COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1846 **Cir. Ct. No. 2005CV1921**

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

STATE OF WISCONSIN EX REL. MICHAEL A. SVEUM,

PETITIONER-APPELLANT,

V.

JUDY P. SMITH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Michael Sveum appeals from a circuit court order that denied his petition for a writ of habeas corpus following a remand from this court. He claims he should have been granted relief on claims that counsel provided ineffective assistance by providing bad advice which had prevented him

from accepting a plea bargain and by failing to present a certain witness at trial. We affirm for the reasons discussed below.

BACKGROUND

¶2 This is the sixth time this case has come before us. Because the State is arguing that one of the issues on the current appeal is procedurally barred, we will set forth the procedural history of this matter, lengthy though it is. On May 7, 1998, we directly affirmed Sveum's convictions for stalking, harassment, violation of a harassment injunction, and criminal damage to property. On September 10, 1998, we denied a ***Knight*** petition which included some allegations of ineffective assistance of counsel that we noted should have been presented to the circuit court as a question of ineffective assistance of postconviction counsel. *See generally* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992) (directing claims of ineffective assistance of appellate counsel to be filed in this court by writ of habeas corpus); ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996) (directing claims of ineffective assistance of postconviction counsel to be filed in the circuit court, either by writ or WIS. STAT. § 974.06 (2005-06)).[1]

¶3 Sveum then returned to the circuit court and filed a WIS. STAT. § 974.06 motion, which the circuit court denied. The motion raised at least twelve claims of error, including allegations that trial counsel had provided ineffective assistance by providing bad advice which had prevented him from accepting a plea bargain and also by failing to present certain witnesses at trial, and that

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

postconviction counsel had provided ineffective assistance by failing to preserve those issues.

¶4 On April 27, 2000, we affirmed the circuit court's denial of the WIS. STAT. § 974.06 motion. We concluded that Sveum's allegations of ineffective assistance of counsel were insufficient to warrant a hearing because:

> Having reviewed the overwhelming evidence of guilt presented at trial, we continue to believe that the record conclusively demonstrates that none of the actions which Sveum contends trial counsel should have undertaken would have had any reasonable likelihood of changing the outcome of the trial.

After unsuccessfully attempting to obtain relief from the federal courts, Sveum next filed a petition for habeas corpus in the circuit court. Among other things, the petition renewed his claims that trial counsel had provided ineffective assistance by providing bad advice which had prevented him from accepting a plea bargain and by failing to present a certain witness at trial. The trial court dismissed the petition without a hearing, citing this court's conclusion on the appeal of the § 974.06 motion that Sveum could not demonstrate prejudice on his ineffective assistance of counsel claims.

¶5 Sveum appealed the denial of his writ petition, but offered argument only on the bad advice claim. We affirmed in a split decision issued on May 11, 2006, concluding that the issue was procedurally barred by the prior WIS. STAT. § 974.06 motion and appeal under ***State v. Pozo***, 2002 WI App 279, ¶9 & n.5, 258 Wis. 2d 796, 654 N.W.2d 12 (habeas corpus cannot be used to assert a claim that was already litigated in a prior postconviction proceeding). In dissent, however, Judge Vergeront disagreed that our decision on the § 974.06 appeal should be used to bar the bad advice claim. She reasoned that the bad advice claim had not been

properly litigated on the prior appeal because we had failed to consider that the prejudice Sveum was asserting on that particular allegation of ineffective assistance was that he would have entered a plea, not that the outcome at trial would have been different.

¶6 The Wisconsin Supreme Court summarily vacated our decision without discussion and remanded with directions that we order supplemental briefing and consider whether Sveum would be "entitled to a hearing on his claim that trial counsel was ineffective for providing correct advice on which Mr. Sveum relied when deciding to reject a plea offer and proceed to trial" based on the allegations in his writ petition. After issuing a decision which was withdrawn on reconsideration, we ultimately reversed and remanded to have the circuit court "consider Sveum's habeas petition on its merits and to provide him a hearing on his claim if warranted." We reasoned that the supreme court's order "implicitly rejected the argument that the ***Pozo*** bar applies to Sveum's ineffectiveness claim."

¶7 The circuit court held a ***Machner*** hearing on remand. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). The court stated the scope of the hearing was limited to the bad advice issue, although Sveum also presented some evidence that counsel had failed to present a witness who could have provided an alternate explanation for how Sveum had obtained the victim's unlisted phone number. Sveum testified that trial counsel had advised him that the State could not prove the harassment charge or the felony enhancement to the stalking charge. He stated that he would not have rejected the plea if he had known he could be convicted of all four charges. Trial counsel denied ever having told Sveum that the State could not obtain convictions on the stalking and harassment charges, although counsel believed there were certain legal issues of first impression that could be raised in defense of those two charges. Instead,

counsel said he advised Sveum to accept a plea offer because counsel felt the State had some strong evidence against him and was going to be able to prove its case.

