

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1133

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID BUCK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Calumet County:
DONALD A. POPPY, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. David Buck appeals from the order denying his motion for postconviction relief. The issue on appeal is whether Buck was denied effective assistance of trial counsel. Buck argues that his counsel was ineffective because he did not convince Buck to accept the State's plea agreement and

because his counsel was not licensed to practice law in Wisconsin. We conclude that the circuit court properly determined that Buck was not denied effective assistance of counsel and that the licensing issue was harmless error. We therefore affirm.

¶2 Buck was charged with two counts of homicide by intoxicated use of a motor vehicle, two counts of homicide by negligent operation of a motor vehicle, and one count of causing great bodily harm by operation of a motor vehicle while intoxicated, all as a repeater. A trial to the court was held. At the start of the trial, Buck's counsel informed the court that he was not licensed in the state of Wisconsin but was licensed in Illinois. He asked permission to represent Buck in this case. Counsel explained his experience to the court. The court inquired if the State had any objection and it did not. The court also asked Buck if he wanted counsel to represent him, and Buck replied that he did. The court then allowed counsel to appear in this matter and did not require that counsel obtain local co-counsel.

¶3 Buck was convicted of all five counts. He appealed his conviction to this court, and we vacated the convictions for homicide by negligent use of a motor vehicle as multiplicitous and affirmed the rest of the judgment. The case was remanded for resentencing.

¶4 Subsequently, Buck brought a postconviction motion under WIS. STAT. § 974.06 (1997-98),¹ alleging ineffective assistance of trial counsel.² Buck

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² Because Buck was represented by the same counsel at trial and in his direct appeal, his claim of ineffective assistance of counsel is not barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

asserted a number of reasons why trial counsel was ineffective, including that his counsel was not licensed to practice law in Wisconsin. The circuit court held a ***Machner*** hearing.³ After the hearing, the court denied Buck's motion, concluding that counsel was not ineffective and that the fact that Buck did not have local co-counsel had not prejudiced him in any way.⁴ The court concluded that Buck had completely failed to meet his burden of establishing that he had received ineffective assistance of counsel.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. *See State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶6 We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See Strickland*, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *See State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

⁴ The State explains in its brief that Buck raised a number of grounds for his claim of ineffective assistance of counsel but abandoned all of them except the two discussed in this opinion.

¶7 We will address the licensing issue first. The circuit court found that it had improperly allowed Buck's counsel to represent him without local co-counsel. The court went on to conclude, however, that the error was harmless. Supreme Court Rule 10.03(4) (1998) states that a judge may allow a nonresident lawyer to appear in his or her court and participate in the proceedings "in association with an active member of the state bar of Wisconsin." This rule requires very minimal participation by the local counsel. It requires that "local co-counsel must be of record and acknowledge that he or she is of record by making, at a minimum, one in-court appearance." *State v. Mosley*, 201 Wis. 2d 36, 48, 547 N.W.2d 806 (Ct. App. 1996). Given this minimal requirement, we agree with the circuit court's conclusion that the error of not requiring local co-counsel was harmless.

¶8 Buck also argues that his counsel was ineffective because he failed to properly advise Buck about whether to accept the plea agreement. Buck testified that his counsel had promised to get him acquitted and that is why he did not accept the plea agreement offered by the State. Buck's counsel testified that he did not promise Buck that he would be acquitted. The circuit court specifically found Buck's testimony on this issue to be incredible and his counsel's to be credible. We conclude that these factual findings are not clearly erroneous, and therefore Buck did not establish that he received ineffective assistance of counsel. We affirm the order of the circuit court denying Buck's motion for postconviction relief.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

