

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2009

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. 2008AP837

Cir. Ct. No. 2000CF2966

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSE S. SOTO,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Jose S. Soto appeals from orders denying his WIS. STAT. § 974.06 (2005-06)¹ postconviction motion. Soto argues that: (1) his

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

postconviction counsel provided ineffective assistance by failing to allege his trial counsel provided ineffective assistance regarding the refusal to allow him phone privileges to contact counsel during interrogation; (2) the trial court erred in summarily denying (without holding an evidentiary hearing) his ineffective assistance claim that postconviction counsel should have alleged that David Claudio's confession constituted newly discovered evidence; and (3) the trial court should have conducted a hearing on his claim that he was actually innocent. Because we resolve each claim in favor of upholding the postconviction orders, we affirm.

BACKGROUND

¶2 This is Soto's second appeal to this court. The facts pertinent to the procedural history of this case were set forth in our decision following Soto's first appeal:

On June 8, 2000, Hector Rodriguez was shot and killed in the lobby of an apartment building at 3014 West Pierce Street, Milwaukee, Wisconsin. A complaint charging Soto with first-degree intentional homicide, together with a warrant for his arrest, were issued. Soto was arrested by Houston, Texas police on the homicide warrant. City of Milwaukee Police Detectives Gregory Schuler and Matthew Quist traveled to Houston to interview Soto. Soto admitted his involvement in Rodriguez's death and signed a written statement to that effect. He was extradited to Milwaukee and was housed at the Waupun Correctional Institution because authorities felt he was too great a security risk to be kept in the county jail. While at Waupun, several of his letters were intercepted by the prison's gang intelligence unit and forwarded to the Milwaukee County District Attorney. The letters addressed a number of issues, including attempting to bribe a witness into saying someone else committed the murder, threatening to kill a witness if she testified, and asking a fellow gang member, Hipolito Claudio, who was also incarcerated, to admit that Claudio committed the murder. Soto moved to suppress the intercepted letters, but his motion was denied. The letters were never used at trial.

Trial was set for May 7, 2001; however, the trial court permitted Michael Fitzgerald to substitute as attorney for Soto. Accordingly, the trial date was postponed. Fitzgerald represented Soto at the suppression hearing, at which Soto alleged that his confession was coerced and should have been suppressed. The trial court denied the motion and the jury trial began on June 4, 2001.

On the second day of trial, Fitzgerald moved to withdraw as counsel because he discovered that he had represented the victim's brother five years earlier on a drug charge. Soto refused to waive the potential conflict of interest. The trial court allowed Fitzgerald to withdraw and declared a mistrial. Attorney Mark Richards was allowed to substitute in as Soto's counsel and a new trial commenced on July 23, 2001.

The jury found Soto guilty and he was sentenced to life in prison. Soto filed a postconviction motion alleging newly discovered evidence and ineffective assistance of trial counsel. The trial court summarily denied the motions in a written order.

State v. Soto, No. 03-2234-CR, unpublished slip op. ¶¶2-5 (WI App Oct. 19, 2004). Soto was represented by Jeffrey Jensen for the postconviction motion and his direct appeal. In our opinion affirming the judgment and order following the direct appeal, we held: (1) “the trial court did not err in summarily denying Soto’s [postconviction] motion alleging the existence of newly discovered evidence,” *see id.*, ¶15; (2) Soto failed to establish that trial counsel (Richards) provided ineffective assistance by failing to seek a new suppression hearing and by failing to call Detective Quist as a witness, *see id.*, ¶¶19, 24; (3) the trial court did not erroneously exercise its discretion when it issued a protective order, *see id.*, ¶29; and (4) Soto’s claim of error relative to suppressing the intercepted letters need not be addressed because the letters were not used at trial, *see id.*, ¶¶30-31. Soto’s petition seeking review by the supreme court of this court’s decision was denied.

¶3 In March 2007, Soto filed a WIS. STAT. § 974.06 postconviction motion. The circuit court summarized Soto’s assertions:

The defendant now asserts that postconviction counsel was ineffective for failing to argue that newly discovered evidence entitled him to a new Miranda-Goodchild hearing and failed to allege that David Claudio’s admission to the crime was newly discovered evidence. Further, he contends that postconviction counsel failed to investigate an alibi defense and that he failed to submit an allegation that the defendant was actually innocent.

