

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP558

Cir. Ct. No. 1991CF913550

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRIANN JOSEPH BLOCK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Briann J. Block appeals from the order denying his motion to vacate his sentence. He argues that he received ineffective assistance of counsel during a probation revocation proceeding, and that the circuit court erred when it summarily denied his motion. We conclude that the circuit court acted properly when it summarily denied his motion. We affirm.

¶2 In 1992, Block pled guilty to three counts of armed robbery. The court sentenced him to eight years on the first count, eight years' incarceration imposed and stayed with five years' probation on count two, and sentence withheld and five years' concurrent probation for count three. Block did not timely appeal from this judgment.

¶3 In 1996, Block was paroled from the eight-year sentence. His parole was revoked in 1997, and he finished serving his sentence for count one in March 2000. His five-year probation term for counts one and two then began to run. Block subsequently was convicted of another offense and was sentenced to three years in prison in 2001. In November 2002, he left the correctional center where he was serving this sentence. As a result of this, he was charged with the crime of escape, and in July 2003, his five-year probation term on the original second count of armed robbery was revoked. His previously stayed eight-year prison term then went into effect.

¶4 Block then moved the circuit court to vacate the eight-year prison sentence on the second armed robbery count. He asserted that his revocation counsel was ineffective because he did not assert as a defense that escape is not an offense that can lead to revocation because a person cannot be on probation while serving a prison sentence. The circuit court summarily denied the motion, concluding that an ineffective assistance of counsel claim must be brought by a petition for a writ of habeas corpus, and that probation may be imposed consecutive to any other sentence. Block appeals.

¶5 A circuit court may refuse to hold an evidentiary hearing on an allegation of ineffective assistance of counsel "if the defendant fails to allege sufficient facts in his motion 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....” *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (citations omitted). To establish an ineffective assistance of counsel claim, a defendant must show both that counsel’s performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. *Id.* at 697. To prove prejudice, a defendant must show that counsel’s errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Id.* at 687. Counsel is not ineffective for failing to make meritless arguments. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶6 In this case, the record establishes that the circuit court properly denied Block’s motion without a hearing. As the State argues, there is no legal bar in Wisconsin to a defendant simultaneously serving a prison sentence and a term of probation. Imposing probation to run consecutively to a different sentence is authorized by WIS. STAT. §§ 973.09(1)(a) and 973.15(2)(a) (2003-04). *See State v. Aytch*, 154 Wis. 2d 508, 511-12, 453 N.W.2d 906 (Ct. App. 1990). We agree with the State that the converse is logically correct as well. Because there is no merit to Block’s argument that he could not have been simultaneously serving a prison and probation term, then his counsel was not ineffective for failing to make that argument. The circuit court acted properly when it summarily denied Block’s motion. We affirm the order of the circuit court.

By the Court.—Order affirmed.

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

