

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-3174

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDDIE LEE QUINN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

¶1 DYKMAN, P.J.¹ Eddie Lee Quinn appeals from an order denying his motion for an evidentiary hearing to establish that he is entitled to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

postconviction relief under WIS. STAT. § 974.06 (1997-98).² Although Quinn concedes that he failed to raise on appeal the issues he is currently asserting, as required by § 974.06, he argues that he has a “sufficient reason” for this failure. His sufficient reason is that his court-appointed appellate counsel provided him with ineffective assistance by refusing to raise issues he wanted raised. We conclude that Quinn’s appointed counsel was not constitutionally ineffective and that Quinn does not have a sufficient reason for failing to comply with the requirements of § 974.06. We therefore affirm.

I. Background

¶2 Eddie Lee Quinn was charged with two counts of battery under WIS. STAT. § 940.19(1) (1995-96), and one count each of disorderly conduct under WIS. STAT. § 947.01 (1995-96), and intimidating a victim under WIS. STAT. § 940.44(1) (1995-96). Quinn asked that he be allowed to proceed pro se because he had a “lack of confidence in court-appointed attorneys, public defenders, and the like,” and the trial court allowed Quinn’s appointed attorney to withdraw from the case. The court appointed standby counsel.

¶3 A jury found Quinn guilty on all four counts. Quinn filed a notice of intent to pursue postconviction relief. He became dissatisfied with his appellate attorney, however, when she decided to narrow the issues on appeal. According to Quinn, his attorney refused to raise three claims that Quinn wished to assert: (1) ineffective assistance of pretrial counsel; (2) ineffective assistance of standby counsel; and (3) prosecutorial misconduct.

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 While his appeal was in the briefing process, Quinn sent a letter to this court's clerk, expressing disagreement with his attorney's decision to narrow the issues. Quinn wrote that his letter was "to protect and preserve my rights, if need arises, to present and litigate those issue at a later date or some time in the near future." In an order, we informed Quinn that his letter did "not necessarily preserve his right to litigate these issues in the future." We noted that Quinn had made no indication that he would prefer to represent himself.

¶5 Quinn's attorney raised one issue: that the trial court had prevented Quinn from presenting a defense of impairment due to intoxication, and the real controversy was therefore not tried. We affirmed Quinn's judgment of conviction.

¶6 After the supreme court denied his petition for review, Quinn, proceeding pro se, filed a motion under WIS. STAT. § 974.06³ for postconviction relief, and requested an evidentiary hearing. Quinn asserted ten grounds for relief: (1) "ineffective assistance of pre-trial counsel;" (2) "ineffective assistance of court-appointed standby counsel;" (3) "prosecutorial misconduct;" (4) "various errors and abuses of discretion by the trial court;" (5) "violation of constitutional right to due process of law;" (6) "violation of constitutional right to equal protection of the law;" (7) "violation of constitutional right to an impartial judge;" (8) "violation of constitutional right to a fair cross-section of an impartial jury;"

³ WISCONSIN STAT. § 974.06 provides in part:

(1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court ... claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state ... may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(9) “ineffective assistance of postconviction or appellate counsel;” and (10) that sufficient reason existed for failure to raise these issues on direct appeal.

¶7 The trial court denied Quinn’s motion for an evidentiary hearing. It concluded:

The issues raised by Mr. Quinn fall into basically three categories. They are issues that have been raised on appeal and dealt with, issues that should have been raised on appeal and dealt with, or issues where Mr. Quinn has failed to adequately state a claim for the relief that he requests.

Quinn appeals.

II. Analysis

A. Standard of Review

¶8 We review a trial court’s decision not to hold an evidentiary hearing under a two-part, mixed standard. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996); *see also State v. Carter*, 131 Wis. 2d 69, 78, 389 N.W.2d 1, (1986) (applying standard to § 974.06 motion). First, we review de novo the determination whether a motion alleges facts that, if true, would entitle the movant to relief. *Bentley*, 201 Wis. 2d at 310. If the motion alleges sufficient facts, the trial court has no discretion and must hold an evidentiary hearing. *Id.* However, if the motion does not allege sufficient facts, or presents only conclusory allegations, or if the record conclusively demonstrates that the movant is not entitled to relief, the trial court has discretion to deny the hearing, and we review its decision under an erroneous exercise of discretion standard. *Bentley*, 201 Wis. 2d at 310-311; *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

