

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 15, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3286-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY L. BENION,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

BROWN, J. Gary L. Benion appeals his conviction for operating a motor vehicle after revocation. He claims that his trial counsel provided ineffective representation because she failed to introduce expert testimony or documentary evidence supporting his claim that amnesia prevented him from recalling that his license was revoked. Benion also contends that his trial counsel should have raised certain objections while he

was being cross-examined by the prosecutor and during the prosecutor's closing arguments. Because Benion has failed to furnish this court with any evidentiary support for his allegations, we uphold the trial court's ruling that Benion's trial counsel acted reasonably and affirm the conviction.

On August 18, 1994, a town of Menasha police officer cited Benion for operating a motor vehicle after revocation. *See* § 343.44(1), STATS. Benion's privileges were revoked by the Winnebago County Circuit Court in December 1993, after it found him guilty of operating a motor vehicle while impaired. The Department of Transportation mailed Benion notice of his revocation on January 25, 1994.

The case went to trial on January 17, 1995. Benion stipulated that he was operating a vehicle on August 18, 1994, and that the DOT revoked his privileges in January 1994.

The issues at trial thus narrowed to whether Benion knew that his license had been revoked. *See* WIS J I—CRIMINAL 2620. Benion claimed that he had physical impairments preventing him from remembering whether his license was valid. He was assaulted in March 1994, and the injuries apparently were severe enough to require several days of hospitalization. He further explained that the injuries caused a significant memory loss and impaired his

ability to recall events. Benion supported the defense with testimony from his sister whom he had lived with since leaving the hospital and who had been taking care of him. She confirmed that Benion had memory difficulties.

The State challenged Benion's theory during cross-examination. It probed Benion's ability to partially recall his appearance before the Outagamie County Circuit Court in July 1994 on another driving while intoxicated charge. During the State's cross-examination, Benion also admitted that he could recall other important facts such as his name, date of birth and previous addresses. The jury subsequently rejected Benion's defense and found him guilty.

Benion later filed a postconviction motion alleging ineffective assistance of counsel. He alleged that his trial counsel was ineffective because she failed to introduce any evidence, such as medical records, to corroborate his defense. Benion also complained that his trial counsel failed to raise certain objections.

While the trial court ordered a *Machmer*¹ hearing on this motion, Benion's new counsel declined the opportunity to present any testimony or

¹ See *State v. Machmer*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979).

documentary evidence; the attorney told the trial court: "I believe the record speaks for itself" The trial court later denied Benion's motion.

We use a two-pronged test to evaluate charges of ineffective assistance of counsel. First, we measure if the attorney's performance was deficient. *State v. Haskins*, 139 Wis.2d 257, 262, 407 N.W.2d 309, 311 (Ct. App. 1987). If it is, we must then determine if the mistakes prejudiced the defense. *Id.* When a court gauges the quality of the attorney's performance, it assesses whether the attorney's work fell below an objective standard of reasonableness. *See State v. Johnson*, 133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986). The defendant, however, must aid in the analysis by pointing to specific acts or omissions, as Benion has, which show that his or her attorney did not exercise reasonable professional judgment. *See Haskins*, 139 Wis.2d at 262, 407 N.W.2d at 311.

Our review of a trial court's conclusions about ineffective assistance claims involves a mixed question of law and fact. The trial court's assessment of what actually happened, the historical facts, will not be set aside unless clearly erroneous. *Id.* The overall question of whether the representation was deficient and prejudicial, however, is a question of law that we review de novo. *Id.* We now turn to the errors upon which Benion rests his claim about the deficiency of trial counsel.

First, we address the failure of Benion's trial counsel to introduce evidence corroborating his medical condition. Although Benion concedes that

his trial counsel elicited some testimony which showed that he had been hospitalized and in a coma for several days after the beating, Benion nonetheless argues that expert testimony or a medical record was necessary to bolster his theory. He cites to the Public Defender's Minimum Attorney Performance Standards and argues that they require the attorney to investigate the facts supporting the defense's theories.

The State complains, however, that this medical evidence never existed and notes that “nowhere in Defendant-Appellant's Brief is such evidence alleged to exist today.” We have likewise scoured the record looking for facts to substantiate this claim and have not found any. Because it is not within the record, we will accept the State's position and assume that this evidence does not exist. See *Fiunefreddo v. McLean*, 174 Wis.2d 10, 27, 496 N.W.2d 226, 232 (Ct. App. 1993). Therefore, since we have no factual basis to support a conclusion that Benion's trial counsel could have obtained this corroborating evidence, we reject Benion's claim that counsel's failure to use this type of evidence was a sign of her deficient performance.

We now turn to the three arguments regarding trial counsel's alleged failure to raise certain objections. Here, we must also affirm because Benion has again failed to provide evidentiary support. As we noted above, Benion and his appellate counsel made a seemingly tactical decision not to call trial counsel as a witness at the *Machmer* hearing. Benion apparently decided to stand only on the transcript and his allegations about what trial counsel should have done.

Nonetheless, when a defendant questions the performance of his or her trial counsel, subsequent counsel bears the burden of calling trial counsel to the *Machmer* hearing to develop a record that shows the reasoning behind trial counsel's decision-making. See *State v. Machmer*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Since Benion's appellate counsel failed to secure trial counsel's presence at the postconviction hearing and make the appropriate record, Benion has waived his right to review these issues. See *id.* We therefore hold that trial counsel's failure to raise these objections does not constitute deficient performance. We affirm the trial court's decision to deny Benion a new trial on this ground.

By the Court. – Judgment and order affirmed.

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