

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 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. 2007AP1334-CR

Cir. Ct. No. 2004CF843

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KHION MURJANI MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Khion Murjani Martin has appealed pro se from a judgment convicting him of first-degree reckless injury by use of a dangerous weapon, party to the crime, in violation of WIS. STAT. §939.05, § 939.63(1)(b) and

§ 940.23(1)(a) (2005-06).¹ He also appeals from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 Martin was originally charged as a party to the crime of one count of attempted first-degree intentional homicide while armed.² Shortly after his trial began, he entered a plea of no contest to the reduced charge of first-degree reckless injury by use of a dangerous weapon, party to the crime. The trial court ultimately sentenced him to twenty years in prison, consisting of twelve years of initial confinement and eight years of extended supervision.

¶3 After conviction, Martin filed a pro se motion for postconviction relief, alleging ineffective assistance of trial counsel and seeking to withdraw his no contest plea on the ground that it was not knowingly, intelligently, and voluntarily made. The trial court denied Martin's postconviction motion after a *Machner*³ hearing at which testimony was received from his trial counsel, Attorney Martin Love.

¶4 On appeal, Martin renews his trial court argument that Attorney Love rendered ineffective assistance by failing to properly investigate his case. Specifically, he contends that Attorney Love provided deficient representation by

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

² He was also charged as a repeat offender under WIS. STAT. § 939.62.

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

unreasonably failing to interview Lorenzo Casares, the victim of the shooting, despite being requested to do so by Martin. Martin contends that Attorney Love's failure to interview Casares and investigate the circumstances surrounding his identification of Martin damaged his defense.

¶5 A defendant who moves to withdraw a no contest plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. *State v. Milanese*, 2006 WI App 259, ¶12, 297 Wis. 2d 684, 727 N.W.2d 94, *review denied*, 2007 WI 61, 300 Wis. 2d 194, 732 N.W.2d 860. The manifest injustice test is met if the defendant was denied effective assistance of counsel. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50, 54 (1996). The two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to a challenge to a no contest plea alleging ineffective assistance of counsel. *Bentley*, 201 Wis. 2d at 311-12.

¶6 Under the *Strickland* test, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *Milanese*, 297 Wis. 2d 684, ¶14. To prove deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* To satisfy the prejudice prong, the defendant must show there is a reasonable probability that, but for counsel's errors, he would not have pled no contest and would have insisted on going to trial. *Bentley*, 201 Wis. 2d at 312.

¶7 Determining whether there has been ineffective assistance of counsel presents a mixed question of law and fact. *State v. Provo*, 2004 WI App 97, ¶6, 272 Wis. 2d 837, 681 N.W.2d 272. The trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. *State v. Knight*, 168 Wis. 2d 509,

514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *Id.*

¶8 A trial attorney has a duty to make either a reasonable investigation or a reasonable decision that an investigation is unnecessary. *Strickland*, 466 U.S. at 691. A particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances, applying a heavy measure of deference to counsel's judgment. *Id.* This court will not second-guess a trial attorney's considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel. *State v. Elm*, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996). A strategic trial decision rationally based on the facts and law will not support a claim of ineffective assistance of counsel. *Id.* at 464-65.

¶9 In analyzing an ineffective assistance claim, we may choose to address either the deficient performance prong or the prejudice prong. *State v. Williams*, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11. Because Martin failed to establish that Attorney Love's representation was deficient, we need not address the deficiency prong. *See id.*

¶10 The gist of Martin's argument on appeal is that interviewing Casares would have assisted his defense by undermining Casares' identification of him.⁴ However, as found by the trial court, Attorney Love's postconviction testimony established that he was aware of the inconsistencies in Casares' identification of Martin, which included inconsistencies in his preliminary hearing testimony and the fact that he identified Martin in a photo array and at the preliminary hearing after indicating in prior statements to the police that he could not identify the person who shot him or provide a good description of the person.

¶11 At the postconviction hearing Attorney Love testified that he did not recall Martin asking him to interview Casares, but if he had, Attorney Love would have explained that, in his judgment, it was not necessary to interview Casares. Attorney Love testified that there were already enough inconsistencies in the record to confront Casares on cross-examination. He testified that interviewing him therefore would not have been productive, and would have run the risk of preparing him for cross-examination at trial.

¶12 Attorney Love could reasonably conclude that interviewing Casares would alert him to the defense's plan to attack his identification of Martin based on the inconsistencies in his prior statements to the police and at the preliminary

⁴ In his appellant's brief, Martin also contends that Attorney Love should have talked to the medical staff and doctors who were in the room treating Casares during his photo identification of Martin. Martin apparently believes that they could provide information relevant to Casares' identification of him in the photo array. However, Martin did not raise this specific issue in the trial court. Issues raised for the first time in a reply brief will not be addressed on appeal. See *State v. Lipke*, 186 Wis. 2d 358, 369 n.3, 521 N.W.2d 444 (Ct. App. 1984). Moreover, a defendant who alleges a failure to investigate on the part of his trial counsel must allege with particularity what the investigation would have revealed and how it would have affected the outcome of the case. *State v. Leighton*, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. Martin did not allege with particularity in the trial court what pertinent information would have been derived from speaking to medical personnel.

hearing. Alerting Casares to this line of questioning might have assisted him in responding to cross-examination, and negated counsel's opportunity to undermine his credibility on cross-examination by obtaining spontaneous answers about the inconsistencies in his identification of Martin. Counsel therefore could reasonably conclude that it was wiser to forgo attempting to interview Casares before trial. Because this was a reasonable strategic decision, it cannot be deemed deficient performance. *See State v. Felton*, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983) (if tactical and strategic decisions are rational under the facts and law relevant to the case, ineffective assistance will not be found).

¶13 In his postconviction motion, Martin also alleged that he was entitled to withdraw his no contest plea because Attorney Love misled him as to the penalty that would be imposed, leading him to believe that he would be sentenced to five years of initial confinement and fifteen years of extended supervision.⁵ In his testimony, Attorney Love denied ever telling clients that a plea would result in a particular length of sentence.

¶14 The trial court found as fact that, when he entered his no contest plea, Martin was fully aware of the potential sentence that could be imposed for the conviction, and was aware that the trial court was not bound by any sentencing agreement or recommendation. It implicitly rejected Martin's contention that Attorney Love told him he would get a lesser sentence. Because the trial court's finding is supported by the record and is not clearly erroneous, it must be upheld.

⁵ Although it is unclear from Martin's briefs whether he is attempting to pursue this issue on appeal, the State discusses it in its respondent's brief. We address the issue to ensure that it is put to rest.

See Milanese, 297 Wis. 2d 684, ¶16 n.3. No basis therefore exists to disturb Martin’s judgment of conviction or the order denying postconviction relief.⁶

By the Court.—Judgment and order affirmed.

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

⁶ In his reply brief, Martin also contends that Attorney Love should have filed a motion to suppress Casares’ in-court and out-of-court identifications of him. Issues raised for the first time in a reply brief need not be addressed on appeal. *See Estate of Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981). Moreover, preserving the testimony of counsel on a claim of ineffective assistance of counsel is a prerequisite to raising that claim on appeal. *Machner*, 92 Wis. 2d at 804. At the postconviction hearing, Martin did not question Attorney Love concerning his failure to file a suppression motion. This court therefore will not address the issue on appeal.