B. Requirements for Relief Under § 974.06

¶9 In determining whether Quinn has alleged sufficient facts to require an evidentiary hearing, we first turn to WIS. STAT. § 974.06. Subsection (4) requires that all grounds for relief available to a defendant under § 974.06 “be raised in his or her original, supplemental or amended motion.” In *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), the supreme court held that all grounds for relief must be asserted in an initial postconviction motion or on direct appeal. The court further held that there is no exception for motions alleging constitutional violations. *Id.* at 181. A defendant who fails to do this must show that there is a “sufficient reason” the ground for relief was not asserted in the original motion or appeal or relief will be denied. WIS. STAT. § 974.06(4). Whether there is a “sufficient reason” is a question of law. *State v. Flowers*, 221 Wis. 2d 20, 27, 586 N.W.2d 175 (Ct. App. 1998).

C. Sufficient Reason Under § 974.06

¶10 Quinn concedes that the claims asserted in his § 974.06 motion were not made on direct appeal. He asserts that the trial court was mistaken in stating that some of the “issues ... have been raised on appeal and dealt with.” However, he also contends that he has a “sufficient reason” for failing to comply with § 974.06(4), namely, that his appellate attorney refused to raise them in her brief, in spite of Quinn’s insistence that she include them.

1. Ineffective Assistance of Appellate Counsel: Failure to Raise Issues on Direct Appeal

¶11 If appellate counsel’s refusal to include the additional issues rose to the level of ineffective assistance of counsel, this could constitute a sufficient reason for why Quinn previously failed to assert these issues. *State ex rel.*

Rothering v. McCaughtry, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996) (“[I]n some circumstances ... ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not.”).

¶12 In determining whether effective assistance of counsel was denied, Wisconsin follows the standard of the United States Supreme Court, announced in **Strickland v. Washington**, 466 U.S. 668 (1984). See **State ex rel. Schmelzer v. Murphy**, 201 Wis. 2d 246, 253, 548 N.W.2d 45 (1996). A defendant has the burden to show both that his attorney performed below an objective standard of reasonableness and that he was prejudiced by counsel’s deficiency. **Strickland**, 466 U.S. at 687; **State v. Adams**, 221 Wis. 2d 1, 6 (Ct. App. 1998). Whether counsel’s performance was deficient and prejudicial is a question of law. **State v. Pitsch**, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Counsel is presumed to have acted properly; a defendant must demonstrate that his attorney made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment. **Strickland**, 466 U.S. at 690.

¶13 The State argues that Quinn’s claim of ineffective assistance of counsel is precluded by **Jones v. Barnes**, 463 U.S. 745 (1983), ending its three-page brief with a citation to **Jones**. In **Jones**, the Supreme Court reversed a decision holding that an attorney must raise all “colorable” issues on appeal when requested by the client. **Id.** at 749. The Court noted that a defendant who is represented by an attorney has the final say in making “certain fundamental decisions” in a case, such as whether to plead guilty or whether to appeal at all, but concluded that decisions regarding which issues to appeal must generally be left to counsel. **Id.** at 751. The Court further said that appellate advocates had long “emphasized the importance of winnowing out weaker arguments on appeal and

focusing on one central issue,” *id.*, and suggested that a rule preventing an advocate from focusing on the strongest issues “would disserve the very goal of vigorous and effective advocacy.” *Id.* at 754. The Court held that defendants have no “constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points.” *Id.* 751.

¶14 *Jones* does not insulate an attorney’s choice of issues from being the subject of an ineffective assistance claim. Rather, the case declined to adopt a *per se* rule that attorneys fail to provide effective assistance when they choose not to raise a nonfrivolous issue even though their clients request that they do so. The Court clarified this in *Smith v. Robbins*, 528 U.S. 259 (2000). In *Smith*, the Court stated: “Notwithstanding [*Jones*], it is still possible to bring a *Strickland* claim based on counsel’s failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.” *Id.* at 288. As an example of a way this could be shown, the Court quoted with approval *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986), which stated: “Generally, only when ignored issues are *clearly stronger* than those presented, will the presumption of effective assistance of counsel be overcome.” *Id.* (Emphasis added).⁴ The supreme court suggested a

⁴ The *Gray* court further stated:

Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel’s choice of issues, the right of effective assistance of counsel on appeal would be worthless. When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal.

Gray, 800 F.2d at 646.

similar standard when it held that failure to preserve a motion for appeal purposes could not be considered ineffective assistance when the decision was “not outside the range of acceptable professional judgment.” *State v. Harvey*, 139 Wis. 2d. 353, 380, 407 N.W.2d 235 (1987).