On May 30, 2007, the circuit court denied the motion in part and ordered an evidentiary hearing on Soto’s contention that he received ineffective assistance based on counsel’s failure to assert that his Sixth Amendment right to counsel was violated when restricting his phone privileges prevented him from seeking counsel during the two-day interrogation in Texas. The circuit court also ruled that “the parties will be permitted to question Attorney Jensen about Soto’s proposed alibi defense at the Machner hearing and why it was not included in his postconviction motion.”

¶4 After conducting a *Machner*² hearing, the circuit court found that: (1) Jensen knew of Soto’s “claim that he was denied access to a telephone, and denied access to counsel, while jailed in Texas”; (2) Jensen consulted Soto’s trial counsel regarding this issue, who indicated that a strategic decision was made to forgo raising this claim “to keep the defendant from testifying ... based on a legitimate concern that he would open himself up to cross-examination by the State as to prior incidents of self-abuse while in custody and also as to letters he had written while imprisoned, which were in the possession of the prosecutor”;

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

and (3) the decision not to call alibi witnesses was a mutual one made after trial counsel and Soto discussed the alibi witnesses. The trial court also found that: “Mr. Soto approved the final version of the post-conviction motion prior to its filing with the Wisconsin Court of Appeals.”

¶5 Based on its findings, the circuit court ruled that Jensen had provided effective assistance to Soto. A second order denying Soto’s postconviction motion was entered. Soto now appeals.

DISCUSSION

¶6 The trial court in this case determined that Soto’s second postconviction motion could be heard on the basis that he alleged his postconviction counsel provided ineffective assistance for failing to raise certain issues. Thus, the procedural rule barring subsequent postconviction motions found in *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994) did not prohibit this appeal. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996) (Ineffective assistance of postconviction counsel may provide a sufficient reason to avoid the *Escalona-Naranjo* procedural bar.).

A. *Violation of Right to Counsel.*

¶7 Soto asserts that his Sixth Amendment right to counsel was violated when he was prohibited from using the telephone while being held overnight at the Texas jail. The record reflects that Houston police arrested Soto on September 20, 2000 and held him in the Harris County Jail. On September 21, 2000, Soto was interviewed by City of Milwaukee Police Detectives Gregory Schuler and Matthew Quist, who traveled to Harris County Jail in Houston to arrest Soto on

the homicide warrant. Soto was given his *Miranda*³ rights and he waived them. After some small talk and being advised that he was arrested on a homicide warrant, Soto told the detectives that he wanted to think about things and come back the next day. He was returned to his cell for the night. A notation in the jail sign-in log dated September 21, 2000 states that Soto was not to use the phone or come out of his cell. An entry made on September 22, 2000 indicates that Soto's phone restrictions had been lifted. The detectives returned to the jail on September 22, 2000 and again read Soto his rights. Soto waived his rights and answered all the questions asked of him. He never requested an attorney, and he never complained about the phone restriction. He confessed to killing Rodriguez and signed a statement to that effect. He was extradited back to Wisconsin and Attorney Fitzgerald represented him at a *Miranda-Goodchild* hearing.⁴

¶8 Detective Schuler was the only person to testify at the hearing. He indicated that Soto willingly cooperated with the questioning and that no threats were made. He also indicated that neither he nor his partner was allowed to bring their guns into the interview room and that the Harris County Jail personnel did not offer them any courtesies with respect to food or drink. No coffee or other beverage was available to them. When the detectives returned on September 22, they brought with them candy bars, gum and bottles of water, which they shared with Soto.

³ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴ See *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

¶9 After the hearing, Fitzgerald reserved his right to call additional witnesses, but subsequently told the court he would not be calling any witnesses. The trial court then ruled:

There is nothing in the record that would indicate to this Court that any statement that was made was anything but a product of free and unconstrained will reflecting deliberateness of choice of thought and not coerced or the product of any type of improper police practices.

Based upon the totality of the circumstances, taking into account the individual, taking into consideration the amount of time, and of course the time that this took place, balancing of the defendant's personal characteristics against the -- any conversations he had with the detectives, the Court believes that the -- the State's met its burden both as to the Miranda... and the voluntariness of his statement, so the Court will deny any motions to suppress the statements.

