COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1837 **Cir. Ct. No. 2008CF2357**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL PERRY OSWALD,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Daniel Perry Oswald, *pro se*, appeals an order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06, alleging ineffective assistance of counsel. Oswald contends his lawyer should have argued during postconviction proceedings and on direct appeal from his

conviction of two counts of homicide by negligent operation of a motor vehicle that the circuit court misused its discretion at sentencing because: (1) the circuit court punished him for exercising his right to a jury trial; (2) the circuit court said that Oswald knew the witnesses who supported his alibi were testifying inaccurately; and (3) the circuit court imposed an unduly harsh sentence. We affirm.

¶2 To prove a claim of ineffective assistance of counsel, a defendant must show both that his lawyer's performance was deficient and that the deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of this test if the defendant makes an insufficient showing on either one. *See* ***id.*** at 697. A lawyer does not perform deficiently by failing to raise an issue requested by a defendant, even if the issue is not frivolous. ***Jones v. Barnes***, 463 U.S. 745, 754 (1983). "'[A]ppellate counsel … need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." ***Smith v. Robbins***, 528 U.S. 259, 288 (2000). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" ***Id.*** (citation omitted).

¶3 Ellen Henak, Esq., explained to Oswald why she did not raise the sentencing issues in a letter she sent him.

> I did not find any other issues of merit for appeal….
>
> We also discussed sentencing. The law requires a judge to consider three factors: the seriousness of the offense, your character, and the protection of the public. We read the judge's remarks at sentencing over together and he considered all of these factors. The weight to give them is up to him. The law also requires the judge to rely on accurate factual information. Based upon the information I have, the judge relied on accurate factual

> information. It is up to the judge to make any inferences or draw any conclusions that are fairly drawn from the information.
>
> You were concerned that the judge's remarks suggested that he was penalizing you for going to trial. I explained that the law in this area turns on whether he was penalizing you for going to trial or just not crediting you for taking responsibility (which he is allowed to do.) After reading over the judge's remarks, he basically was talking about his view that you largely failed to take responsibility and I believe his remarks are legally permissible.
>
> We also discussed whether your sentence was **legally** harsh and excessive, although I may not have used that exact phrase. Basically, a sentence is legally harsh and excessive if it would shock the conscience of the community. Although you were not drinking on the day of the accident, the public is aware that many people who do not stop at an accident fail to do so because they have been drinking. Given that fact, the public is likely to assume that you were drinking and not to be shocked by your sentence.

¶4 We agree with the State that "[t]his letter demonstrates that … Henak conscientiously reviewed the sentencing issues and determined that the issues either lacked merit or were unlikely to succeed." Henak did exactly what a lawyer is supposed to do; she exercised her professional judgment to determine which issues to raise in order to maximize the likelihood that Oswald would succeed on appeal. *See* ***Robbins***, 528 U.S. at 288. Rather than raising the sentencing issues, Henak argued that the circuit court misused its discretion in allowing Oswald's parole agent to testify at trial and in assessing a DNA surcharge without a sufficient reason, and was successful with the later motion. Oswald has failed to show that Henak's performance was deficient. Therefore, we reject his argument that his lawyer provided ineffective assistance.

By the Court.—Order affirmed.

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