COURT OF APPEALS DECISION DATED AND FILED

May 2, 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. 01-1625 STATE OF WISCONSIN Cir. Ct. No. 98-CT-1309

IN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed*.

¶1 LUNDSTEN, J. 1 Jeffrey L. Thompson appeals, *pro se*, an order of the trial court denying his motion for postconviction relief filed pursuant to WIS. STAT. § 974.06. For the following reasons, we affirm.

Background

¶2 On November 30, 1998, Thompson was issued a citation for driving after revocation, sixth offense. At a jury trial, Officer Patrick Mackey testified that on November 30, 1998, he had occasion to stop Thompson and, after running a check on Thompson's driver's license, Mackey found that the license was revoked due to Thompson's status as a habitual traffic offender. At this point in the trial, the State introduced a certified copy of Thompson's driving record, showing Thompson's license had been revoked on November 4, 1998, due to his status as a habitual traffic offender. The State also introduced a copy of a letter sent by the Wisconsin Department of Transportation to Thompson on November 4, 1998, indicating that his license was revoked due to cancellation of his insurance filing.

The jury found Thompson guilty of operating a motor vehicle after revocation, contrary to WIS. STAT. § 343.44(1) (1995-96). Subsequent to trial, Thompson filed a postconviction motion, pursuant to WIS. STAT. § 809.30(2)(h), in which he requested the court to either expunge his remaining fine, or allow him to serve a period of confinement, concurrent with another prison term not at issue here, in lieu of the fine. The court granted Thompson's request to convert his fine

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

to a period of concurrent confinement. Thompson then filed an additional postconviction motion, pursuant to WIS. STAT. § 974.06. The court denied that motion without an evidentiary hearing, and Thompson appealed.

Discussion

In his WIS. STAT. § 974.06 postconviction motion, Thompson argued that his trial counsel was ineffective because counsel refused to produce evidence that Thompson had a valid occupational license, and because counsel asserted as a defense that Thompson did not receive the Department of Transportation's revocation order in the mail. Thompson also argued that his postconviction counsel was ineffective because, in the first postconviction motion, counsel only sought to have Thompson's fine converted to a term of confinement, and because counsel did not inform Thompson he could file an appeal.

¶5 Additionally, Thompson argued the following: (1) the trial court erred in not allowing him to present evidence; (2) the police had no probable cause to stop his vehicle; and (3) the Department of Transportation improperly revoked his license, pursuant to WIS. STAT. § 351.02(1)(a).²

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel made errors so serious that he or

² Thompson also asserted that the trial court erred in not sending him any brief or opinion of his postconviction counsel. We assume Thompson is referring to a no merit report. However, as no such report is encompassed in the record, it appears no report was ever filed. Additionally, it is not the trial court's responsibility to send the defendant a copy of the no merit report. *See* WIS. STAT. RULE 809.32.

she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* Even if deficient performance is found, a judgment of conviction will not be reversed unless the defendant proves that the deficiency prejudiced his or her defense. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

Initially, we note that the trial court denied Thompson's motion without holding an evidentiary hearing. A defendant is not entitled to an evidentiary hearing on a postconviction motion unless his motion alleges facts which, if proven true, would entitle him to relief. *See Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). A trial court may, in the exercise of its discretion, deny a postconviction motion alleging ineffective assistance without holding a hearing if the defendant fails to allege sufficient facts in his or her motion to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *State v. Curtis*, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). Thompson's motion was properly denied without an evidentiary hearing.

Thompson first asserted in his postconviction motion that his trial counsel was ineffective because counsel refused to produce evidence in the form of a petition signed by the court that Thompson had a valid occupational license. This evidence would have shown that Thompson had a valid occupational license as of September 23, 1998. At trial, the State introduced a certified driving record from the Department of Transportation showing as much. However, the issues at trial were whether Thompson's occupational license had been revoked over one month later at the time Thompson was driving, and whether Thompson had cause to believe his license was revoked. The State introduced a copy of an order of

revocation, sent by the Department of Transportation to Thompson on November 4, 1998, at his current address. The letter informed Thompson that his driving privileges were revoked and, in particular, explained what he needed to do to have his occupational license reinstated. Accordingly, trial counsel was not ineffective for failing to introduce evidence that Thompson was granted an occupational license on September 23, 1998.

