

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 2010

A. John Voelker
Acting 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 Nos. 2009AP1781-CR
2009AP1782-CR
2009AP1783-CR**

**Cir. Ct. Nos. 2005CM3433
2006CF265
2006CF665**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GECOBEA M. LEACH,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gecobea M. Leach appeals the judgments of conviction after revocation of probation and the order denying his motion for resentencing. Leach argues that he received ineffective assistance of counsel

when he was sentenced after revocation; there are new factors warranting sentence modification; the imposition of consecutive sentences was excessive and violated double jeopardy; the court did not consider the sentence it gave to Leach's codefendant; and he is entitled to be resentenced in the interests of justice. We conclude that Leach was not entitled to a hearing on his claim of ineffective assistance of counsel, and that we need not address the merits of his remaining arguments because they are inadequately briefed. We affirm the judgments and order of the circuit court.

¶2 Leach was convicted of four counts of battery, two counts of disorderly conduct, one count of second-degree recklessly endangering safety, and one count of substantial battery. The crimes were all committed against women, two of whom were pregnant at the time. The court withheld sentence and placed Leach on probation. Leach's probation was revoked for, among other things, battering women, and he returned to court for sentencing. The court imposed the maximum sentence on all counts.

¶3 Leach filed a motion for postconviction relief alleging that he received ineffective assistance of counsel for several reasons and also asserted the claims of error we list in ¶1, above. The court denied the motion without holding a hearing. Leach appeals.

¶4 We first address Leach's argument that he received ineffective assistance of counsel at the hearing on sentencing after revocation.¹ Leach asserts

¹ As we discuss later in this opinion, the actual issue presented in this appeal is not whether Leach received ineffective assistance of counsel, but rather whether he alleged sufficient facts to warrant a hearing on his claims of ineffective assistance of counsel.

that his counsel was ineffective in ten ways: (1) she failed to review and advise the court of errors in the revocation order; (2) she stipulated that there were no errors in the revocation order; (3) she failed to bring to the court's attention misstatements made by the State; (4) she failed to arrange for "one or two of the alleged victims" to testify at the hearing to recant or submit recanted testimony; (5) she failed to advise the court about Leach's medical condition; (6) she failed to "detail" Leach's character and contrast that with the need to protect the public; (7) she did not know the correct maximum sentences for the crimes until the morning of the sentencing hearing; (8) she failed to properly prepare for the hearing; (9) she failed to bring to the court's attention the sentence the court imposed on Leach's codefendant; and (10) she failed to advise the court about an error in the testimony of a Department of Corrections agent.

¶5 Because the circuit court denied this motion without holding a hearing, we must examine Leach's postconviction motion to determine whether it contains sufficient facts to require a hearing. The standard we apply was summarized in *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433:

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.

Id., ¶9 (citations omitted). The motion must include facts that allow the reviewing court to meaningfully assess the defendant’s claim. *Id.*, ¶21. The facts that allow a reviewing court to “meaningfully assess a defendant’s claim are those facts that are *material* to the issue presented to the court.” *Id.*, ¶22. To be sufficient, a defendant’s postconviction motion should allege “the five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” *Id.*, ¶23.

¶6 To the extent that Leach’s motion asserts ineffective assistance of counsel, we must consider the standards for proving that claim. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel’s performance was deficient and that he or she was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground, and, if we conclude that the defendant has failed to prove one prong, we need not address the other prong. *Id.* at 697. There is a strong presumption that counsel rendered adequate assistance. *Id.* at 690. Professionally competent assistance encompasses a “wide range” of behaviors and “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.* at 689. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

¶7 Turning to Leach’s motion, we first observe that most of the claims of ineffective assistance of counsel are mere conclusory allegations

unaccompanied by factual assertions that even arguably warranted a hearing. For example, Leach asserts that his counsel failed to identify errors in the revocation report, but he does not identify the errors, much less assert facts demonstrating that they are wrong. Similarly, Leach complains that his counsel did not advise the court about his medical condition, but does not allege what his counsel should have said, or how and why this information would have affected the sentence.

¶8 Two of Leach’s ineffective assistance claims are somewhat more developed, and we now address these claims.

¶9 Leach asserts that his counsel failed to correct statements made by the Department of Corrections agent, Josh Wichmann. The record shows that the court asked Wichmann at the sentencing after revocation hearing for his opinion on the recommended sentence. Wichmann, who had made a written recommendation in his report, said that he would go “towards a higher end of my range recommendation, and quite likely would support something closer to a three to four or four year recommendation.” Wichmann also said that “I don’t necessarily know that I am in full support of a maximum recommendation.” Leach claims that Wichmann’s recommendation in his report to the court was for two to three years, and counsel was ineffective for failing to correct Wichmann’s assertion that the higher range of his report’s recommendation was three to four years. The problem with this argument is that it is plain from the transcript that the agent was informing the court that he was increasing his recommendation from his written report. Thus, there was nothing for Leach’s counsel to correct.

¶10 Leach contends that his counsel failed to call victims who would have recanted. Leach’s motion says that these victims would have provided contradictory testimony. Leach’s affidavit in support of his motion states:

I then asked if she had secured the attendance of Angie Weaver, an alleged victim; and the subpoena or in the minimum securing of the transcript of the preliminary hearing of 06CF265, wherein alleged victim Jamie Schwarz provided testimony contradictory or the information originally filed in the 06CF265; I said that Ms. Weaver wanted to make sure the judge knew about the incorrect parts of that new charge and I wanted to make sure that my counsel had the court aware of the testimony of Ms. Schwarz; Counsel indicated that she did not want to call Ms. Weaver and that she had not secured the transcript on the matter with Ms. Schwarz, but didn't think it was a big deal since that charge had been dismissed.

The motion does not say what testimony these witnesses would have given and, therefore, does not present facts that, if true, demonstrate that his counsel rendered ineffective assistance by failing to call the witnesses.

¶11 Leach's remaining arguments to this court are inadequately briefed. He asserts without factual or legally developed argument that there are new factors warranting sentence modification, that his sentence was harsh and excessive, that his sentence violated double jeopardy principles, that the court erroneously failed to consider the sentence it gave to his codefendant, and that he is entitled to be resentenced in the interests of justice. Leach's new factor argument does not identify or discuss the correct standard for the new factor test, but says only that a new factor "frustrates the sentence" and that there must be a connection between the sentence and the factor. Leach's argument that the imposition of consecutive sentences was excessive and violates double jeopardy is barely comprehensible and is not supported by appropriate legal authority. Leach's argument about his codefendant's sentence repeats the previous argument and is similarly devoid of appropriate legal authority. And Leach's argument that he is entitled to a new sentencing in the interests of justice is two sentences long. None of these arguments are adequately developed legal arguments, and we will not address

them. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not decide issues that are inadequately briefed).²

¶12 In sum, the circuit court properly denied Leach's ineffective assistance claims without an evidentiary hearing and, therefore, we affirm the judgments and order of the circuit court.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

² Contrary to counsel's certification, the appendix does not include the circuit court's decision on the postconviction motion or other essential portions of the record, including Leach's postconviction motion to the circuit court and relevant portion of the transcript of the hearing on sentencing after revocation. WISCONSIN STAT. RULE 809.83(2) provides that failure to follow the Rules of Appellate Procedure is grounds to impose a penalty on counsel or to take any other action the court considers appropriate. Counsel could be subject to a fine for filing a false certification. *See State v. Bons*, 2007 WI App 124, ¶¶20-25, 301 Wis. 2d 227, 731 N.W.2d 367.

