

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2002

Cornelia G. Clark
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. 01-1484
STATE OF WISCONSIN**

Cir. Ct. No. 95-CF-438

**IN COURT OF APPEALS
DISTRICT II**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATE WILSON,

DEFENDANT-APPELLANT.**

APPEAL from an order of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Nettlesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Nate Wilson appeals pro se from an order denying his motion for postconviction relief under WIS. STAT. § 974.06 (1999-2000).¹

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Wilson argues that he was denied the effective assistance of trial counsel because counsel failed to impeach a key witness with a transcript of the witness's sentencing in a drug case.² We affirm the order.

¶2 Wilson was convicted as a repeat offender of attempted first-degree intentional homicide by use of a dangerous weapon and possession of a firearm by a felon. His conviction was affirmed on direct appeal. *State v. Wilson*, No. 97-1520-CR, unpublished slip op. (Wis. Ct. App. Aug. 5, 1998). Wilson contends that the testimony of the prosecution's "star witness," Joseph Moore, was elicited by an improper agreement to seek leniency for Moore at his sentencing on an unrelated drug conviction in Racine county. He characterizes Moore's testimony as the product of bribery and perjury and faults trial counsel for not impeaching Moore with a transcript of the sentencing hearing. He specifically contrasts Moore's denial that the Kenosha county prosecutor "put in some good words" for him at the Racine county sentencing with the fact that the Kenosha county prosecutor appeared and spoke at Moore's sentencing.

¶3 The trial court denied Wilson's claim of ineffective assistance of counsel without a hearing. We review the trial court's decision not to hold an evidentiary hearing on a postconviction motion using a mixed standard of review. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). We consider de

² Wilson also argues that his postconviction counsel was ineffective for not raising this issue in his first appeal of right. We need not separately consider that issue since it only bears on whether a sufficient reason for not raising the issue on direct appeal exists, thus clearing the way for Wilson's WIS. STAT. § 974.06 motion. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Wilson's motion was not denied for jurisdictional or waiver reasons.

novo whether Wilson's motion alleged facts which, if true, entitle him to relief. *Id.*

¶4 The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. *State v. Pitsch*, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). The test for the prejudice prong is whether counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable trial outcome. *Id.* at 640-41. An error is prejudicial if it undermines confidence in the outcome. *Id.* at 642.

¶5 This is not a case where there was no impeachment of the witness. Through trial counsel's cross-examination the jury learned that Moore was convicted in Racine county for the drug offense, that the Kenosha county prosecutor appeared at the sentencing hearing and informed the court that Moore would be testifying in Wilson's case, and that both the prosecutor and Moore's attorney recommended a probation sentence and, in fact, Moore was sentenced to probation. Additionally, trial counsel's closing argument emphasized for the jury that Moore had already completed the drug deal for which he was convicted when he went to the police with information against Wilson. Counsel suggested that Moore was "laying the plans here for a special consideration. And he gets special consideration." While use of Moore's sentencing transcript might have been a better tactic, Wilson is not entitled to the best counsel, just adequate counsel. *See State v. Williquette*, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 677, 526 N.W.2d 144 (1995). Trial counsel's impeachment of Moore was adequate and reasonable under the circumstances.

¶6 We further conclude that Wilson was not prejudiced by trial counsel's failure to utilize the transcript of Moore's sentencing.³ While Moore knew that he was likely to be charged with the drug offense before giving information about Wilson's crime, Moore volunteered the information without any deal in place for consideration. At Moore's sentencing, the Racine county prosecutor indicated that Moore volunteered his cooperation without any promise for consideration. The Kenosha county prosecutor's statement at Moore's sentencing confirmed that no consideration was given to Moore in exchange for his testimony against Wilson. The Kenosha county prosecutor did not ask for leniency for Moore, but merely conveyed that Moore was one of the only cooperative witnesses in Wilson's pending case. Thus, the sentencing transcript would have detracted from Wilson's theory that Moore's testimony was to be disbelieved because it was bargained for. Moreover, the transcript demonstrates the falsity of Wilson's underlying assumption that Moore's testimony was "purchased." The transcript demonstrates that Moore's testimony was volunteered and that his cooperation was a factor, albeit a significant one, in the sentence imposed.⁴

¶7 Wilson contends that Moore's sentence was contingent on Moore's testimony against him and that the prosecution should have disclosed that fact to the jury. While the sentencing court admonished Moore that his continued cooperation was expected, Moore's sentence was not contingent on Wilson's

³ For the same reasons, we reject Wilson's contention that trial counsel was ineffective for not personally attending Moore's sentencing hearing.

⁴ The sentencing court stated that it was giving Moore a "tremendous break" because of his cooperation in the Kenosha county prosecution.

conviction. Only the amount of jail time Moore would serve as a condition of probation was left open until after Wilson's trial; the sentence for probation was otherwise in place and final. The prosecution was not required to make any disclosure, particularly since it had no agreement with Moore.

¶8 Wilson is not entitled to relief on his claim of ineffective assistance of counsel because there was neither deficient performance nor prejudice. The trial court properly exercised its discretion in denying Wilson's postconviction motion without a hearing. *See Bentley*, 201 Wis. 2d at 310 (if the motion fails to allege sufficient facts, the trial court has the discretion to deny a postconviction motion without a hearing). Also, it was within the trial court's discretion to accept the prosecutor's late response to Wilson's motion.

By the Court.—Order affirmed.

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