Thompson next asserted that his trial counsel was ineffective because counsel pursued a defense that Thompson did not receive the Department of Transportation's revocation order in the mail. Thompson alleged that this was ineffective because, pursuant to WIS. STAT. § 343.44(3), failure to receive an order of revocation is not a defense to the charge of driving after revocation. While Thompson's reading of § 343.44(3) is correct, it is also true that one of the elements of operating a motor vehicle after revocation is that the defendant had cause to believe his operating privilege had been revoked. *See State v. Collova*, 79 Wis. 2d 473, 487, 255 N.W.2d 581 (1977). The trial court properly instructed the jury that while failure to receive written notice of revocation is not itself a defense to the charge of operating a motor vehicle after revocation, "it is relevant on the question whether the defendant had cause to believe his operating privileges had [been] revoked." Accordingly, trial counsel was not ineffective for arguing that Thompson did not receive the revocation order.

¶10 Thompson also asserted that his postconviction counsel was ineffective because counsel only sought to convert Thompson's remaining fine to jail time. Thompson did not, however, indicate what arguments he believed his postconviction counsel should have made and, thus, Thompson failed to allege any facts entitling him to relief. Assuming we liberally construe Thompson's argument as an assertion that postconviction counsel was ineffective for failing to

assert that trial counsel was ineffective, we would still affirm the trial court's dismissal order because, as discussed above, we cannot conclude that trial counsel was ineffective for any of the reasons alleged by Thompson.

¶11 Thompson also alleged that his postconviction counsel indicated there was no merit to an appeal, but failed to inform Thompson of his right to file an appeal regardless. Thompson did not assert, however, that he would have filed an appeal and, after reviewing the record, we conclude that there would have been no merit to an appeal.

¶12 Thompson next asserted that the trial court erred in not allowing him to present evidence, and that the police had no probable cause to stop his vehicle.³ Thompson again failed to allege facts, with respect to both issues, entitling him to relief. First, Thompson did not indicate what evidence he wanted to present, but was prevented from doing so by the trial court, and how it would have changed the outcome of his case. Second, Thompson alleged no facts to support his claim that the traffic stop was made without sufficient probable cause.

¶13 Finally, Thompson argued that the Department of Transportation improperly revoked his license based on an old version of WIS. STAT. § 351.02(1)(a) (1995-96), no longer in effect. Thompson argued that the Department's certified driving record showed that Thompson's license was revoked due to his status as a "habitual traffic offender." Pursuant to the old

³ We first note that Thompson failed to raise these issues in his first postconviction motion and does not explain any reason for this failure. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-86, 517 N.W.2d 157 (1994) (issues that could have been, but were not, raised in first postconviction motion are waived). Nevertheless, we will liberally construe Thompson's arguments in the context of an ineffective-assistance-of-counsel claim.

§ 351.02(1)(a) (1995-96), a habitual traffic offender was defined as a person who, within a five-year period, had four or more convictions for separate and distinct offenses, including any combination thereof, one of which at subsection 4 was for operating after revocation. Nevertheless, under the current version of § 351.02(1)(a), effective August 1, 1998, subsection 4 has been deleted. *See* 1997 Wis. Act 84, §§ 149 & 168(2). Thus, Thompson argued, his license was improperly revoked.

Thompson's postconviction counsel made the same argument in his postconviction motion filed pursuant to WIS. STAT. § 809.30(2)(h), and Thompson failed to appeal the court's resolution of that motion. Even if we were to interpret Thompson's current motion as asserting that his postconviction counsel was ineffective for failing to also allege that his trial counsel was ineffective for not arguing that Thompson's revocation was invalid under WIS. STAT. § 351.02(1)(a), we would still affirm. It is true that the Department of Transportation's records indicate that Thompson's license was revoked on November 4, 1998, due to his status as a habitual traffic offender. However, a copy of the letter sent to Thompson by the Department of Transportation indicates that Thompson's license was revoked due to cancellation of his insurance filing.

¶15 The jury was made aware of the conflict in the Department of Transportation records, but it still concluded that Thompson's license was revoked at the time he was driving and that he had reason to know of its revocation. Thompson did not, in his WIS. STAT. § 974.06 postconviction motion, argue that the Department also improperly revoked his license for cancellation of his insurance filing. Thus, even if Thompson's trial counsel had argued that Thompson's license was not properly revoked under the new WIS. STAT.

§ 351.02(1)(a), this does not account for the revocation for cancellation of his insurance filing.

¶16 Finally, when subsection 4 was deleted from WIS. STAT. § 351.02(1)(a), effective August 1, 1998, WIS. STAT. § 351.09 was added to allow persons to seek recalculation of their status as habitual traffic offenders. *See* 1997 Wis. Act 84, § 151. Thus, Thompson's remedy, assuming his license was improperly revoked due to his status as a habitual traffic offender, was to seek recalculation of his status, not to continue driving under the theory that the revocation was invalid.

¶17 For all of the reasons stated, we affirm the trial court's order denying Thompson's postconviction motion.

By the Court.—Order affirmed.

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