

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2007

David R. Schanker
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. 2006AP2622-CR
2006AP2623-CR
STATE OF WISCONSIN**

**Cir. Ct. No. 2005CM2506
2005CM7280**

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SIDNEY E. RUSHING,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Sidney E. Rushing appeals from judgments entered after he pled guilty to two counts of retail theft, one under WIS. STAT.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

§ 943.50(1m)(a) and the second under § 943.50(1m)(b) (2005-06).² He also appeals from an order denying his postconviction motion.³ Rushing claims that his trial counsel provided ineffective assistance by failing to request a competency examination, that the trial court should have *sua sponte* ordered a competency examination, and that the trial court erred in denying his ineffective assistance of counsel claim without conducting an evidentiary hearing. Because Rushing has failed to establish that his trial counsel provided ineffective assistance or that the trial court erred in either respect, this court affirms.

BACKGROUND

¶2 On April 18, 2005, Rushing was arrested for theft when he tried to steal \$23.00 worth of merchandise from Walgreens. On September 15, 2005, Rushing was also arrested for theft at Wal-Mart for attempting to steal \$63.00 worth of merchandise. He was subsequently charged with two counts of retail theft for each instance.

¶3 During a bail hearing on September 23, 2005, trial counsel advised the court that Rushing had mental and physical disabilities. The trial court inquired as to whether counsel was raising a competency issue. Counsel indicated that he was not, that he did not have a problem working with the defendant, and that he had been dealing with the defendant for several months. The trial court then questioned the defendant to determine whether a competency evaluation was

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

³ Although the retail theft counts were charged separately, the cases were handled together at the trial court level and were consolidated for purposes of this appeal.

warranted. After that colloquy, the trial court concluded that Rushing understood the charges and the roles of his attorney and the court. Based on Rushing's demeanor and responses, the trial court concluded that competency was not an issue.

¶4 On October 6, 2005, Rushing pled guilty to two counts of theft, and several weeks later, the court sentenced him to six months on each count, to be served consecutively. Postconviction, Rushing's appellate counsel moved the trial court for a competency examination to ascertain whether Rushing was competent to assist in the appellate proceedings. The trial court granted the request and an examination was conducted. After which, a doctor's report was submitted to the court with the conclusion that Rushing was competent to proceed.

¶5 The trial court summarily denied Rushing's postconviction motion alleging ineffective assistance of counsel. Rushing now appeals.

DISCUSSION

¶6 Rushing, in essence, raises two arguments in this appeal: (1) that trial counsel provided ineffective assistance and the trial court erred in summarily denying the claim without conducting an evidentiary hearing; and (2) that the trial court should have *sua sponte* ordered a competency examination be conducted. This court rejects both arguments and affirms.

A. Ineffective Assistance of Counsel.

¶7 Rushing contends that his trial counsel provided ineffective assistance of counsel by failing to raise the issue of his competency and request that the trial court order a competency examination. In reviewing claims of ineffective assistance of counsel, we apply the following standards of review.

¶8 In order to establish that he did not receive effective assistance of counsel, Rushing must prove two things: (1) that his 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 Rushing can show that his or her counsel’s performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel’s errors “were so serious as to deprive [him] 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).

¶9 In assessing Rushing’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.

¶10 Moreover, if Rushing wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he 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 trial court erroneously exercised its discretion in making this determination. *Id.* at 318.

¶11 Here, Rushing has failed to establish that his trial counsel provided ineffective assistance with respect to the competency issue. WISCONSIN STAT. § 971.14 requires the court to order a competency hearing if there is a “reason to doubt” that the defendant is competent to proceed. A defendant will be declared incompetent when he or she “lacks substantial mental capacity to understand the proceedings or assist in his or her own defense.” WIS. STAT. § 971.13(1). The trial court’s determination on this issue is a finding of fact, which this court will not overturn unless it is clearly erroneous. *State v. McKnight*, 65 Wis. 2d 582, 595, 223 N.W.2d 550 (1974).

