COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 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. 99-0743-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JESSE FRANKLIN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, RICHARD J. SANKOVITZ, and JEAN W. DiMOTTO, Judges. *Affirmed.*

¶1 SCHUDSON, J.[1] Jesse Franklin, *pro se*, appeals from the judgments of conviction for battery, criminal damage to property, and two counts

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

of disorderly conduct, following two jury trials, and from the order denying his motions for postconviction relief. He argues: (1) his convictions were obtained in violation of art. I, § 7 of the Wisconsin Constitution,[2] because the trials were before six-person juries under the statute subsequently declared unconstitutional in ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998);[3] (2) trial counsel were ineffective for being unaware of ***Hansford***, which was on appeal in the Wisconsin Supreme Court when his trials were held, and for waiving his right to twelve-person juries without his consent or knowledge; and (3) the trial court "abused its discretion when it ordered conditions of bail/release without cause or justification," and subsequently ordered his bail "revoked and forfeited in an arbitrary manner." This court affirms.

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[2] Article I, § 7 of the Wisconsin Constitution states:

> In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public *trial by an impartial jury* of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

(Emphasis added.)

[3] The supreme court explained that, at the time it decided ***State v. Hansford***, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), the statutory status was as follows:

> Wisconsin Stat. § 756.096(3)(am) [1995-96] states: "A jury in [] misdemeanor case[s] shall consist of 6 persons."
>
> The legislature enacted Wis. Stat. § 756.096(3)(am) pursuant to 1995 Wisconsin Act 427. Although § 756.096(3)(am) has been repealed, the language providing for six-person juries in misdemeanor cases is still in effect and is now codified in Wis. Stat. § 756.06(2)[(am)] (1997-98).

Id. at 229 n.2.

I. BACKGROUND

¶2 The facts relevant to resolution of this appeal are not in dispute. Franklin was convicted of four misdemeanors in two separate trials, each conducted before a six-person jury, under the statute mandating six-person juries in misdemeanor cases. In neither instance did he object to being tried by a six-person jury. In ***Hansford***, however, the supreme court concluded that, under art. I, § 7 of the Wisconsin Constitution and four Wisconsin Supreme Court decisions, "the right to a 12-person jury extends to all criminal defendants, regardless of whether they are charged with misdemeanor or felony offenses." ***Hansford***, 219 Wis. 2d at 241.

¶3 On March 13, 2000, this court entered an order denying Franklin's motion to advance submission of this appeal, and placing it on hold pending the Wisconsin Supreme Court's decisions in ***State v. Wingo***, No. 98-3457-CR, and ***State v. Huebner***, No. 98-2470-CR. This court's order pledged to "decide this appeal promptly following the supreme court decisions in ***Huebner*** and ***Wingo***," both of which were expected to address the primary issue presented in Franklin's appeal: whether, in the absence of an objection to a six-person jury, ***Hansford*** applied retroactively to invalidate a conviction by a six-person jury. On April 14, 2000, the supreme court decided ***Wingo*** but did not resolve the issue; on June 20, 2000, however, the supreme court decided ***Huebner*** and did so.

¶4 Based *directly* on ***State v. Huebner***, 2000 WI 59, ___ Wis. 2d ___, 611 N.W.2d 727, this court concludes that because Franklin did not make a constitutional objection to the six-person juries, ***Hansford*** does not invalidate his convictions. Based *inferentially* on ***Huebner***, this court also concludes that counsel's failures to object to the six-person juries did not constitute ineffective

assistance because Franklin, in each instance, "received an otherwise fair and error-free trial by six jurors." *See* ***Huebner***, 2000 WI 59 at ¶17. Finally, this court concludes that Franklin has failed to establish that the trial court erred either in setting bail conditions or in revoking his bail and declaring it forfeited.

II. RETROACTIVE EFFECT OF ***HANSFORD***, UNDER ***HUEBNER***

¶5 In ***Hansford***, the defendant had objected to the six-person jury in his case, specifically contending that the six-person misdemeanor jury statute was unconstitutional under art. I, § 7 of the Wisconsin Constitution. *See* ***Hansford***, 219 Wis. 2d at 232. Concluding that the defendant was correct, the supreme court reversed his conviction. *See* ***id.*** at 243. In ***Huebner***, however, the defendant, Huebner, did not object to the six-person jury. Thus, in ***Huebner***, the supreme court addressed whether ***Hansford*** applied retroactively to invalidate the conviction by a six-person jury in the absence of a defense objection to the six-person jury. *See* ***Huebner***, 2000 WI 59 at ¶5.

¶6 Huebner, like Franklin in the instant case, conceded that he had made no objection to the six-person jury. *See* ***id.*** at ¶8. On appeal, however, he argued that under the retroactivity analysis of the United States Supreme Court's decision in ***Griffith v. Kentucky***, 479 U.S. 314, 328 (1987), adopted by the Wisconsin Supreme Court in ***State v. Koch***, 175 Wis. 2d 684, 694, 499 N.W.2d 152 (1993), ***Hansford*** should apply to invalidate his conviction, despite his failure to object. *See* ***Huebner***, 2000 WI 59 at ¶9. The Wisconsin Supreme Court disagreed, concluding that because Huebner had "made no constitutional objection at the trial court level," he had waived or forfeited his constitutional claim. *See* ***id.*** at ¶¶10-11.

