

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2012

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 No. 2010AP2834

Cir. Ct. No. 2005CF641

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE D. BROOKS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Eugene D. Brooks, *pro se*, appeals from a circuit court order denying his WIS. STAT. § 974.06 (2009-10) motion for postconviction

relief.¹ He argues that he is entitled to outright dismissal of one count and a new trial on other counts based on ineffective assistance of trial counsel. We reject his arguments and affirm the order.

BACKGROUND

¶2 A jury found Brooks guilty of five counts of armed robbery with threat of force, party to a crime, as a habitual criminal, and one count of possession of a firearm by a felon, party to a crime, as a habitual criminal. The charges stemmed from a series of robberies of individuals in 2004. With the assistance of postconviction counsel, Brooks filed a motion for a new trial, but later withdrew the motion before it was decided. A no-merit notice of appeal was filed, but postconviction counsel was later relieved of further representation. Brooks voluntarily dismissed the appeal and did not subsequently file a postconviction motion pursuant to WIS. STAT. RULE 809.30, although he was given an extension of time to do so. *See State v. Brooks*, No. 2007AP1036-CR, unpublished order (WI App April 15, 2008).

¶3 Two years later, Brooks filed the *pro se* WIS. STAT. § 974.06 motion that is at issue in this appeal. Brooks argued that his trial counsel provided ineffective assistance when counsel: (1) did not argue at the *Miranda-Goodchild*² hearing that detectives “fail[ed] to scrupulously honor Brooks’[s] right to silence”; and (2) did not move to dismiss the single count of being a felon in possession of a

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² *See Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

firearm at the close of the State’s case-in-chief or “at the conclusion of the entire case.” Brooks also argued that the “combined effect” of those two errors prejudiced his defense. (Capitalization omitted.)

¶4 The circuit court denied the motion without a hearing, for reasons detailed below. This appeal follows.

LEGAL STANDARDS

¶5 To succeed on a claim of ineffective assistance of counsel, a defendant must show both deficient representation and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both prongs “if the defendant makes an insufficient showing on one.” *Id.* at 697. To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are “outside the wide range of professionally competent assistance.” *Id.* at 690. To prove prejudice, a defendant must demonstrate that the lawyer’s errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Id.* at 687. Thus, in order to succeed on the prejudice aspect of the *Strickland* analysis, “[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

¶6 A claim for ineffective assistance of counsel presents a mixed question of fact and law. *State v. Doss*, 2008 WI 93, ¶23, 312 Wis. 2d 570, 754 N.W.2d 150. We defer to the circuit court’s factual findings unless they are

clearly erroneous. *Id.* The conclusions as to whether an attorney’s performance was deficient or prejudicial, however, are questions of law that we review independently. *Id.*

DISCUSSION

I. Alleged error with respect to *Miranda-Goodchild* hearing.

¶7 Prior to trial, the circuit court conducted a *Miranda-Goodchild* hearing.³ Detectives who questioned Brooks on three occasions testified about the interrogations, as did Brooks. Brooks said that during the first interview, he told the detective that he “had nothing to say and ... wanted a lawyer.” He said that when a detective came to see him for a second interrogation, the detective promised Brooks immunity if he cooperated. Brooks said he falsely admitted to some of the robberies based on that promise of immunity. Brooks also complained that his request to make a phone call to “retain counsel” was denied. Trial counsel’s argument in favor of suppression concerned the length of the interrogations, Brooks’s isolation, and representations made about the release of a co-defendant who cooperated.

¶8 The trial court explicitly found that the testimony of the detectives was credible and that Brooks’s testimony was incredible. It found that each detective read Brooks his rights and that he understood them. It further found that

³ The Hon. Timothy G. Dugan conducted the *Miranda-Goodchild* hearing, while the Hon. Elsa C. Lamelas presided over the jury trial and sentencing. The Hon. Richard J. Sankovitz denied the postconviction motion at issue in this appeal.

Brooks was not deprived of food or sleep and that no force was used to make him confess. The trial court found that Brooks had not asked any of the detectives for an attorney, had not asked to stop the interviews, and had voluntarily made his statements. Finally, the trial court rejected Brooks's testimony that he had falsely confessed and that he had been promised immunity.

