

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 22, 2009**

David R. Schanker  
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. 2008AP2239-CR**

**Cir. Ct. No. 2002CF6557**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DANIEL P. EMOND,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
CARL ASHLEY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Daniel P. Emond appeals from an order denying his motion for a new reconfinement hearing. The issue is whether reconfinement counsel was ineffective for failing to review the transcript of the original sentencing hearing prior to the reconfinement hearing. We conclude that Emond's

personal waiver of his counsel's reading that transcript was valid, and negates any arguable ineffective assistance claim. Therefore, we affirm.

¶2 Emond was convicted of burglary and bail jumping in 2003. The trial court imposed two eight-year concurrent sentences, comprised of two equal four-year periods of initial confinement and extended supervision. Emond was released to extended supervision, but his supervision was later revoked. Emond was returned to court for a reconfinement hearing.

¶3 The court ordered a two-year period of reconfinement. Emond moved for a new reconfinement hearing, claiming his counsel was ineffective for failing to read the transcript of his original sentencing proceeding that the court indicated it had read prior to the reconfinement hearing. The reconfinement court denied the motion because: (1) Emond personally and validly waived the right to permit counsel to do so, claiming that "he [personally] was already familiar with the[] contents [of the original sentencing transcript] and wanted to go forward"; and (2) reconfinement counsel's performance was not deficient or prejudicial. Emond appeals.

¶4 At the reconfinement hearing, the court listed the materials it had reviewed in preparation for the hearing, including the original sentencing transcript, and asked reconfinement counsel if she had reviewed those materials.

COUNSEL: *I have not, and I did discuss that with Mr. Emond; and I indicated to him that given the situation here that I believe that the Court of Appeals has made it clear the Court is required to review them. I indicated I would not have an opportunity to review them or make them available to him as long as the court had reviewed them; and we were able to waive our right to review those documents, [which] would be sufficient if he wanted to proceed today, which he did.*

THE COURT: I do want to tell you both, [reconfinement counsel] and Mr. Emond, that I have reviewed that transcript; and *I will tell you that the content of that transcript provided the Court with some additional insight about you and my decision to be made today.*

*So knowing that, if you want to either pass it or, if necessary, get a new date in order for you to know what I'm looking at and review that transcript, I'll allow you to do that; but what I want to do now is allow you to talk to [reconfinement counsel] without me being involved to figure out what you want to do.*

*(Whereupon discussion was had off the record between the defendant and counsel.)*

THE COURT: We're back on the record. [Reconfinement counsel]?

COUNSEL: We've had a brief discussion; and I indicated to Mr. Emond, obviously, the Court had to have some reason to give him the sentence it did initially, which is four in and four out, which is a substantial sentence.

*And I said so what do you want to do, Mr. Emond; do you want me to adjourn it so we can review this further? He said, no, I do not; I don't want to burden the Court further. I want to get this matter resolved.*

THE COURT: Do you want to pass it to get --

THE DEFENDANT: *No, Judge, I'll trust your judgment. I know I made a mistake. I just want to get this taken care of and pay my debt and move on. I don't want to burden the Court.*

THE COURT: *I want you to be very clear on this. You would not be burdening the Court in any way as relates to me making a better decision and allowing you to know what the Court considered; so knowing that, I'll still proceed without you reviewing it; but it shouldn't be premised on burdening the Court.*

THE DEFENDANT: *I read those reports when I was sentenced in 2003, so I pretty much know what the contents are of them; so I would just rather just go ahead with it if it's okay with you.*

THE COURT: It's fine with me, Mr. Emond. That's absolutely fine. You want to weigh in on this in any way, [asking the prosecutor]?

THE PROSECUTOR: No thank you, Judge.

THE COURT: Okay. All right. *So the Court has reviewed the transcript as well as the presentence investigation and the memo.*

*All parties have been given an opportunity to look at all that information. And with that, [are] there any other comments before we actually deal with the issue of sentencing and the reconfinement hearing, [counsel]?*

(Emphasis added.)

¶5 The reconfinement court notified Emond and his counsel that it had read the original sentencing transcript that provided it with “additional insight about [Emond],” and allowed Emond’s counsel the opportunity to review that transcript. Emond discussed this opportunity with his counsel and personally declined. He declined for four reasons: (1) he did not want to burden the court by taking the additional time; (2) he “trust[ed]” the court’s judgment in imposing a reconfinement period; (3) he “just want[ed] to get this taken care of ... and move on”; and (4) he had “read those reports when [he] was sentenced in 2003, so [he] pretty much kn[e]w what the contents are of them; so [he] would just rather just go ahead.”

¶6 The reconfinement court explicitly explained that it was no burden to allow counsel additional time to read the transcript. The court also explained that it was unnecessary to “trust” the court, telling Emond that reviewing the transcript may be beneficial, and certainly not detrimental, to his cause. The court also offered the options of “either pass[ing the case] or, if necessary, get[ting] a new date in order for you to know what I’m looking at and review that transcript,

I'll allow you to do that.” We consequently reject Emond’s contention that he did not understand that “passing” the case did not necessarily require rescheduling. The court offered Emond the option of passing the case, which it did to allow counsel to discuss this precise matter with Emond, or adjourning it, “get[ting] a new date.” Emond also told the court that it was unnecessary for him or counsel to read the original sentencing transcript because he had “read” it and knew its contents.

¶7 Emond personally waived his right for his counsel to read the sentencing transcript; his waiver was knowing, voluntary and intelligent. The court and Emond’s counsel explained the benefit of counsel reading the transcript before the reconfinement period was imposed to demonstrate the knowledge aspect of his waiver decision. The court offered Emond the options of passing or adjourning the case to demonstrate the voluntariness of his waiver decision. Emond’s admission that he had “read” the transcript and knew its contents demonstrates the intelligence of his waiver decision.

¶8 Emond was given ample opportunity to allow his counsel to read the transcript. He insisted on waiving that right. His claim of ineffective assistance of counsel for failing to do what he expressly insisted she not do, necessarily fails. *See State v. Divanovic*, 200 Wis. 2d 210, 224-25, 546 N.W.2d 501 (Ct. App. 1996). Under these circumstances, particularly with the fullness and clarity of the record on this point, Emond cannot maintain an ineffective assistance claim against counsel when Emond himself insisted on waiving the right for his counsel

to read the original sentencing transcript in preparation for the defense presentation at his reconfinement hearing.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

