. When the applicable facts are undisputed, as they are in this case, our review of an ineffective assistance of counsel claim is de novo. *See* ***State v. DeKeyser***, 221 Wis.2d 435, 442, 585 N.W.2d 668, 672 (Ct. App. 1998).

[2] Harvey also contends, in a brief and undeveloped argument, that the right to a twelve-person jury is a fundamental constitutional right that cannot be waived unless the defendant personally makes a voluntary, knowing and intelligent waiver on the record. Although the right to a jury trial is such a personal fundamental right, *see* ***State v. Villarreal***, 153 Wis.2d 323, 326, 450 N.W.2d 519, 521 (Ct. App. 1989), Harvey provides no support for his claim that the right to a twelve-person jury, as opposed to a six-person jury, is also a "fundamental" right that needs to be personally waived by the defendant.

To prevail on a claim of ineffective assistance of counsel, Harvey must establish that his counsel's actions constituted deficient performance, and that the deficiency prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). 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." ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 38 (Ct. App. 1992) (quoting ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986)). We thus assess whether such performance was reasonable under the circumstances of the particular case. *See* ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 105 (Ct. App 1992).

Deficient performance is limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue. ***State v. McMahon***, 186 Wis.2d 68, 85, 519 N.W.2d 621, 628 (Ct. App. 1994). "Counsel is not required to object and argue a point of law that is unsettled." ***Id.*** at 84, 519 N.W.2d at 628. Whether § 756.096(3)(am), STATS., violates the Wisconsin Constitution was not settled at the time of Harvey's jury selection and trial. Neither the court of appeals nor the supreme court had released an opinion on the issue. The supreme court did not even accept certification of the issue until over a month after Harvey's trial.[3] Harvey has presented no evidence that, despite the unsettled nature of the issue, it was standard practice for defense attorneys to request twelve-person trials for misdemeanor cases in December of 1997.

[3] The supreme court accepted certification of ***State v. Hansford*** on January 23, 1998. Marilyn L. Graves, Wisconsin Supreme Court Table of Pending Cases, 13 (Feb. 3, 1998).

Therefore, we conclude Harvey's trial counsel's failure to object to the six-person jury and argue that the statute was in violation of the Wisconsin Constitution was not "outside the wide range of professionally competent assistance." ***Guck***, 170 Wis.2d at 669, 490 N.W.2d at 38. Since we conclude that Harvey's trial counsel's performance was not deficient, we need not consider its alleged prejudicial impact. *See* ***Strickland***, 466 U.S. at 700.

By the Court.—Judgments and order affirmed.

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