¶9 Brooks argues that his trial counsel performed deficiently at the *Miranda-Goodchild* hearing. He explains:

Counsel was aware of the fact that Brooks had been interrogated three separate times, in "relay" type interrogations about the exact same robberies. Counsel was also aware that Brooks had invoked his right to silence on the previous two occasions, thus, there ... [was no] logical expl[an]ation ... why counsel fail[ed] to pursue or argue that the latter two interrogations, and subsequent confessions came only after the detectives fail[ed] to scrupulously honor Brooks'[s] right to silence.

¶10 The circuit court considered this argument and concluded that Brooks had failed to show he was prejudiced by trial counsel's alleged deficiency. It stated:

Judge Dugan listened to the testimony, considered who was more credible and concluded that Mr. Brooks did not refuse to [answer] questions and never requested an attorney during any of the interviews.... The record supports Judge Dugan's findings that the defendant received and understood the *Miranda* warnings, and that he voluntarily waived his right to remain silent. Even if Mr. Brooks'[s] attorney had made the argument [Brooks] faults him for not making, there is no reasonable probability that Judge Dugan's findings would have been different.

(Bolding added.) We agree with this analysis. It was the trial court's role to assess credibility and weigh the evidence, *see State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990), and we defer to the trial court's findings of fact unless they are clearly erroneous, *see State v. Patton*, 2006 WI App 235, ¶7, 297

Wis. 2d 415, 724 N.W.2d 347. We see no reason to disturb the trial court's findings in this case.

¶11 Based on the trial court's findings, it would not have been persuaded by an argument that the detectives infringed on Brooks's right to remain silent. Because the motion would have been denied, Brooks cannot prove that he was prejudiced by his trial counsel's allegedly deficient conduct and, therefore, his ineffective assistance claim fails.

II. Alleged errors at trial with respect to the felon-in-possession charge.

¶12 Brooks argues that his trial counsel performed deficiently when he failed to move to dismiss the charge of being a felon in possession of a firearm, both at the close of the State's case and at the entire case's conclusion. The circuit court rejected this argument, concluding that Brooks was not prejudiced by trial counsel's alleged deficiencies, because the motion to dismiss would not have been granted. The circuit court explained:

Even if Mr. Brooks'[s] lawyer had moved to dismiss, the motion would have failed, because Mr. Brooks twice was seen holding a gun....

....

Because there was evidence before the jury on the basis of which the jury could conclude that Mr. Brooks was holding a handgun, the jury was entitled to find that the defendant was in actual possession of a firearm. Therefore, even if Mr. Brooks'[s] lawyer had moved to dismiss, the motion would have failed.

¶13 We agree with the circuit court. Detectives testified that two co-defendants said Brooks held a gun. One co-defendant said Brooks was carrying a large chrome revolver during one robbery and pointed it at a victim, and the other

said Brooks waved a gun around before a robbery. Based on this evidence, the motion to dismiss would have been denied. *See Bere v. State*, 76 Wis. 2d 514, 524, 251 N.W.2d 814 (1977) (both on appeal and on motion to dismiss for insufficient evidence, the issue is whether a trier of fact, acting reasonably, could make findings supporting guilt).

¶14 Brooks disagrees with this analysis. He argues that a reasonable jury could not have believed that he possessed the gun, as evidenced by the fact that the jury in this case sent the trial court notes on two occasions during deliberations asking about the legal definition of “possession.” Brooks asserts that the circuit court deciding his postconviction motion “turn[ed] a blind eye to the fact that the jury clearly did not believe” testimony that Brooks held a gun on two occasions. We are not persuaded by Brooks’s reasoning. At issue is whether Brooks was prejudiced by his trial counsel’s failure to move to dismiss the possession charge. If the motion had been brought, it would have been denied because there was evidence in the record that Brooks held a gun. *See id.* Whether a jury would later choose to accept or reject this testimony, or whether this jury in fact later rejected that testimony, would not have been part of the trial court’s analysis of the motion to dismiss.

¶15 For the foregoing reasons, we conclude that Brooks was not prejudiced by his trial counsel’s failure to move to dismiss the possession charge. Therefore, Brooks was not denied the effective assistance of counsel and his postconviction motion was properly denied.

III. Combined effect of the alleged errors.

¶16 Brooks argues that the errors he has alleged, in combination, undermined his convictions. We are not convinced that Brooks was prejudiced by

either alleged error or that he is entitled to discretionary reversal based on the alleged errors.

By the Court.—Order affirmed.

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