¶10 The case went to trial on June 4, 2001. The defense witness list included alibi witnesses from Soto's family. Fitzgerald advised the jury during his opening statement that Soto was not present at the scene of the crime charged in this case and that the defense would present evidence that Soto was attending his brother's high school graduation at the time Rodriguez was shot.

¶11 On the second day of trial, Fitzgerald discovered that five years earlier, he had represented the victim's brother, Ernesto Rodriguez, in a federal drug case. This discovery created a conflict of interest, which only Soto could waive for Fitzgerald to continue as his attorney. Soto refused to waive the conflict and the circuit court declared a mistrial.

¶12 Richards became Soto's attorney and a new trial date of July 23, 2001 was set. During the defense opening statement at the second trial, Richards did not advise the jury that the defense would be presenting any alibi witnesses.

Rather, he told the jury that the State would fail to present sufficient evidence to sustain its burden of proof. The evidence was presented and Soto declined to take the stand in his own defense.

¶13 The circuit court instructed the jury on both the original charge of first-degree intentional homicide, as well as the lesser-included crimes of first-degree reckless homicide and homicide by negligent handling of a dangerous weapon. Richards argued in the defense closing argument that the State had failed to prove “anything near first degree murder.” Richards asked the jury to acquit Soto and stated: “At most he’s guilty of the negligent homicide of Hector Rodriguez.”

¶14 As noted above, the jury convicted Soto and he proceeded with the appellate process. At this juncture, he is arguing that Jensen provided ineffective assistance by failing to argue that the restriction on his phone privileges between September 21 and September 22 while at the Harris County Jail violated his Sixth Amendment right to counsel.⁵ We reject his claim.

¶15 To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that counsel’s errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Strickland*, 466 U.S. at 697.

⁵ Soto is actually arguing that Jensen’s ineffective assistance was his failure to allege ineffective assistance of trial counsel for failing to seek suppression of his confession on the basis that his phone privileges were restricted while incarcerated at the Texas jail. We simplified the issue to avoid confusion.

¶16 An attorney’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.” *Id.* at 687. To satisfy the prejudice prong, defendant must demonstrate that counsel’s deficient performance was “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* In other words, there must be a showing 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.” *Id.* at 694.

¶17 Whether counsel’s actions constitute ineffective assistance is a mixed question of law and fact. *See State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). “The trial court’s determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous.” *State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant’s right to effective assistance of counsel is a question of law for which no deference to the trial court’s decision need be given. *See State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). “[A]n accused is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation.” *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973). There is a strong presumption that counsel acted reasonably within professional norms. *See Pitsch*, 124 Wis. 2d at 637.

¶18 Jensen testified at the *Machner* hearing that, based on his conversation with Fitzgerald, the phone restriction issue as a ground for the suppression motion was not raised because he did not want Soto to testify at the

suppression hearing, which he would have had to do to pursue this claim. Jensen recounted Fitzgerald's reasons to support this strategic decision. First, putting Soto on the stand at the suppression hearing would have given the State a preview of Soto's testimony. Second, it would have given the State an opportunity to cross-examine Soto and ask him questions about the damaging letters he had written in prison and the suspected self-abuse he engaged in. Soto claimed that Schuler and Quist had poured hot coffee on his hands when interviewing him in Texas, resulting in scalding of his hands and coercion of his confession. Schuler testified, however, that there was no coffee available at the Harris County Jail and the State had additional evidence that Soto's scalded hands were the result of self-abuse he had inflicted upon himself. Based on these circumstances, Fitzgerald, who intended to pursue the alibi defense at trial, made a reasonable strategic decision to forgo raising the phone restriction issue as a basis for suppression. Jensen testified that Fitzgerald explained his theory of defense, leading Jensen to conclude that Fitzgerald's course of action was reasonable, which is why Jensen elected not to assert ineffective assistance based on the phone restriction issue in the first postconviction motion or the direct appeal. We hold that Fitzgerald's strategic decision was reasonable and did not constitute deficient performance. Logically then, Jensen's decision not to raise this issue did not constitute ineffective assistance either.

¶19 We also note that the record demonstrates that Soto approved the final version of the postconviction motion filed by Jensen. Jensen testified that: "Mr. Soto had given me an order that I not file anything until he approve[d] of it." Thus, Soto was aware of what issues were being raised and his implicit consent could be construed as waiver of any future right to raise additional issues.

