

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 14, 2008

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. 2007AP1429

Cir. Ct. No. 1998CF811

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN I. GAUSTAD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Nathan Gaustad appeals an order denying him WIS. STAT. § 974.06 (2005-06)¹ relief from a burglary conviction. Gaustad alleged that he received ineffective assistance from trial counsel. The trial court denied the motion without a hearing. We affirm.

¶2 Gaustad was sixteen years old when he committed the burglary. The State filed a delinquency petition and sought waiver into adult court. Gaustad did not contest the waiver and the court granted it. In the ensuing prosecution Gaustad was represented by appointed counsel, although not the counsel that represented him in the juvenile proceeding. In September 1998 he was convicted on a no-contest plea. He was sentenced to prison in November 2000 on revocation of his probation. We affirmed the postrevocation judgment in November 2005, on Gaustad's no-merit appeal.

¶3 Gaustad's WIS. STAT. § 974.06 motion alleged that trial counsel ineffectively represented him by failing to recognize and pursue meritorious defenses to the waiver into adult court. Specifically, he argued that counsel could have successfully challenged the waiver because (1) the trial court did not adequately determine whether his consent to the waiver was knowing, intelligent and voluntary, as required by WIS. STAT. § 938.18(4)(c); and (2) the court did not hold an evidentiary hearing on the waiver. The trial court denied relief without a hearing, resulting in this appeal.

¶4 To obtain a hearing on a postconviction motion the defendant must allege facts that, if true, entitle him or her to relief. *State v. Allen*, 2004 WI 106,

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Conclusory allegations are insufficient; the defendant must allege facts that allow a meaningful assessment of the claim. *Id.*, ¶21. If the defendant does not go beyond conclusory allegations, or the record conclusively shows that the defendant is not entitled to relief, no hearing on the motion is necessary. *Id.*, ¶9.

¶5 To establish ineffective representation, the defendant must show that counsel's act or omission was prejudicial. See *State v. Tomlinson*, 2001 WI App 212, ¶40, 247 Wis. 2d 682, 635 N.W.2d 201. Prejudice occurs when there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694. (1984).

¶6 Gaustad's WIS. STAT. § 974.06 motion and the accompanying brief and exhibits present no facts demonstrating that trial counsel could have successfully challenged the waiver decision. Arguably, the trial court's brief colloquy with Gaustad did not satisfy WIS. STAT. § 938.18(4)(c), which required the court to first inquire into and then determine whether Gaustad had the capacity to make a knowing, intelligent and voluntary decision not to contest the waiver.²

² The trial court's inquiry into Gaustad's capacity to waive his rights consisted of the following colloquy:

THE COURT: Nathan, do you understand what's being explained to me?

MR. GAUSTAD: Yes.

THE COURT: That you're agreeing that I'll send these charges over to the adult court for a prosecution?

MR. GAUSTAD: Yes.

THE COURT: Okay. And you've had full opportunity to talk to your lawyer about your rights to contest this waiver?

(continued)

However, Gaustad alleged no facts, and the transcript of the juvenile proceeding shows none, that would support a finding that he lacked the capacity to understand the proceeding, or that he did not make a knowing and voluntary decision. Consequently, no hearing was necessary on counsel's performance. The necessary factual basis to warrant a hearing is missing from Gaustad's submissions.

¶7 Gaustad also contends that the waiver was subject to challenge because the court was required to hold an evidentiary hearing despite his consent to it. In support of that contention, he cites *T.R.B. v. State*, 109 Wis. 2d 179, 194-97, 325 N.W.2d 329 (1982), in which the court held that WIS. STAT. § 48.18(5) (1979-80) required an evidentiary hearing even on an uncontested waiver petition. However, *T.R.B.* is outdated law. Section 48.18(5) no longer existed at the time of Gaustad's waiver. Its replacement, WIS. STAT. § 938.18(5), plainly and unambiguously provides that an evidentiary hearing is necessary only on a contested waiver.

¶8 We note that the trial court decided the motion on different grounds, concluding that, under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), Gaustad's no-merit appeal precluded litigation of his ineffectiveness claim. We agree with Gaustad that his prior appeal does not bar this action. *Escalona* bars claims that could have been brought in the defendant's prior postconviction motion or appeal. *Id.* at 181, 184. However, we limited Gaustad's

MR. GAUSTAD: Yeah.

THE COURT: All right. And you don't want to have a contested hearing?

MR. GAUSTAD: No.

no-merit appeal to issues concerning the postrevocation proceeding in 2000. Therefore, *Escalona* does not bar claims regarding his 1998 conviction. We nevertheless affirm the trial court's decision notwithstanding its misplaced reliance on the *Escalona* rule. See *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (we affirm if trial court reaches the right result, but for the wrong reason).

¶9 In summary, Gaustad was not entitled to a hearing on his motion because he provided inadequate factual support for his first argument about why counsel's omission was prejudicial, and his second argument has no basis in the law.

By the Court.—Order affirmed.

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