¶15 Under this standard, then, in order to show that appellate counsel’s performance was deficient, Quinn had the burden to demonstrate that at least one of the three issues appellate counsel declined to assert on appeal in spite of Quinn’s urgings was “clearly stronger” than the issue she ultimately chose to raise, namely, that the trial court prevented Quinn from presenting a defense of impairment due to intoxication. In making this showing, Quinn may not rely on “conclusory allegations,” but instead must “provide facts that allow the reviewing court to meaningfully assess his ... claim.” *Bentley*, 201 Wis. 2d at 314. Because the State relied wholly on its misinterpretation of *Jones*, it failed to evaluate the strength of any of these other arguments.⁵ Therefore, we examine independently each of the three issues in turn.⁶

a. Ineffectiveness of pretrial counsel

¶16 Quinn first argues that his appellate counsel erred when she failed to raise the claim that Quinn’s pretrial counsel was constitutionally ineffective.

⁵ We consider a three-page brief citing only *Jones* to be inadequate. We anticipate that counsel’s future briefs will fully address relevant issues.

⁶ As noted *supra* ¶6, Quinn’s § 974.06 motion was not limited to these three issues, but also alleged a number of additional constitutional errors, including violations of his rights to equal protection, an impartial judge, and a jury comprised of a fair cross-section of the community. Quinn, however, does not argue that these additional issues were among those that he pressed appellate counsel to assert on appeal. He has not offered an alternative “sufficient reason” to explain why they were not asserted in his original motion. Accordingly, these issues have been waived. *Escalona*, 185 Wis. 2d at 185.

Quinn's basis for this argument is his claim that pretrial counsel told him "that there was no such statute in Wisconsin law which dealt with a voluntary intoxication-drugged condition," which Quinn further interprets as being lied to about the existence of WIS. STAT. § 939.42(2) (1995-96).⁷ In addition, Quinn claims that pretrial counsel failed to file a demand for a speedy trial.⁸

¶17 Assuming *arguendo* that these claims are true and that they would indicate that pretrial counsel's performance fell below an objective standard of reasonableness under *Strickland*, Quinn still has not shown that an ineffective assistance claim with regard to pretrial counsel would have been stronger than the argument asserted by appellate counsel. *Strickland* requires not only a showing of deficient performance, but also that the defendant was prejudiced. *Id.* at 687. There is no indication, however, that Quinn was harmed by these alleged deficiencies. Even if pretrial counsel misled Quinn about the existence of WIS. STAT. § 939.42(2), Quinn asserted the argument himself after pretrial counsel withdrew and Quinn proceeded pro se. Although both the trial court and the court of appeals rejected Quinn's argument that he should have received a jury

⁷ WISCONSIN STAT. § 939.42 provides in part:

An intoxicated or a drugged condition of the actor is a defense only if such condition:

....

(2) Negatives the existence of a state of mind essential to the crime

⁸ In one sentence of his brief, Quinn also claims that pretrial counsel failed to "contact, interview, investigate, or even subpoena some of the witnesses Quinn requested." Quinn, however, fails to explain how these witnesses would have been important to his case, why pretrial counsel chose not to act or even who these witnesses were. Because Quinn relies only on a conclusory allegation and provides no factual support of this claim, it is rejected. *Bentley*, 201 Wis. 2d at 314.

instruction regarding intoxication, there is nothing to indicate that the result would have been different had he learned about § 939.42(2) sooner. Quinn’s claim regarding the notice for a speedy trial is likewise devoid of any showing of prejudice. Therefore, appellate counsel was not acting outside acceptable professional judgment when she declined to press this issue on appeal.

b. Ineffectiveness of standby counsel

¶18 Quinn’s second argument also involves an ineffective assistance claim. Specifically, Quinn contends that appellate counsel should have asserted that standby counsel had provided ineffective assistance of counsel because he had “engage[d] in stonewalling tactics,” failed to subpoena a number of witnesses, and made numerous other errors.