¶20 With regard to Richards and whether he was deficient for failing to seek a second suppression hearing to raise the phone restriction issue, we again conclude that no deficient performance occurred. First, a defendant is not entitled to multiple suppression hearings or a new suppression hearing every time he acquires a new lawyer. Second, Richards was pursuing a different defense strategy. Instead of arguing alibi, he sought to impeach all of the State’s witnesses with the hope of getting the court to instruct on a lesser-included offense. The basis for the lesser-included offense was Soto’s statement. If Richards had sought to suppress the statement, there would be no basis upon which to request a lesser-included offense instruction. Moreover, the State had a strong case against Soto, even without his statement. Namely, it had an eyewitness who saw Soto shoot Rodriguez. Again, we conclude that Richards’s conduct did not constitute deficient performance. His trial strategy, under the circumstances, was reasonable and to seek a second suppression hearing would have been counterproductive.

B. Evidentiary Hearing on Claudio’s Statement.

¶21 Soto next claims that he is entitled to a hearing on his claim that Jensen was ineffective for failing to allege in the postconviction motion that Claudio’s confession “was not discovered until *after* the trial.” Soto asserts that if the circuit court held a hearing on this claim, Soto would testify that Claudio’s “involvement with the murder was unknown to him prior to trial.” The circuit court summarily denied this allegation ruling:

This court in its prior decision dated August 4, 2003 did not reject this claim solely on procedural grounds; it also discussed the merits. In so doing, it found that Claudio’s affidavit was “completely at odds with the eyewitness testimony in this case” and denied the claim on the basis that there was not a reasonable probability that the defendant would have been acquitted had he known of and had possession of Claudio’s affidavit -- “given the

defendant's own confession, the police report pertaining to [other] eyewitness testimony." ... The Court of Appeals likewise touched on the merits of the claim, despite the procedural glitch it found dispositive, and concurred with the trial court's ruling.

The circuit court then addressed the five-part test for newly discovered evidence found in *State v. Coogan*, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990) and concluded that Claudio's confession was not newly discovered evidence because "it is not reasonably probable that a different result would be reached in a new trial" even if this evidence had been admitted. We agree with the trial court's analysis.

¶22 If an appellant wants 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. See *State v. Bentley*, 201 Wis. 2d 303, 309-11, 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. See *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 findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. *Id.* at 318.

¶23 Here, the circuit court did not erroneously exercise its discretion in refusing to conduct an evidentiary hearing on this issue. The record conclusively

shows that a failure to allege that Claudio's confession was not known until after the trial was not only false, but also was not the basis on which the circuit court denied the motion. In its original decision denying Soto's first postconviction motion, the circuit court found Claudio's affidavit taking responsibility for the homicide to be "completely at odds with the eyewitness testimony" and would not have made any difference in the outcome of this case. The circuit court referenced a police report documenting the conversation between a jail inmate by the name of Hector Cubero and Quist. Cubero stated that before Soto's trial, Soto told Cubero he had killed Rodriguez, but was going to get fellow gang member, David Claudio, to confess to the murder. Cubero also saw Claudio's handwritten statement confessing to the Rodriguez killing. The report reflects that the Cubero-Quist conversation took place months before Soto's trial. Obviously, then Claudio's confession was not "new."

¶24 Based on the foregoing, the record conclusively demonstrates that Claudio's confession was not "new." Thus, Jensen's failure to make the allegation in the first postconviction motion did not constitute deficient performance, nor was it prejudicial. Accordingly, holding an evidentiary hearing on this issue was not required.

C. Evidentiary Hearing on claim of Actual Innocence.

¶25 Soto's final claim is that the trial court erred by failing to provide him with an evidentiary hearing on his claim that he is actually innocent. In his postconviction motion, Soto asserted that Jensen provided ineffective assistance by failing to raise a separate claim that he was actually innocent. We reject this claim as well.

¶26 The claim of “actual innocence,” which Soto asserts should have been raised, is not legally recognized by the laws of Wisconsin. Rather, a person asserting actual innocence must pursue claims based on valid legal theories such as insufficient evidence or newly discovered evidence. *See, e.g., State v. DeLain*, 2005 WI 52, 280 Wis. 2d 51, 695 N.W.2d 484; *State v. Edmunds*, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590. Because an independent claim of actual innocence is not legally cognizable here, Jensen’s failure to raise a claim of actual innocence cannot constitute ineffective assistance.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

