COURT OF APPEALS
DECISION
DATED AND FILED

January 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2801 **Cir. Ct. No. 2006CV68**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

BERT ROEHL,

PLAINTIFF-APPELLANT,

V.

SHARON GISSELMAN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Bert Roehl appeals an order dismissing his legal malpractice claim against Sharon Gisselman. Roehl's complaint alleged that Gisselman negligently represented him in a fifth-offense OWI case by failing to collaterally attack one of his previous OWI convictions. The circuit court granted

Gisselman's motion to dismiss, concluding Roehl's complaint did not state a claim for legal malpractice.

¶2 A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding only on the ground that the defendant was denied the constitutional right to counsel. ***State v. Hahn***, 2000 WI 118, ¶25, 238 Wis. 2d 889, 618 N.W.2d 528. Because Roehl does not allege that he was denied counsel in his previous OWI case, he could not have collaterally attacked that conviction in the fifth-offense OWI proceeding. Thus, Gisselman was not negligent for failing to challenge Roehl's prior conviction because the challenge would have failed. Accordingly, we affirm the order dismissing Roehl's claim.

BACKGROUND

¶3 Roehl's complaint alleged Gisselman was his attorney in Shawano County case No. 2000CF121, in which he was convicted of operating a motor vehicle while intoxicated, fifth offense. Roehl alleged that, in charging him with fifth-offense OWI, the State relied on prior OWI-related convictions from 1990, 1993, 1994, and 1998.

¶4 Roehl's 1998 conviction was based on default judgments that the Shawano County Municipal Court entered against him in case Nos. 1998TR6526 (OWI, first offense) and 1998TR6527 (operating with a prohibited blood alcohol concentration).[1] Roehl's complaint alleged the municipal court did not have subject matter jurisdiction to enter these judgments because Roehl was

[1] Because the charges in these cases stemmed from the same incident, the two judgments only counted as one conviction for purposes of calculating Roehl's previous OWI-related convictions. *See* WIS. STAT. § 346.63(1)(c) (2007-08).

erroneously charged with first-offense OWI, which is a civil matter, rather than second-offense OWI, which is a criminal offense. The complaint also alleged that, because second-offense OWI is a criminal offense, Roehl had a constitutional right to be present in court for the adjudication of his guilt, making the default judgments entered against him improper. Accordingly, the complaint alleged that Gisselman should have collaterally attacked Roehl's 1998 conviction and that her failure to do so was negligent.

¶5 Roehl's complaint further alleged that, had Gisselman successfully challenged the 1998 conviction, he would have been charged with fourth-offense OWI instead of fifth-offense OWI in Shawano County case No. 2000CF121. As a result of the lesser charge, Roehl would have been able to obtain Huber privileges and could have continued running his flooring business. Instead, Roehl served twenty-seven months and ten days in prison, without Huber privileges, and his flooring business failed.

¶6 Gisselman moved for summary judgment, which the circuit court granted. On appeal, we reversed the summary judgment and remanded for further proceedings. *See* ***Roehl v. Gisselman***, No. 2008AP7891-FT, unpublished slip op. (WI App Dec. 4, 2008). Gisselman then filed a motion to dismiss, alleging Roehl's complaint failed to state a claim upon which relief could be granted. The circuit court agreed and dismissed Roehl's complaint. Roehl now appeals.

DISCUSSION

¶7 "A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint." ***Watts v. Watts***, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). Whether a complaint states a claim for relief is a question of law that we review independently. ***Wausau Tile, Inc. v. County Concrete Corp.***,

226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). We accept the facts stated in the complaint as true and draw all reasonable inferences from those facts in favor of stating a claim. ***Meyer v. The Laser Vision Inst.***, 2006 WI App 70, ¶3, 290 Wis. 2d 764, 714 N.W.2d 223. A complaint should be dismissed for failure to state a claim only when it is quite clear there are no conditions under which the plaintiff can recover. ***Casteel v. McCaughtry***, 176 Wis. 2d 571, 578, 500 N.W.2d 277 (1993).

¶8 Roehl's complaint alleges Gisselman committed legal malpractice. To prevail in a legal malpractice suit, a plaintiff must prove: (1) that a lawyer-client relationship existed; (2) that the defendant committed acts or omissions constituting negligence; (3) that the defendant's negligence caused the plaintiff's injury; and (4) the nature and extent of the injury. ***Hicks v. Nunnery***, 2002 WI App 87, ¶33, 253 Wis. 2d 721, 643 N.W.2d 809. Furthermore, because Roehl's malpractice claim stems from legal representation in a criminal case, public policy considerations preclude the imposition of liability unless Roehl can establish he was innocent of the charges of which he was convicted. *See* ***id.***, ¶34. Roehl contends the allegations in the complaint, taken as true, establish these elements.

¶9 We disagree. Roehl's complaint alleges Gisselman was negligent by failing to collaterally attack his 1998 OWI conviction. Thus, Roehl's malpractice claim depends upon the premise that his 1998 conviction was subject to collateral attack. If a collateral attack on Roehl's conviction would not have been possible, then Gisselman was not negligent for failing to challenge that conviction as a matter of law.

¶10 Based on the allegations in the complaint, Roehl's 1998 conviction was not subject to collateral attack. A defendant may collaterally attack a prior

conviction in an enhanced sentence proceeding only on the ground that the defendant was denied the constitutional right to counsel in the earlier case. ***Hahn***, 238 Wis. 2d 889, ¶25. Roehl's complaint does not allege that he was denied the constitutional right to counsel in his 1998 case. Instead, it alleges that: (1) the judgments in that case were entered without subject matter jurisdiction; and (2) Roehl was denied the constitutional right to be present in court for the adjudication of his guilt. Under ***Hahn***, neither of these arguments is a proper basis to collaterally attack a prior conviction. *See* ***id.*** Consequently, it would not have been possible for Gisselman to challenge Roehl's 1998 conviction in Shawano County case No. 2000CF121.[2]

¶11 Thus, even accepting the allegations in Roehl's complaint as true, Roehl cannot establish that Gisselman's failure to collaterally attack the 1998 conviction was negligent. Without establishing that the defendant attorney was negligent, a plaintiff cannot prevail on a claim for legal malpractice. *See* ***Hicks***, 253 Wis. 2d 721, ¶33. Dismissal of Roehl's complaint was therefore proper because it is clear there are no conditions under which Roehl can recover. *See* ***Casteel***, 176 Wis. 2d at 578.

By the Court.—Order affirmed.

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

[2] To the extent Roehl's complaint alleges the 1998 conviction was subject to collateral attack, this is a legal conclusion, not a factual allegation. We are not required to accept as true legal conclusions in a plaintiff's complaint. ***Larson v. Burmaster***, 2006 WI App 142, ¶3 n.2, 295 Wis. 2d 333, 720 N.W.2d 134.