

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 8, 2006**

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. 2005AP2019**

**Cir. Ct. No. 2003CF336**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**NICHOLAS V. MAIORANO,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Nicholas V. Maiorano appeals *pro se* from an order denying his postconviction motion alleging ineffective assistance of counsel. Maiorano claims the trial court erred in summarily denying his claim of ineffective assistance of counsel. Because Maiorano failed to allege sufficient facts which, if

true, would entitle him to an evidentiary hearing on his ineffective assistance claim, the trial court did not erroneously exercise its discretion when it denied the motion. Accordingly, we affirm.

## BACKGROUND

¶2 In January 2003, Maiorano pled guilty to second-degree sexual assault and two counts of battery. He was sentenced to ten years on the sexual assault, with four years of initial confinement, followed by six years of extended supervision. He was sentenced to two, nine-month terms in the House of Correction on the battery counts to be served consecutively to each other as well as to the term of imprisonment on the sexual assault count.

¶3 Subsequently, Maiorano moved the court for postconviction relief, seeking plea withdrawal on the basis that his trial counsel had provided ineffective assistance. Specifically, Maiorano claims his trial counsel should not have waived the preliminary hearing and that counsel should have filed a motion seeking to suppress the statement Maiorano made to police. The trial court denied the motion without conducting a hearing, ruling that Maiorano's motion contained only conclusory assertions and that Maiorano personally waived the claims he makes now when he signed the preliminary hearing questionnaire and waiver form and entered his guilty plea. The trial court issued an order denying the postconviction motion on July 21, 2005. Maiorano appeals from that order.

## DISCUSSION

¶4 Maiorano claims the trial court erred in denying his ineffective assistance of counsel claim without conducting an evidentiary hearing. He asserts that trial counsel provided ineffective assistance by waiving the preliminary

hearing and failing to challenge the admissibility of the statement he made to police. We reject Maiorano's claims.

¶5 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." *Id.* Stated another way, to satisfy the prejudice-prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Sanchez*, 201 Wis. 2d at 236 (citation omitted).

¶6 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See Strickland*, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See Sanchez*, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, *id.*, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *Id.* at 236-37.

¶7 Moreover, if an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege, with specificity, both deficient performance and prejudice in the postconviction motion. *Id.* at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. *Id.* at 310. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. *Id.* at 318.

¶8 In its order denying the postconviction motion, the trial court concluded that Maiorano's assertions were all conclusory in nature. We agree. Maiorano raises two contentions of ineffective assistance. First, that counsel should have allowed the preliminary hearing to take place to challenge the sufficiency of the evidence. Maiorano, however, fails to allege how waiving the preliminary hearing caused him prejudice. He does not demonstrate that if counsel had not waived the preliminary hearing, the State would not have been able to establish probable cause or that the case would have been dismissed.

¶9 Second, Maiorano asserts that counsel should have challenged the statement he gave to police, but fails to proffer sufficient facts to demonstrate that

such a challenge would have been successful. Maiorano alleges only conclusory statements—that the statement was taken in violation of *Miranda*,<sup>1</sup> and it was not signed. He offers no specific facts which, if true, would entitle him to relief such that the statement would be suppressed or that suppression of his statement would have resulted in acquittal.

¶10 Moreover, we also agree with the trial court’s ruling that Maiorano waived both issues he claims constituted ineffective assistance. First, by signing the preliminary hearing questionnaire and waiver form, Maiorano conceded that the State could establish probable cause. This concession eliminated the need for a preliminary hearing. Accordingly, trial counsel cannot possibly have been ineffective for waiving the preliminary hearing because Maiorano admitted that the State could establish probable cause.

¶11 Second, by pleading guilty, Maiorano, as stated by the trial court, “waived his right to challenge police procedure or to seek a suppression hearing to determine if his statement was admissible.” The trial court points out that both waivers were “fully supported by the colloquys held at the Preliminary Hearing Waiver on January 28, 2003 and the Guilty Plea Hearing on May 28, 2003.”

¶12 Based on the foregoing, we conclude that the trial court did not erroneously exercise its discretion in summarily denying Maiorano’s postconviction motion.

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<sup>1</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

*By the Court.*—Order affirmed.

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

