



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 IV

January 12, 2023

To:

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Circuit Court Judge
Electronic Notice

Jacki Gackstatter
Clerk of Circuit Court
Rock County Courthouse
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Robert N. Meyeroff
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1107 State of Wisconsin v. Milton Eugene Warren (L.C. # 2014CF2123)

Before Blanchard, P.J., Kloppenburg, and Graham, 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).

Milton Warren appeals an order denying a petition that the circuit court construed as a postconviction motion under WIS. STAT. § 974.06 (2019-20).¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

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

After a jury trial, Warren was convicted of possession of heroin with intent to deliver, and other offenses. His postconviction motion claimed that his appellate counsel was ineffective by failing to argue that his trial counsel was ineffective in two ways: (1) by not obtaining surveillance video from a bus stop; and (2) by failing to preserve Warren's vehicle for fingerprint and DNA testing. The circuit court held an evidentiary hearing and denied the motion.

To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. *Strickland*, 466 U.S. at 697. 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.* We affirm the circuit court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

Warren's opening brief argues that his trial counsel's performance was deficient by not obtaining the video and preserving the vehicle, but it entirely fails to argue how Warren was prejudiced by these omissions. Warren continues this failure in his reply brief. Therefore, Warren has failed to show that the circuit court erred in denying his motion.

However, we briefly address his claims on the merits. As to the bus stop video, Warren asserts as fact in his brief, but without citation to the record, that the video "demonstrated" that Warren did not stop there or pick up anyone. This is contrary to the circuit court's finding that there

was no evidence before the court that a video actually existed, or as to what it showed. Warren does not argue that this finding was clearly erroneous, or cite to any record evidence that contradicts it, and therefore we accept the finding. This finding compels the conclusion that Warren failed to establish prejudice, because without proof of what the alleged video showed, he cannot show a reasonable probability of a different result in his case.

Regarding Warren's claim that counsel failed to preserve his vehicle, thus giving up the possibility of collecting DNA or fingerprint evidence that might have suggested that the alleged courier had not been in the vehicle, we conclude that counsel's performance was not deficient. The test for deficient performance is an objective one that asks whether trial counsel's performance was objectively reasonable under prevailing professional norms. *State v. Kimbrough*, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. Therefore, a claim of deficient performance fails if counsel's action was one that an attorney could reasonably have taken, in light of the information available to trial counsel at the time. Here, counsel could reasonably have chosen not to seek fingerprint or DNA evidence from the van because such evidence could have turned out to be inculpatory, rather than exculpatory, if it showed the presence of the courier. And, even without testing, the defense would have been able to argue that the State failed to introduce fingerprint or DNA evidence showing that the courier was present.

Warren has failed to show that his trial counsel was ineffective, and therefore his appellate counsel was not ineffective by not raising these issues, and Warren's postconviction motion was properly denied.

IT IS ORDERED that the order appealed from is summarily affirmed under 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