¶19 Whether standby counsel was ineffective or not, Quinn has no basis for asserting that his constitutional right to counsel was violated as a result of his performance. Quinn waived his right to counsel when he asked the trial court to allow him to proceed pro se, and as such he also waived his right to effective assistance of counsel. Quinn had a right to represent himself *or* a right to be represented by counsel; he did not have a right to both. *See Moore v. State*, 83 Wis. 2d 285, 300, 265 N.W.2d 540 (1977). Although the trial court in its discretion decided to appoint standby counsel, this was for the convenience of the trial court, not Quinn, and therefore did not establish anew Quinn’s right to effective assistance of counsel. *See State v. Cummings*, 199 Wis. 2d 721, 754 n.17, 546 N.W.2d 406 (1996). Consequently, Quinn cannot argue that this issue was clearly stronger than the one appellate counsel asserted and, therefore, that her decision to exclude this issue on appeal constituted ineffective assistance of counsel.

c. Prosecutorial misconduct

¶20 Finally, Quinn argues that appellate counsel was ineffective because she chose not to allege prosecutorial misconduct on appeal. Quinn claims that during his trial an assistant district attorney (1) failed to disclose evidence to him in a “timely fashion;” (2) did “knowingly solicit and condone false and otherwise perjured testimony;” (3) had a pretrial ex parte meeting with a hearing examiner; and (4) made prejudicial statements at his sentencing hearing. Because of this conduct, Quinn asserts that he was denied due process.

¶21 If prosecutorial misconduct “poisons the entire atmosphere of the trial,” it violates due process. *State v. Lettice*, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996) (internal quotation omitted). However, “[r]eversing a criminal conviction on the basis of prosecutorial conduct is a ‘drastic step’ that ‘should be approached with caution.’” *Id.* (quoting *State v. Ruiz*, 118 Wis. 2d 177, 202, 347 N.W.2d 352 (1984)). The court in *Ruiz* enumerated a number of factors that must be balanced in deciding whether a new trial should be ordered for a prosecutor’s misconduct:

the defendant’s interest in being tried on evidence validly before the jury; the public’s interest in having the guilty punished; the public’s interest in not burdening the administration of justice with undue financial or administrative costs; the public’s interest that the judicial process shall both appear fair and be fair in fact; and the interest of the individuals involved—the witnesses and family of the victim—not to be subjected to undue trauma, embarrassment or inconvenience.

Ruiz, 118 Wis. 2d at 202. Taking these factors into consideration, we conclude that Quinn has failed to allege sufficient facts that would demonstrate an assertion of prosecutorial misconduct was clearly stronger than the intoxication argument

raised by appellate counsel or that she was not exercising professional judgment in the decision she made.

¶22 With regard to Quinn's first claim of prosecutorial misconduct, Quinn argues that the prosecutor's delay in informing him that she would be using certain photographs as evidence forced him to ask for a continuance. He does not claim that the prosecution failed to disclose evidence to him or that its delay prevented him from preparing a defense. Rather, Quinn argues that because of the continuance, he could not benefit "from the June 1998 Wisconsin Supreme Court ruling overturning convictions involving six-person juries." Presumably, Quinn is referring to *State v. Hansford*, 219 Wis. 2d 226, 243, 580 N.W.2d 171 (1998), in which the supreme court held that WIS. STAT. § 756.096(3)(am), a provision that had mandated six-person juries for misdemeanor cases, violated article I, § 7 of the Wisconsin Constitution.

¶23 Quinn's trial was held on June 30, 1998, just under two weeks after *Hansford* was decided; he therefore received a twelve-person jury as required by *Hansford*. Although Quinn's argument is far from clear, we presume he means to assert that, had it not been for the continuance, his trial would have occurred before *Hansford* and he would have received a six-person jury rather than twelve, thus rendering his conviction vulnerable to constitutional attack. Although creative, this argument lacks merit. In essence, Quinn is arguing that he was prejudiced by having his constitutional right to a twelve-person jury protected. But prejudice does not result from an inability to challenge a conviction because the trial court safeguarded a constitutional right, particularly with regard to a § 974.06 motion, in which Quinn is seeking redress for alleged violations of his constitutional rights.

¶24 With regard to his allegation that the prosecutor “solicited” and “condoned” perjured testimony, Quinn has offered no facts to support this assertion, but made only repeated conclusory statements that the prosecution’s witnesses lied and that the prosecutor knew about it. Because Quinn has failed to “provide facts that allow the reviewing court to meaningfully assess his ... claim,” we reject this argument. *Bentley*, 201 Wis. 2d at 314.

¶25 Quinn asserts next that the assistant district attorney had a pretrial ex parte meeting with a hearing examiner, which prejudiced his case. But Quinn also states that the meeting was with regard to a probation revocation meeting. Quinn does not explain how this meeting could have affected the outcome of his trial.