¶7 In this regard, Franklin's circumstances are indistinguishable from those of Huebner. Accordingly, this court concludes that, under ***Huebner***, Franklin's failure to make a constitutional objection to the six-person juries waived or forfeited the claim he now presents on appeal.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

¶8 In ***Huebner***, the supreme court noted that Huebner had "abandoned any claim that he received ineffective assistance of counsel." *See* ***id.*** at ¶8. Franklin, however, has directly presented that very claim, arguing that counsel were ineffective for failing to be aware of the ***Hansford*** appeal, and for failing to object to the six-person juries.

¶9 Given Huebner's abandonment of his ineffective-assistance-of-counsel claim and the supreme court's resulting failure to directly address the argument Franklin now presents, and given the 3 (majority)—1 (concurrence)—3 (dissent) decision dividing the justices in ***Huebner***, it is not possible to determine, with certainty, whether our supreme court would reject Franklin's argument. Based on the ***Huebner*** majority opinion, however, this court concludes that because Franklin's six-person jury trials were "otherwise fair and error-free," *see* ***id.*** at ¶17, Franklin has failed to establish that he was prejudiced by counsel's alleged deficient performances.

¶10 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing both that counsel's performance was deficient and that the deficient performance was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 232-236, 548 N.W.2d 69 (1996). If the defendant fails to establish that counsel's alleged conduct was prejudicial, this court need not address whether counsel's

alleged conduct was deficient. *See* ***Strickland***, 466 U.S. at 697. To show prejudice, the defendant must establish "a reasonable probability" that, but for counsel's performance, "the result of the proceeding would have been different." *See* ***id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶11 Ineffective-assistance-of-counsel claims present mixed questions of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-634, 369 N.W.2d 711 (1985). Whether alleged deficient performance prejudiced a defendant is an issue of law, subject to this court's *de novo* review. *See* ***id.*** at 634.

¶12 If a postconviction motion alleges facts that, if true, would entitle a defendant to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If, however, the motion "'fails to allege sufficient facts … to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" *See* ***id.*** at 309-310 (quoting ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972)). Whether a motion alleges sufficient facts to require a hearing is an issue subject to *de novo* review. *See* ***id.*** at 310.

¶13 Franklin's ineffective-assistance claim begs a simple question: In each trial, but for counsel's alleged deficient performance, would "the result of the proceeding … have been different"? *See* ***Strickland***, 466 U.S. at 694. The answer, however, is not so simple. It depends on what one views as "the result of the proceeding."

¶14 On the one hand, assuming that counsel were deficient—for failing to be aware of ***Hansford*** and/or failing to object to the six-person juries—then "the result of the proceeding" would have been different if "the result of the proceeding" is the determination of whether the jury will be comprised of six or twelve persons. That is, under ***Hansford*** and ***Huebner***, "the result of the proceeding" would have been different because Franklin ultimately would have been tried by twelve-person juries, as a result of either the trial courts' decisions or an appellate court's mandate. On the other hand, again assuming counsel were deficient, "the result of the proceeding" would *not* have been different if "the result of the proceeding" is the verdict, and the verdicts of the twelve-person juries would have been the same as those rendered by the six-person juries.

¶15 What is "the result of the proceeding"? On which basis should this court determine whether Franklin was prejudiced by counsels' alleged deficient performances? While not directly addressing these questions, ***Huebner*** strongly suggests the answers.

¶16 In ***Huebner***, the supreme court majority notes that Huebner, in the court of appeals, presented the ineffective-assistance claim he later abandoned in the supreme court. *See* ***Huebner***, 2000 WI 59 at ¶¶6, 8. The supreme court observed that this court "rejected Huebner's argument that he had received ineffective assistance of counsel, because the court found no reasonable probability that a twelve-person jury would have produced a different outcome in Huebner's case." *See* ***id.*** at ¶6. Although the supreme court's observation, standing alone, resolves nothing, it sets the stage for several subsequent comments that, implicitly, all but preclude the ineffective-assistance claim Franklin pursues.

¶17 Rejecting Huebner's argument that ***Hansford*** should be applied retroactively to invalidate his conviction, the supreme court declared:

> Huebner has not lost his right to a jury trial. A trial by six jurors is not equivalent to no jury trial at all. Huebner received an otherwise fair and error-free trial by six jurors.
>
> Nothing in ***Hansford*** suggests that having a six-person jury trial is equivalent to having no jury trial at all. ***Hansford*** did not state that a six-person jury is procedurally unfair or that it is an inherently invalid factfinding mechanism….
>
> We find nothing in ***Hansford*** to support the conclusion that the difference between a six-person jury trial and a twelve-person jury trial is so fundamental that a six-person jury trial, which was conducted without objection under the express authority of a statute, is automatically invalid.