¶8 The trial court found that trial counsel "did not assure, promise, predict that the defendant could not be convicted of all four charges. His testimony was that the evidence was overwhelming, that the defendant denied he'd done anything wrong and that there were legal defenses." The court concluded that counsel could not have known how the appellate court would rule on an issue of first impression, and that the advise counsel gave his client did not constitute deficient performance. The court did not believe that the additional witness issue was properly before it, but stated that even if it were, counsel did not learn of the additional witness with enough time to have presented her at trial, and her testimony would not have likely changed the outcome of the trial in any event.

DISCUSSION

¶9 On this appeal, Sveum argues that trial counsel provided ineffective assistance in two ways: by providing inaccurate information about the law relevant to his case which induced Sveum to reject a plea offer, and by making no attempt to contact the witness who could have provided an alternate explanation of how Sveum obtained the victim's unlisted phone number. The State argues that the trial court correctly determined that trial counsel did not provide bad advice and that Sveum is procedurally barred from raising the witness claim.

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably

> within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted).

¶10 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Similarly, because the trial court is the ultimate arbiter of credibility when acting as fact finder, we will defer to any factual findings which resolve conflicts in the testimony. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Pitsch***, 124 Wis. 2d at 634.

¶11 We will independently review whether claims are procedurally barred. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

Bad Advice Claim

¶12 It was undisputed at the ***Machner*** hearing that trial counsel advocated at trial for interpretations of the harassment and stalking statutes which we rejected on Sveum's first appeal. It was also uncontested that counsel advised Sveum prior to trial about his view of the law, and the possibility that Sveum

could prevail at trial on two of the charges under counsel's legal theories. However, the trial court explicitly found that counsel never told Sveum that he could not be convicted on all four counts, and actually advised him to accept a plea.

¶13 We see nothing deficient with counsel's performance. Counsel could not know in advance how an appellate court would rule on issues which had never before been litigated on appeal. Because the proper interpretation of the stalking and harassment statutes were at that time issues of first impression, counsel performed zealously on behalf of his client by advocating the interpretation most favorable to the defense. It was not bad advice for counsel to tell Sveum that he had potential legal defenses; it was his duty to do so. Moreover, counsel advised his client that he should accept a plea notwithstanding any potential defenses, given the overall strength of the State's evidence. Therefore, Sveum had a reasonable professional evaluation of his chances at trial based on the existing state of the law before entering his pleas.

Failure to Present Witness

¶14 At trial, Renee Walls testified for the State that Sveum had told her that he had called over 1000 chronological telephone numbers, starting from one he knew to have been newly issued, in order to discover the victim's new unlisted number. Sveum contends this was key evidence for enhancing the stalking charge to a felony. Sveum alleges in his current petition that he told counsel prior to trial that Susan Applebaum would testify that she had given Sveum the victim's telephone number without him requesting it, but that counsel failed to take any action to secure Applebaum's testimony at trial because it would have been

irrelevant under counsel's view of the law. He also raised the issue on his prior WIS. STAT. § 974.06 motion, but did not raise it on his last appeal to this court.

¶15 As we mentioned above, ***Pozo*** generally bars a litigant from raising previously litigated claims in a subsequent habeas corpus action. ***Pozo***, 258 Wis. 2d 796, ¶9. In addition, issues not briefed on appeal may be deemed abandoned. ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994).

¶16 Sveum argues that we should not apply ***Pozo*** here because the Wisconsin Supreme Court has already implicitly determined that it is inapplicable, and he claims he did not abandon the witness issue on his last appeal because the question there was only whether he was entitled to a hearing on his writ petition. He argues that once he showed he was entitled to a hearing, he ought to have been able to present all the alleged instances of ineffective assistance that had been set forth in the petition.

¶17 We are not persuaded that the Wisconsin Supreme Court's implicit decision that ***Pozo*** should not be applied to Sveum's bad advice claim also means that it should not be applied to his witness claim. Because Sveum did not present his witness claim to the Wisconsin Supreme Court, the decision cannot be read to address it. Furthermore, as Judge Vergeront explained in her dissent from our May 11, 2006 decision, the bad advice claim did not fit into the lack of prejudice rationale we had offered when affirming the denial of Sveum's WIS. STAT. § 974.06 motion, because the alleged prejudice from the bad advice was the decision not to accept a plea, while our prejudice analysis focused on the likelihood that any of Sveum's claims would result in a different result at trial,

given the strength of the State's evidence. That likelihood-of-a-different-outcome at trial analysis still applies to Sveum's witness claim.

¶18 Finally, regardless whether the witness claim is procedurally barred by ***Pozo***, we agree with the State that Sveum abandoned it by not raising it on his last appeal. The circuit court had ruled that Sveum was not entitled to a hearing on any claim raised in his petition, and Sveum challenged that ruling only with respect to his bad advice claim.

By the Court.—Order affirmed.

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