COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP909 **Cir. Ct. No. 2000CF3363**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD S. CURTIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Reginald S. Curtis appeals *pro se* from an order denying his WIS. STAT. § 974.06 postconviction motion. He claims his right to be present at "every stage" of his trial was violated when the trial court answered questions from the jury during deliberations without Curtis's knowledge or

consent. He also claims that this issue was not raised during his direct appeal due to ineffective assistance of counsel. Because Curtis fails to prove ineffective assistance of counsel, his claim is procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

BACKGROUND

¶2 On June 24, 2000, Curtis was at the home of Juwan Bates where the two were discussing a debt Curtis owed Bates. Curtis asserted that during the discussion, Bates became angry with Curtis and started to reach behind his back. Curtis believed that Bates was reaching for a gun; Curtis pulled out his gun and shot Bates in the neck. Bates died as a result of the gunshot wound. Curtis was subsequently charged with felony murder and tried by a jury on October 10-12, 2000. During deliberations, the jury sent a note to the trial court with three requests: (1) they wanted the diagrams and pictures of the bullets; (2) they asked if they could have a dictionary; and they asked (3) "Does reaction to fear play a part or am I [sic] just looking at the reaction to the movement or reaching for what might have been a gun, fear for life or just fear?"

¶3 The trial court did not notify any of the parties, but responded to the jurors' requests as follows. The trial court (presumably) had the bailiff provide the jurors with the exhibits requested as there was a stipulation on the record that the jury would be given the exhibits if they requested them. The trial court denied the request for a dictionary and, with respect to the third question, told the bailiff to have the jury reread the jury instructions and rely on their collective memory. The jurors eventually reached a verdict, settling on the lesser-included offense convicting Curtis of first-degree reckless homicide with the use of a dangerous weapon. In November 2000, he was sentenced to forty years, consisting of

twenty-seven years of confinement, followed by thirteen years of extended supervision.

¶4 Postconviction, Curtis, by counsel, filed a motion for a new trial based on newly discovered evidence. The motion was denied in December 2001. Curtis then filed a direct appeal to this court. We affirmed the judgment and order in March 2003.

¶5 On February 21, 2006, Curtis filed a *pro se* WIS. STAT. § 974.06 motion raising the current issue. The trial court denied the motion by written order on February 28, 2006. Curtis now appeals from that order.

DISCUSSION

¶6 Curtis claims that the trial court committed constitutional error by communicating with the jurors during deliberations without making a record or giving his attorney an opportunity to respond. Curtis acknowledges that he did not raise this issue in his first postconviction motion or direct appeal, but asserts the reason for that was due to ineffective assistance of counsel.

¶7 Defendants are not permitted to pursue an endless succession of postconviction remedies:

> We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation.

Escalona-Naranjo, 185 Wis. 2d at 185. Thus, claims which were raised previously, or could have been, but were not, raised in a prior postconviction motion or on direct appeal, are procedurally barred unless a sufficient reason for

failing to raise the issue is presented. ***Id.*** "[D]ue process for a convicted defendant permits him or her a single appeal of that conviction and a single opportunity to raise claims of error …." ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998).

¶8 Postconviction ineffective assistance of counsel may constitute a "sufficient reason" to avoid the procedural ***Escalona-Naranjo*** bar. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). When a defendant claims ineffective assistance of postconviction counsel on the basis of a failure to assert trial counsel's ineffectiveness, however, the defendant must first establish that trial counsel provided ineffective assistance. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 ("to establish that postconviction or appellate counsel was ineffective, a defendant bears the burden of proving that trial counsel's performance was deficient and prejudicial").

¶9 Here, Curtis claims postconviction counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness. Specifically, he argues that his trial counsel should have objected and/or moved for a mistrial when the trial court advised what had happened with the jury's questions and how the trial court responded to the questions. We conclude that Curtis has failed to establish that trial counsel provided ineffective assistance.

¶10 Curtis alleges that trial counsel should have objected, but he offers no allegations as to how counsel's failure to object caused him prejudice. 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, "'[a] 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).

¶11 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, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶12 Curtis has not established that if trial counsel would have objected or moved for a mistrial, there is a reasonable probability that "the result of the proceeding would have been different." The jury here posed three requests. First, it asked for certain exhibits. The trial court, based on a stipulation in the record, acted in accord with the stipulation in responding to that request. Therefore, there is no possibility, let alone probability, of prejudice with respect to this request.

¶13 The jury's second request was for a dictionary, which the trial court denied. There is no evidence that the trial court's response was harmful. A jury's reliance on a dictionary for definitions or legal terms constitutes error. ***Manke v. Physicians Ins. Co. of Wis., Inc.***, 2006 WI App 50, ¶¶27-30, 289 Wis. 2d 750, 712 N.W.2d 40 (dictionary definition of legal terms constitutes improper "extraneous information" in jury's deliberations). Curtis does not provide this court with any contention that his counsel would have made, which would have justified sending a dictionary into the jury room.

¶14 Finally, the court responded to the jury's last question with respect to fear by having the bailiff tell them to use their collective memories and reread the jury instructions. The trial court, in its postconviction order, noted that even if trial counsel had objected to that procedure, the trial court would have done the same exact thing. This was the trial court's practice with respect to questions from the jury regarding something contained in the jury instructions. Moreover, Curtis again fails to assert what exactly trial counsel would have said had he been present and objected to the trial court's response to the jury's question. He does not suggest any different response from the one the court gave, or a response that would have helped Curtis. Curtis fails to allege how any objection by counsel would have probably changed the outcome of the proceeding. The trial court's response merely had the jury reread proper instructions which they already had for deliberations.

¶15 Curtis does focus a substantial amount of his argument on his belief that the record states the trial court advised the bailiff to personally reread the jury instructions to the jury. In the transcript, the trial court states: "And I sent the bailiff to go in and to reread the instructions and use your collective memories." Although this passage may be read to believe the bailiff reread the instructions, the

trial court clarified this in its postconviction order: "The defendant in his motion believes that the court had its bailiff reread the instructions to the jury. This was not the case and was *never* the court's practice. The court merely informed its bailiff to tell the jurors to reread the instructions; it did not have its bailiff read any instructions to the jurors."

¶16 Based on the foregoing, and because the passage could also be interpreted consistent with the trial court's explanation, we accept the trial court's clarification with respect to what occurred.

¶17 Accordingly, Curtis has failed to establish that trial counsel provided ineffective assistance which, in turn, means that postconviction counsel cannot be ineffective. Because postconviction counsel did not provided ineffective assistance of counsel, Curtis does not have a sufficient reason to avoid the procedural ***Escalona-Naranjo*** bar on successive postconviction motions. Therefore, we affirm.

By the Court.—Order affirmed.

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