¶26 Finally, Quinn contends that the assistant district attorney made several prejudicial and false statements at his sentencing hearing. Quinn had a due process right to be sentenced only upon materially accurate information. *State v. Lechner*, 217 Wis. 2d 392, 419, 596 N.W.2d 912 (1998). The only example he provides, however (other than his remarks regarding alleged perjured testimony, which we have already addressed), is a reference that the prosecutor made to a 1987 charge which was ultimately dismissed. The transcripts of the hearing, however, make it not at all clear which charge Quinn is referring to, as the assistant district attorney never mentioned any charges from 1987 during the sentencing hearing. Quinn *did* object at the hearing to a statement by the assistant district attorney regarding an alleged conviction for lewd and lascivious behavior. However, even if Quinn is correct that the assistant district attorney provided inaccurate information with regard to that charge, it is also clear from the transcript that, to the extent the trial court considered Quinn’s extensive prior record in imposing a sentence, it was primarily concerned with Quinn’s past violent behavior. Appellate counsel did not err when she declined to appeal this

issue. *See id.* (stating that defendant seeking resentencing must show that information was both inaccurate and that the court relied on the information in the sentencing).

¶27 In short, we conclude that Quinn has failed to show that any of the issues he asked appellate counsel to raise were clearly stronger than the issue appellate counsel decided to appeal, or that she was acting outside accepted professional judgment in choosing not to raise them against his wishes. Consequently, we conclude that Quinn has failed to demonstrate that he received ineffective assistance of counsel.

2. Other Sufficient Reasons

¶28 Absent a claim for ineffective assistance of counsel, Quinn has no “sufficient reason” for failing to comply with the requirements of WIS. STAT. § 974.06. At the time of his appeal, Quinn had a right to represent himself without the benefit of counsel so long as he could demonstrate his ability to proceed pro se. *Faretta v. California*, 422 U.S. 806, 819-20 (1975); *State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). Quinn was no doubt aware of this right, as he had already exercised it in the trial court when he requested that pretrial counsel be dismissed. Moreover, in his brief Quinn alludes to a letter written to him by the Office of the State Public Defender, informing Quinn that he could ask appellate counsel to withdraw if he was unsatisfied with her work. Although Quinn made it very clear he was dissatisfied, there is no indication in the record, nor does Quinn assert, that he asked appellate counsel to withdraw and to proceed pro se. Quinn also does not allege that appellate counsel or anyone else led him to believe that he had no choice but to accept his counsel’s strategy to

appeal only one issue or that there was any bad faith on her part in choosing to do so.

D. Trial Court's Exercise of Discretion

¶29 Because Quinn has failed to allege facts, which, on their face, would entitle him to relief, we review the trial court's denial of Quinn's motion for an evidentiary hearing under the erroneous exercise of discretion standard. **Bentley**, 201 Wis. 2d at 311. Under this standard, we will conclude that a trial court has properly exercised its discretion when it examined the relevant facts, applied the proper legal standard, and engaged in a rational decisionmaking process. **Id.** at 318. However, the trial court must “form its independent judgment after a review of the record and pleadings and ... support its decision by written opinion.” **Id.** at 318-19 (quoting **Nelson**, 54 Wis. 2d at 498). Although findings of fact and conclusions of law are not required, the trial court must deal with each ground for relief *separately* in order to facilitate review. **Smith v. State**, 60 Wis. 2d 373, 385, 210 N.W.2d 678 (1973).

¶30 The trial court below did not issue a written opinion and did not address separately each ground set forth in the § 974.06 motion. We are obliged to uphold a discretionary determination if we can independently conclude that the facts of record applied to the proper legal standards support the trial court's decision. **Andrew J.N. v. Wendy L.D.**, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993). Based on our analysis, we conclude that the trial court's decision was

correct. We therefore affirm the order of the trial court denying Quinn's motion for an evidentiary hearing.⁹

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

⁹ In the last two pages of his brief, Quinn also challenges the way in which the trial court made its decision, asking whether it was “appropriate” for the trial court to rule on the merits of his motion at a telephone scheduling conference. He further argues that he did not have proper notice that the conference was going to be dispositive of the motion.

We cannot provide Quinn with any relief based on the nature of the trial court's decision. Quinn did not have a right to a hearing until he could allege facts that would entitle to him to relief. Quinn failed to do so, so the trial court had no obligation to allow Quinn to present his case orally. Moreover, Quinn was given a full opportunity to present his side of the argument in writing, of which he took full advantage by writing a 177-page motion. In short, although deciding Quinn's motion during a scheduling conference may have been unorthodox, it does not provide Quinn with any grounds for relief.