¶12 In the instant case, the trial court found that Rushing was competent to proceed. It made this finding after inquiring of counsel as to Rushing’s competency and conducting its own colloquy with Rushing. Counsel advised the court that he believed Rushing was competent and he was able to work with Rushing for several months without problems. Trial counsel disclosed to the court Rushing’s reported mental health and physical issues. Based on Rushing’s

responses and demeanor, the trial court found that Rushing understood what he was doing and appeared to be competent. This court cannot conclude that the trial court's finding was clearly erroneous.

¶13 The trial court provided an adequate explanation for its finding which is supported by counsel's representations and the record itself. Although Rushing asserts that his mental health issues, his hesitation to enter guilty pleas, and a few random non-sensical responses should have triggered a competency evaluation, this court cannot agree. The presence of medical or psychiatric problems alone does not automatically render a defendant incompetent; what is significant is whether the defendant can understand the proceedings and assist with his defense. *State v. Byrge*, 2000 WI 101, ¶¶31, 48, 237 Wis. 2d 197, 614 N.W.2d 477. The trial court established that Rushing understood what was going on and that he was able to assist with his defense. Thus, despite any mental or physical issues he had, he was still competent to proceed.

¶14 Rushing cites *State v. Johnson*, 133 Wis. 2d 207, 395 N.W.2d 176 (1986), wherein the court held that trial counsel's failure to raise the competency issue with the court constituted ineffective assistance of counsel. *Id.* at 221. The instant situation, however, is dissimilar to *Johnson*, because in *Johnson*, defense counsel had reason to believe that his client had competency issues because of the existence of two separate medical opinions, but failed to advise the trial court. *Id.* at 211-213. In the instant case, defense counsel did not have any medical opinions suggesting that Rushing was not competent. Further, the issue of competency was raised and discussed with the trial court, resulting in the trial court's finding that there was no reason to doubt Rushing's competence.

¶15 This court is also not persuaded by the isolated non-sensical passages that Rushing points out as support of his claim. The transcript as a whole demonstrates competent and appropriate responses by Rushing during the colloquy with the trial court. Taking the record as a whole, and deferring to the trial court's findings on Rushing's demeanor and interactions with that court, the isolated passages referred to are insufficient for this court to overturn the trial court's determination.

¶16 Thus, based on the foregoing, Rushing has failed to establish that his trial counsel provided ineffective assistance. Moreover, Rushing failed to present sufficient evidence to warrant an evidentiary hearing on his ineffective assistance of counsel claim. Rushing's claims are both conclusory and the record demonstrates he is not entitled to relief. As the State points out, Rushing failed to present to the trial court any medical evidence, aside from his personal representations, that he had a mental or physical condition, which interfered with his ability to understand the legal proceedings and adequately assist his lawyer. Likewise, this court has already concluded that the record conclusively establishes that Rushing is not entitled to relief. Therefore, Rushing's claim that his trial counsel provided ineffective assistance and his claim that he was entitled to an evidentiary hearing are hereby rejected.

B. Trial Court Sua Sponte.

¶17 Rushing also claims that the trial court erred in failing to *sua sponte* order a competency evaluation. A trial court, can on its own motion, order a competency examination if it has "reason to doubt" the defendant's competency. WIS. STAT. § 971.14. A trial court's decision on competency involves an assessment of a defendant's conduct, demeanor and ability to present a defense.

As such, the trial court is in the best position to make the assessment, and thus, this court's review is deferential. *State v. Garfoot*, 207 Wis. 2d 214, 223-25, 558 N.W.2d 626 (1997). This court cannot conclude that the trial court's determination was erroneous.

¶18 The trial court had several opportunities to observe Rushing's demeanor and asked Rushing questions to determine if he was competent. The trial court was satisfied by these interactions that Rushing understood what was happening and was able to assist his lawyer. Further, the trial court asked defense counsel's opinion as to competency and was told that counsel believed that Rushing was competent based on counsel's ability to work with the defendant for the past couple of months. Based on the foregoing, this court cannot conclude that the trial court was obligated to *sua sponte* order a competency evaluation.

By the Court.—Judgments and order affirmed.

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