Id. at ¶¶17-19.

¶18 Later in its opinion, the ***Huebner*** majority, declining to exercise its discretionary power to reverse Huebner's conviction, emphatically reiterated these same principles and quoted the court of appeals' decision, which had rejected Huebner's ineffective-assistance claim:

> The use of a six-person jury rather than a twelve-person jury did not undermine the fundamental integrity of Huebner's trial. Rather, "this case concerns the application of a constitutional principle that 'does not affect the basic accuracy of the factfinding process at trial.'" We conclude that the interests of justice do not require us to exercise our discretionary power to reverse Huebner's conviction.

Id. at ¶31 (citations omitted).

¶19 Finally, the supreme court focused on the fact that Huebner's trial was fair, and that ordering a new trial in such circumstances would be a substantial and unwarranted imposition on judicial resources:

> Proceeding on the reasonable assumption that Huebner did not object to the use of a six-person jury in his case, the trial court provided Huebner with a full, fair, and otherwise error-free trial by a six-person jury.

> To invalidate Huebner's trial, and the trials of all those other defendants who were convicted by six-person juries under the authority of Wis. Stat. § 756.096(3)(am) without objection, would result in a tremendous waste of judicial resources. Because Huebner has not established that a miscarriage of justice has occurred or that the real controversy in his case was not tried, we decline to exercise our discretionary power to reverse his conviction by a six-person jury.

Id. at ¶¶34-35.

¶20 The implications for Franklin are clear. Because he has not claimed any error in either trial, other than the number of jurors, he has not established any flaws in the fact-finding processes. Thus, while it is conceivable that his chances for acquittal or hung juries would have been greater with twelve jurors than with six, that possibility, purely speculative at best, is insufficient to establish prejudice. *See* ***id.*** at ¶31 ("The use of a six-person jury rather than a twelve-person jury did not undermine the fundamental integrity of Huebner's trial."); *but see* ***id.*** at ¶83 (Abrahamson, C.J., dissenting) ("The size of a jury can affect the fact-finding process."). Therefore, this court concludes that, even assuming counsels performed deficiently, their performances did not prejudice Franklin.[4]

IV. BAIL CONDITIONS AND BAIL REVOCATION

¶21 Following Franklin's conviction in the first of the two trials underlying this appeal, the trial court stayed his sentences pending appeal and set bail. Approximately three months later, following Franklin's conviction in the

[4] This court acknowledges the novel issue presented by Franklin's ineffective-assistance-of-counsel claim, the uncertainty inherent in the 3—1—3 supreme court decision in ***State v. Huebner***, 2000 WI 59, ___ Wis. 2d ___, 611 N.W.2d 727, and the fact that Franklin, on appeal, is *pro se*. Given that this court's decision in his appeal may merit further review, and that Franklin may desire legal assistance, this court will provide a copy of this decision to the Wisconsin State Public Defender's appellate division.

second trial underlying this appeal, the trial court stayed the sentence for that conviction. About two months after that, the trial court added bail conditions requiring that Franklin report to Wisconsin Correctional Services twice per month, submit to random drug and alcohol testing, reside at a specific address, and inform the court of any change of address. Franklin argues that no logical reasoning supported these conditions, and that the subsequent revocation and forfeiture of his bail was arbitrary. He seeks the return of his $4,000.00 bail.

¶22 Whether to stay a sentence pending appeal, and whether to set bail and attach conditions to bail (in addition to the conditions mandated by WIS. STAT. § 969.09(2)), are discretionary determinations for the trial court. *See* WIS. STAT. RULE 809.31(3), (6); WIS. STAT. § 808.07(1), (2)(a)1. This court will not reverse a trial court's determination of bail conditions absent an erroneous exercise of discretion. *See* ***Ness v. Digital Dial Communications, Inc.***, 227 Wis. 2d 592, 599-600, 596 N.W.2d 365 (1999) ("A circuit court's discretionary decision is reviewed under an erroneous exercise of discretion standard. A reviewing court will uphold a discretionary decision if the circuit court considered the relevant facts, properly interpreted and applied the law, and reached a reasonable determination.") (citation omitted). Further, a trial court's determination of whether a defendant has violated the conditions of bail, such that revocation and/or forfeiture is appropriate, also is discretionary, *see* WIS. STAT. § 969.13 (1)-(2), and therefore subject to reversal only for an erroneous exercise of discretion.

¶23 In this case, Franklin offers no reply to the State's response that his conviction in the second trial and the resulting sentence[5] supported the addition of bail conditions. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted). Further, as the State points out, Franklin has failed to include the record of the hearing at which the trial court revoked his bail and ordered it forfeited, *see* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993) ("[W]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling."), and has failed to offer any argument in support of his contention that the trial court's action was improper, *see* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" argument). Thus, this court concludes that Franklin has failed to establish any trial court error in setting bail conditions, or in revoking his bail and declaring it forfeited.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] Although Franklin was convicted of misdemeanors in these trials, his potential sentences included habitual-criminal enhancements. The sentence for the conviction in the second trial added eighteen months to his earlier sentences.