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**DISTRICT III**

July 6, 2023

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

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2022AP699-CR

State of Wisconsin v. Thomas Allen Nelson  
(L. C. No. 2020CF191)

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

Thomas Nelson appeals from a judgment convicting him of fourth-offense operating a motor vehicle while intoxicated (OWI) and from an order denying his postconviction motion to withdraw his guilty plea. The sole issue on appeal is whether Nelson's trial counsel provided ineffective assistance by failing to advise Nelson that his OWI conviction would result in a mandatory permanent administrative revocation of his driver's license.<sup>1</sup> After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary

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<sup>1</sup> We note that Nelson has not advanced an alternate theory that his plea was not knowingly entered. We therefore do not address what, if any, application *State v. Brown*, 2004 WI App 179, ¶¶8-14, 276 Wis. 2d 559, 687 N.W.2d 543, would have to the circumstances in this case.

disposition. *See* WIS. STAT. RULE 809.21 (2021-22).<sup>2</sup> We affirm on the ground that the license revocation was a collateral consequence of Nelson’s OWI conviction about which trial counsel had no obligation to inform Nelson under existing precedent.

To establish a claim of ineffective assistance, a defendant must prove two elements: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. *State v. Sholar*, 2018 WI 53, ¶32, 381 Wis. 2d 560, 912 N.W.2d 89. We will not set aside the circuit court’s factual findings about what actions counsel took or the reasons for them unless they are clearly erroneous. *See State v. Balliette*, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334. However, whether counsel’s conduct violated the constitutional standard for effective assistance is ultimately a legal determination that this court decides de novo. *Id.* We need not address both elements of the test if the defendant fails to make a sufficient showing on one of them. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

Here, neither party challenges the circuit court’s finding that Nelson’s trial counsel failed to advise Nelson that, upon his conviction for a fourth-OWI offense, he would be subject to a mandatory permanent administrative revocation of his driver’s license by the Department of Transportation pursuant to WIS. STAT. § 343.31(1m)(b).<sup>3</sup> We conclude, however, that counsel’s failure did not constitute constitutionally deficient performance.

In order to demonstrate deficient performance, a defendant must overcome a presumption that counsel’s actions fell within a wide range of professional conduct. *Strickland v.*

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

<sup>3</sup> Although the statute refers to the revocation as “permanent,” it also provides conditions under which an offender may apply for reinstatement after ten years. WIS. STAT. § 343.31(1m)(b).

*Washington*, 466 U.S. 668, 689 (1984). “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citation omitted).

The prevailing norm applicable to this case is that trial counsel is required to inform a defendant about only the direct consequences of a plea, not collateral consequences. *State v. LeMere*, 2016 WI 41, ¶30, 368 Wis. 2d 624, 879 N.W.2d 580. The direct consequences of a plea “are those that have a ‘definite, immediate, and largely automatic effect on the range of a defendant’s punishment.’” *Id.*, ¶31 (citation omitted). In contrast, collateral consequences are indirect and, rather than flowing from the conviction, “‘may be contingent on a future proceeding in which a defendant’s subsequent behavior affects the determination’ or may ‘rest[] not with the sentencing court, but instead with a different tribunal or government agency.’” *Id.* (alteration in original; citation omitted).

Nelson contends that the mandatory permanent administrative license revocation provision of WIS. STAT. § 343.31(1m)(b) warrants an exception to the collateral-consequences rule akin to that recognized in *Padilla v. Kentucky*, 559 U.S. 356 (2010), regarding the collateral consequence of deportation. Nelson urges this court to apply the six factors discussed in *LeMere* as being central to the *Padilla* decision: (1) the uniqueness of the consequence at issue; (2) the severity of the consequence; (3) whether the consequence is penal or civil in nature; (4) whether the consequence is automatic; (5) whether the consequence is enmeshed in the criminal process; and (6) whether the consequence applies to an especially vulnerable class of persons. *LeMere*, 368 Wis. 2d 624, ¶¶49-68.

This court is not free to consider whether to make an exception to the collateral-consequences rule for mandatory permanent administrative license revocation, however, because we have previously determined that a defendant need not be informed prior to entering a plea that an OWI conviction, in combination with prior OWI convictions, would carry the collateral consequence of a five-year mandatory administrative license revocation. *State v. Madison*, 120 Wis. 2d 150, 159-61, 353 N.W.2d 835 (Ct. App. 1984). The mere difference in the length of the revocation at issue here provides no reasoned basis for distinguishing the holding in *Madison*. We are bound by the prior precedent of our own court. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

Moreover, even if this court were to extend the *Padilla* exception to a mandatory permanent administrative license revocation, doing so would announce a new rule. In order to constitute deficient performance, “the law must be settled in the area in which trial counsel was allegedly defective.” *State v. Hanson*, 2019 WI 63, ¶28, 387 Wis. 2d 233, 928 N.W.2d 607. In sum, trial counsel was entitled to rely upon the holding in *Madison* and therefore did not perform deficiently by failing to advise Nelson that he would face a mandatory permanent revocation of his driver’s license upon entering a plea to a fourth-offense OWI charge.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*