

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 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 Nos. 2008AP2420-CR
2008AP2421-CR
2008AP2422-CR**

**Cir. Ct. Nos. 2005CM42
2006CF15
2006CF36**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM N. GERHARTZ,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Calumet County: ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. William Gerhartz appeals from judgments of conviction entered against him and the order denying his motion for postconviction relief. Gerhartz argues that he received ineffective assistance of

trial counsel because his counsel did not move to suppress the results of a blood test, did not adequately investigate the facts of an accident scene, and did not hire an accident reconstructionist. Because we conclude that Gerhartz did not receive ineffective assistance of trial counsel, we affirm.

¶2 Gerhartz pled guilty to two counts of disorderly conduct in case No. 2008AP2420-CR. He also entered into a diversion agreement under which the charges would be dismissed if he met certain conditions. The agreement was revoked when Gerhartz was charged in case No. 2008AP2421-CR. Gerhartz was charged in that case with, among other things, injury by intoxicated use of a motor vehicle after the truck he was driving collided with a car driven by Brandon Bratz. Gerhartz's blood alcohol concentration was .243 at the time, and Bratz and a passenger in his car were both injured in the crash. In case No. 2008AP2422-CR, Gerhartz was charged with operating while intoxicated as a fifth or subsequent offense and felony bail jumping. Gerhartz eventually entered into a plea agreement whereby he pled no contest to one count each of injury by intoxicated use of a motor vehicle and operating while intoxicated as a fifth or subsequent offense and two counts of disorderly conduct. The remaining charges were dismissed. The court sentenced Gerhartz to a total of twelve years of initial confinement and six years of extended supervision in all three cases.

¶3 Postconviction counsel was appointed to represent Gerhartz and filed a no-merit appeal. We granted Gerhartz's motion to dismiss the no-merit appeal and allowed Gerhartz to represent himself. Gerhartz then filed a motion for postconviction relief in the circuit court alleging that he received ineffective assistance of trial counsel. Gerhartz asserted that his trial counsel was ineffective because he failed to investigate the scene of the collision that led to charge of

injury by intoxicated use of a motor vehicle and did not hire an accident reconstructionist. Gerhartz argued that such an investigation would have shown that Bratz, and not he, was responsible for the collision. The circuit court held a hearing and denied the motion.

¶4 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Id.* at 697. We review the denial of an ineffective assistance claim as a mixed question of fact and law. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the circuit court's factual findings unless they are clearly erroneous. *Id.* However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *Id.* at 128.

¶5 There is a strong presumption that counsel rendered adequate assistance. *Strickland*, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation

omitted). Counsel is not ineffective for failing to make meritless arguments. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶6 Gerhartz first argues that his trial counsel was ineffective because he did not move to suppress the results of a blood test that was taken from Gerhartz after the accident. Gerhartz was unconscious at the time of the blood draw. The State argues that Gerhartz did not raise this argument in his motion in the circuit court, and that we, therefore, need not address it. While the State is correct, we nonetheless address the issue on the merits.

¶7 We conclude that trial counsel was not ineffective for failing to move to suppress the results of the blood test. Under Wisconsin's Implied Consent Law, a person who drives a motor vehicle on a public highway in Wisconsin is deemed to have consented to a blood draw at the request of a law enforcement officer. *See* WIS. STAT. § 343.305(2) (2007-08).¹ The officer may obtain a blood sample, even if the person is unconscious, if the officer has probable cause to believe that the person has violated WIS. STAT. § 346.63(1), (2m) or (5), or WIS. STAT. § 940.25. *See* WIS. STAT. § 343.305(3)(b). In this case, a paramedic who was treating Gerhartz at the scene of the collision told the officer that he believed Gerhartz had been drinking alcohol, and another first responder was a bartender who said she had served Gerhartz alcohol that evening. Because the officer had probable cause to believe Gerhartz had been driving after consuming alcohol, a motion to suppress the results of the blood test would have

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

been denied. Trial counsel, therefore, was not ineffective for failing to make such a motion.

¶8 Gerhartz next argues that his trial counsel was ineffective because he did not adequately investigate the facts of the scene of the accident or hire an accident reconstructionist. Gerhartz asserts that it was Bratz who was driving recklessly given the weather conditions at the time of the accident, and that Gerhartz's intoxication was not the cause of Bratz's injuries. Gerhartz further asserts that his trial counsel would have been able to prove this if counsel had properly investigated the scene of the accident and had hired an accident reconstructionist.

¶9 This issue was addressed by the circuit court. The circuit court found that counsel did not hire a reconstructionist because Gerhartz decided it was too expensive. The circuit court also found that counsel made a reasoned decision about how to approach the case, and that the best tactical decision counsel could have made was to recommend that Gerhartz agree to a plea by which some of the charges against him were dismissed. The court further found that there was a significant amount of evidence of Gerhartz's guilt, and that even if counsel's performance had somehow been deficient, Gerhartz had not shown how he was prejudiced by it. The court stated that Gerhartz got the best deal he could have gotten, and that if he had gone to trial, it might have been worse.

¶10 We agree with the circuit court's determination that Gerhartz has not established that his trial counsel's performance was less than it should have been. Counsel negotiated a reasonable deal for Gerhartz given the significant evidence of his guilt and the number of charges pending against him. Gerhartz also has not established that even assuming counsel's performance was somehow deficient, he

was prejudiced in anyway. There was, as we have said, strong evidence of guilt, and Gerhartz faced trial on the felony charge of operating while intoxicated as a fifth or subsequent offense. Counsel, instead, negotiated a plea agreement that reduced Gerhartz's potential exposure on all charges. Counsel's decisions were reasonable under all of the circumstances of this case. For the reasons stated, we affirm the judgments of conviction and the order denying postconviction relief.

By the Court.—Judgments and order affirmed.

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

