COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 6, 1996

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.

NOTICE

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

No. 96-0068-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID A. CHADWICK,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Bayfield County: ROBERT E. EATON, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. David Chadwick appeals a judgment convicting him of armed robbery, six counts of intentionally pointing a firearm at another, and three counts of possessing a controlled substance. He also appeals an order denying his postconviction motions. Chadwick argues that he was denied effective assistance of counsel when his trial attorney waived his right to poll the jury without first consulting him and for failing to seek a hearing pursuant

to ***Franks v. Delaware***, 438 U.S. 154 (1978), in order to suppress evidence obtained as the result of a search warrant based on false information. Chadwick also argues that his new-found religious beliefs constitute a "new factor" justifying a reduced sentence. We reject these arguments and affirm the judgment and order.

To prevail on a claim of ineffective assistance of counsel, Chadwick must establish that his counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, Chadwick must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id***. at 694.

Chadwick has not established any prejudice from his trial attorney's decision not to poll the jury. The court instructed the jury that it must be unanimous as to each verdict before its verdicts could be legally received. After the court read the verdicts, it asked "Are these the verdicts of you all, so say you all?" The foreperson answered, "Yes." The record discloses no basis for believing that the jury disregarded the court's instruction or that the foreman misrepresented the verdict of any of the jurors. In the absence of any evidence that the jury was not unanimous, Chadwick can show no prejudice from his counsel's decision. *See* ***State v. McMahon***, 168 Wis.2d 68, 96, 519 N.W.2d 621, 632 (Ct. App. 1994).

Chadwick has established neither deficient performance nor prejudice from his counsel's decision not to seek a ***Franks*** hearing to suppress evidence seized through an allegedly improper search warrant. This issue was not properly preserved because Chadwick's attorney at the time a suppression motion would have been filed was not called as a witness at the postconviction hearing to explain his decision. Counsel's performance will not be reviewed absent his testimony at the postconviction hearing. *See* ***State v. Machner***, 92 Wis.2d 797, 802, 285 N.W.2d 905, 907 (Ct. App. 1979). In addition, the search warrant is supported by adequate probable cause even if the challenged statements are not considered.

Evidence regarding Chadwick's new-found religious beliefs do not constitute a "new factor" justifying resentencing. Whether a set of facts constitutes a new factor is a matter of law that we decide without deference to the trial court. ***State v. Michels***, 150 Wis.2d 94, 97, 441 N.W.2d 278, 279 (Ct. App. 1989). A new factor must be one that has a close connection to the sentence and strikes at the very purpose of the sentence chosen by the trial court. ***Id***. At the sentencing hearing, the trial court heard evidence of Chadwick's new-found religious beliefs. While the court expressed skepticism, it did not base the sentencing decision on that factor. Rather, it concluded that his religious beliefs were matters of the soul to which it attached no legal significance. Because additional evidence of Chadwick's religious beliefs does not have a close connection to the sentence or strike at the very purpose of the sentence chosen by the court, it is not a new factor justifying resentencing. Chadwick's testimony at the postconviction hearing related mostly to his good behavior in prison. This information should be presented to the parole board. It does not constitute a new factor justifying resentencing. *See* ***State v. Ambrose***, 181 Wis.2d 234, 240, 510 N.W.2d 758, 761 (Ct. App. 1993).

By the Court.—Judgment and order affirmed.

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