



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

September 17, 2019

To:

Hon. Eric J. Lundell
Circuit Court Judge
St. Croix County Courthouse
1101 Carmichael Road
Hudson, WI 54016

Kristi Severson
Clerk of Circuit Court
St. Croix County Courthouse
1101 Carmichael Road
Hudson, WI 54016

Michael E. Nieskes
District Attorney
1101 Carmichael Rd., Ste. 2301
Hudson, WI 54016

Tiffany M. Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Alexander C.D. Otis 603445
Stanley Correctional Inst.
100 Corrections Drive
Stanley, WI 54768

You are hereby notified that the Court has entered the following opinion and order:

2018AP1019

State of Wisconsin v. Alexander C.D. Otis (L. C. No. 2014CF292)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Alexander Otis, pro se, appeals an order denying his WIS. STAT. § 974.06 (2017-18)¹ motion for postconviction relief. Otis argues the circuit court erroneously exercised its discretion when ordering restitution. Otis also contends the circuit court erred in denying without a hearing his claim that his trial counsel was ineffective by failing to challenge the restitution amount

ordered. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Otis's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21.

The State charged Otis with three counts of burglary of a dwelling; three counts of theft of movable property having a value greater than \$10,000; and three counts of arming himself with a dangerous weapon while committing a burglary. The charges arose from allegations that Otis stole a significant amount of property, including guns, from his best friend, as well as from that friend's mother and grandmother. Pursuant to a plea agreement, Otis pleaded guilty to three counts of burglary and one count of theft. The remaining counts were dismissed and read in "for purposes of restitution." The circuit court imposed concurrent sentences resulting in a total of seven and one-half years' initial confinement followed by five years' extended supervision.

At the sentencing hearing, the circuit court also ordered restitution in the amount of \$78,917.84, to be paid to the victims and their insurers. Defense counsel challenged the restitution amount and asked for a restitution hearing. Counsel questioned how the restitution amount was calculated and what insurers had paid.

At a subsequent restitution hearing conducted by a court commissioner, two of the victims testified that the \$78,917.84 amount did not include a complete valuation of the property that Otis stole. The commissioner heard testimony detailing that some of the property not included in the original restitution amount was currency in the form of collectible coins and

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

uncut bills that Otis had taken from a safe. Both victims explained it was difficult to place an exact value on the property; however, one victim estimated its value at over \$250,000.

After the restitution hearing, Otis wrote the court commissioner stating his attorney had not consulted with him before the hearing. Otis also questioned how much the victims had received in insurance payments. The commissioner subsequently issued proposed findings of fact and conclusions of law, stating it was “impossible to return the [victims] to the position they were in before Otis injured them[,]” as “[t]he theft and pawning of collectibles ... including jewelry, silver dollars, gold coins, U.S. Mint proof sets and family heirlooms destroyed a lifetime of savings and investment by the [victims].” The commissioner determined that the victims had established an actual loss in excess of \$328,000. In considering Otis’s ability to pay over the course of his lifetime, the commissioner ultimately opined that a restitution award of “not less than \$100,000 should be ordered.”

The circuit court adopted the commissioner’s findings of fact and ordered Otis to pay \$100,000 in restitution. Of that amount, \$19,307.02 was allocated to reimburse the insurers. Otis, through counsel, filed a motion for postconviction relief seeking plea withdrawal, but he later withdrew that motion.

Months later, Otis filed the underlying WIS. STAT. § 974.06 motion seeking modification of the restitution amount. Otis also alleged his trial counsel was ineffective at both the sentencing hearing and at the restitution hearing. The circuit court denied Otis’s motion without a hearing, and this appeal follows.

On appeal, as in his WIS. STAT. § 974.06 motion, Otis challenges the amount of restitution ordered, claiming the circuit court did not properly compute the amount owed because

there were “no subtractions made” for insurance payments or returned property. Relief under § 974.06, however, is limited to constitutional and jurisdictional challenges, and it does not include review of discretionary decisions. *State v. Nickel*, 2010 WI App 161, ¶7, 330 Wis. 2d 750, 794 N.W.2d 765. The circuit court’s determination of the amount of restitution owed is discretionary. *See State v. Fernandez*, 2009 WI 29, ¶50, 316 Wis. 2d 598, 764 N.W.2d 509. Therefore, Otis cannot directly challenge the computation of restitution in a § 974.06 motion. *See Nickel*, 330 Wis. 2d 750, ¶7.

