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**DISTRICT III**

September 21, 2021

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

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2020AP974

State of Wisconsin v. Kou Thao (L. C. No. 2013CF331)

Before Stark, P.J., Hruz and Nashold, 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).**

Kou Thao appeals an order denying his WIS. STAT. § 974.06 (2019-20)<sup>1</sup> motion for postconviction relief. Thao argues that he is entitled to resentencing based on the ineffective assistance of his trial and postconviction counsel. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Thao's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21.

In April 2013, the State charged Thao with first-degree intentional homicide, hiding a corpse, and possession of a firearm by a felon, the latter two offenses as a repeater. The charges

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

arose from allegations that Thao shot and killed Tong Hang. Police discovered the victim's head in the trunk of a car Thao had been driving and, based upon information Thao provided, they later discovered the victim's other body parts in a Milwaukee residence.

Pursuant to a plea agreement, the State filed an amended Information reducing the intentional homicide charge to a second-degree offense and removing the repeater penalty enhancer from the other two offenses. Thao pleaded no contest to the second-degree intentional homicide charge and guilty to the remaining charges. The parties remained free to argue at sentencing. The circuit court imposed concurrent sentences, with the controlling sentence being the maximum sixty-year term for the homicide offense, consisting of forty years' initial confinement and twenty years' extended supervision.

Thao filed a postconviction motion for resentencing, claiming the State breached the plea agreement when it refused to concede at sentencing that it would be unable to meet its burden to disprove the existence of Thao's affirmative defense—specifically, imperfect self-defense during the fatal shooting.<sup>2</sup> The circuit court denied Thao's motion after a hearing, and we affirmed on appeal, concluding that even if the State breached the plea agreement, the breach was not material and substantial. *See State v. Thao*, No. 2016AP1758-CR, unpublished slip op. (WI App Aug. 15, 2017).

Thao then filed the underlying motion for postconviction relief pursuant to WIS. STAT. § 974.06, asserting, in part, that he was sentenced on the basis of inaccurate information.

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<sup>2</sup> Imperfect self-defense is an affirmative defense mitigating an otherwise first-degree intentional homicide to a second-degree offense. *See* WIS. STAT. § 940.01(2).

Because Thao's challenge to his sentence was not preserved by his trial counsel, he necessarily argued that his postconviction counsel was ineffective by failing to challenge his trial counsel's effectiveness in this regard. After a *Machner*<sup>3</sup> hearing at which both trial counsel and postconviction counsel testified, the circuit court denied the motion. This appeal follows.

Thao argues he is entitled to resentencing because the circuit court relied on inaccurate information; his trial counsel failed to object to that information; and his postconviction counsel failed to challenge, and thus preserve, the issue of trial counsel's alleged ineffectiveness.<sup>4</sup> Defendants have a due process right to be sentenced on the basis of accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. In order to establish a due process violation, the defendant has the burden of proving by clear and convincing evidence both that the information was inaccurate and that the court actually relied on the inaccurate information at sentencing. *Id.*, ¶26.

With respect to Thao's ineffective assistance of counsel claims, this court's review is a mixed question of fact and law. See *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The circuit court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.* However, the ultimate determination of whether an attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. *Id.* To substantiate a claim of ineffective assistance of counsel, a defendant must show both that

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<sup>3</sup> See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

<sup>4</sup> To the extent Thao raised other arguments in his postconviction motion, he does not pursue these alternative claims on appeal. Therefore, we will not address them. See *State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) (issues raised, but not briefed, are deemed abandoned on appeal).

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. *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. 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. *Id.* at 690. Because “[j]udicial scrutiny of counsel's performance must be highly deferential ... the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (citation omitted). A defendant proves prejudice by demonstrating 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.

At sentencing, the prosecutor recommended the maximum penalties on each of Thao's three convictions, noting that “[t]he nature of [Thao's] convictions alone” justified “a lengthy prison sentence.” The prosecutor added, however, that Thao's history of criminal and gang-related activity provided additional justification for the maximum penalty. She then highlighted Thao's criminal history and gang activity, including, as relevant to this appeal, a 2003 gang-related incident. The prosecutor stated that in May of that year, Thao and other members of his gang sought revenge against rival gang members based on their belief that one of the rival members was responsible for one of their own members going to jail. The prosecutor

stated that Thao drove members of his gang to a house where they obtained a sawed-off shotgun. After locating rival gang members outside an elementary school, Thao “pulled up on the group ... got out to confront them, and one of the people in his car pulled a knife on one of the [rival gang] members and put it to his neck.” The prosecutor continued:

According to one of the people in [Thao]’s car, [Thao] pulled the sawed-off shotgun from the car and pointed it to everybody and was saying to them, “who wanted to die?” [Thao] was holding the gun about four to five feet away. This continued until the man with the knife to his neck said he was sorry.

In his postconviction motion, Thao argued the prosecutor “cherry picked” Toua Vue’s statement to police that it was Thao who held the sawed-off shotgun. Thao claimed this information was inaccurate, as three other individuals involved in the 2003 incident told police it was Vue, not Thao, who held the sawed-off shotgun.

At the *Machner* hearing, Thao’s postconviction counsel acknowledged that he was aware there were different accounts of who had the shotgun during the 2003 incident. Counsel explained that he did not pursue a claim that trial counsel was ineffective by failing to seek resentencing based on inaccurate information because he had to be able to show that the information was, in fact, incorrect. Counsel added that after reviewing discovery materials, he believed “that the witness that the State had used at sentencing was hardly less credible than the other witnesses that had a different version of who possessed the gun.” Moreover, in counsel’s estimation, the particular discussion about the 2003 incident was “a small portion of the State’s argument considering the charges that the defendant ... had been convicted of,” and even if other witnesses would have testified that Thao did not possess the gun, he was still “there at the scene,” and he was not “there to make friends.” Rather, “he was there to cause harm,” which was consistent with the State’s discussion of Thao’s character.

In denying Thao’s postconviction motion, the circuit court found there was “no clear version of events to say that one version ... is more accurate than the other.” Proving that information is inaccurate is a threshold question. A defendant ‘cannot show actual reliance on inaccurate information if the information is accurate. See *State v. Travis*, 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491. Because Thao fails to show that the challenged information was inaccurate, as opposed to one of several differing versions, he cannot establish that the court relied on inaccurate information at sentencing. Having determined that Thao’s challenge to his sentencing is meritless, it follows that neither his trial nor his postconviction counsel could be ineffective for failing to raise a meritless claim. See *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

Upon the foregoing,

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

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*