Otis alternatively challenges the effectiveness of his trial counsel with respect to restitution, and he contends the circuit court improperly denied his ineffective assistance of counsel claims without a hearing. A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing. To obtain an evidentiary hearing, the defendant’s motion must allege, with specificity, both that counsel provided deficient performance and that the deficiency was prejudicial. *State v. Bentley*, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). If the motion alleges facts that entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. *Id.* at 310. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review independently. *Id.* However, if the factual allegations of the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny the motion without a hearing. *Id.* at 309-10. When reviewing a court’s discretionary act, this court utilizes the deferential erroneous exercise of discretion standard. *Id.* at 310-11.

The analytical framework that must be employed in assessing the merits of a defendant’s claim of ineffective assistance of counsel is well established. To prevail on a claim of ineffective

assistance of counsel, a defendant must show both that counsel's performance was deficient, and that counsel's errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See id.* at 697.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. *Strickland*, 466 U.S. at 690.

With respect to the prejudice component of the test, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *See id.* at 693. The defendant cannot meet this burden by merely showing that the error had some conceivable effect on the outcome. *Id.* Rather, the defendant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In his postconviction motion, Otis claimed his trial counsel was ineffective at the sentencing hearing by failing to argue that the restitution amount improperly included awards for returned property and payments made by the insurers. Otis further claimed that his trial counsel was ineffective at the restitution hearing by failing to challenge the victims' loss assessment, and by failing to call an expert witness to establish that the value of the loss was less than the victims claimed. Otis asserted he was prejudiced by these claimed deficiencies because he must now pay restitution in an amount greater than he deems owed.

To the extent Otis argues his trial counsel was ineffective by failing to challenge the restitution award at the sentencing hearing, the record belies his claim. As noted above, at sentencing, defense counsel raised a challenge to the restitution award on grounds that it was unclear how the restitution amount was calculated and what the insurer had paid. Due to that challenge, the circuit court granted Otis a restitution hearing. Thus, Otis cannot claim that his counsel was deficient for failing to challenge the restitution award, nor can he claim prejudice given that he received a restitution hearing.

Citing WIS. STAT. § 949.06(3)(b), Otis alternatively argues his trial counsel was ineffective at the restitution hearing by failing to argue that the restitution award should be reduced by the amount of insurance paid.² Otis is mistaken. The cited statute is inapplicable to the present case, as it serves only to reduce the amount a crime victim may recover from the State's crime victim compensation fund by any insurance payment the victim received. The statute does not apply to reduce the amount a defendant is responsible to pay as restitution to a

² Otis was represented by different attorneys at the sentencing hearing and at the restitution hearing.

victim. Moreover, amounts paid by insurers may be included in a restitution award. *See* WIS. STAT. § 973.20(5)(d). Therefore, restitution hearing counsel was not deficient by failing to object that the restitution amount included reimbursement to insurers.

Otis also argues that restitution hearing counsel was ineffective by failing to challenge \$9,275 in restitution for items that were returned to the victims. Otis, however, has not satisfied his burden of showing that the victims included those items in the initial calculation of \$78,917.84. Even assuming those items were included, subtracting that amount from the final actual loss of \$328,000 does not support the conclusion that the court's order of \$100,000 was excessive. Therefore, any alleged deficient performance resulting from restitution hearing counsel's failure to object to the inclusion of amounts for returned items did not prejudice Otis.

Next, Otis claims his attorney at the restitution hearing was ineffective by failing to object to the victims' testimony regarding the value of their property. Under WIS. STAT. § 973.20(14), the victim of a crime bears "[t]he burden of demonstrating by the preponderance of the evidence the amount of loss sustained by a victim as a result of a crime considered at sentencing." To the extent Otis asserts that the victims were required to prove their losses by expert valuation, the present value of personal property may be established by the non-expert opinion of its owner. *Trible v. Tower Ins. Co.*, 43 Wis. 2d 172, 187, 168 N.W.2d 148 (1969). Additionally, there are no facts asserted in Otis's WIS. STAT. § 974.06 motion to establish that the value of the stolen property was actually less than the \$250,000 estimated by one of the victims.

Otis nevertheless contends his counsel was ineffective by failing to call an expert to refute the victim's testimony. However, his conclusory assertion does not show that an expert

would have testified that the loss was less than the \$100,000 awarded. Otis has therefore failed to establish that his trial counsel was deficient in failing either to challenge the absence of expert testimony for the victims or to call an expert in Otis's defense. For the same reason, Otis also fails to show how he was prejudiced by these claimed deficiencies.

Because Otis's WIS. STAT. § 974.06 postconviction motion failed to allege facts that, if proven, would establish that his counsel was deficient and that he was prejudiced by any claimed deficiency, Otis was not entitled to an evidentiary hearing and the circuit court properly denied the motion. See *Bentley*, 201 Wis. 2d at 313-18.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals