

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 2010

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. 2008AP2291

Cir. Ct. No. 1997CF352

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN D. MASCARETTI,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County:
SCOTT C. WOLDT, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. John D. Mascaretti has appealed from orders denying his motion and amended motion for postconviction relief under WIS. STAT. § 974.06 (2007-08).¹ We affirm the orders.

¶2 In 1998, Mascaretti was convicted after a jury trial of armed robbery and false imprisonment, both offenses as a party to the crime and repeat offender.² He was sentenced to forty years in prison for the armed robbery, with a consecutive stayed sentence and term of probation for the false imprisonment.

¶3 In March 1999, Mascaretti filed a postconviction motion under WIS. STAT. RULE 809.30(2)(h), followed by a direct appeal. This court affirmed Mascaretti's judgment of conviction and the trial court's order denying postconviction relief in *State v. Mascaretti*, No. 1999AP1493-CR, unpublished slip op. (WI App. May 3, 2000).

¶4 In July 2008, Mascaretti filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06, seeking a new trial or, alternatively, a new sentencing hearing. On August 5, 2008, the trial court denied the motion on the ground that the issues being raised by Mascaretti were not raised by him in his previous postconviction motion and appeal. The trial court concluded that the issues were therefore barred under *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994), which holds that an issue finally adjudicated, waived, or not raised in a prior postconviction motion may not serve as the basis

¹ All references to the Wisconsin statutes are to the 2007-08 version.

² The jury also found Mascaretti guilty of being a felon in possession of a firearm. That conviction was later set aside and a new trial was ordered on that count. Mascaretti subsequently entered a plea of no contest to being a felon in possession of a firearm.

for a subsequent § 974.06 motion, unless a sufficient reason exists for the defendant's failure to have raised the issue previously.

¶5 In response, Mascaretti filed an amended motion for postconviction relief under WIS. STAT. § 974.06, alleging that his failure to raise the current issues in his 1999 postconviction motion and direct appeal resulted from ineffective assistance by his original postconviction counsel. Relying on *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996), Mascaretti contended that a sufficient reason therefore existed for not having raised the issues earlier.

¶6 The trial court again denied relief, stating that Mascaretti had not made an adequate showing as to why the issues were not raised in his previous postconviction motion and appeal. This appeal followed.

¶7 On appeal, Mascaretti contends that the trial court erroneously exercised its discretion by denying his amended motion without providing a clear explanation of the reasons for the denial. Mascaretti contends that the trial court failed to address the real controversy when it failed to clearly analyze and address whether *Escalona-Naranjo* barred his motion, or whether sufficient grounds

existed to raise the new issues. Mascaretti asks this court to vacate the trial court's orders and remand the matter for further proceedings on his amended motion.³

¶8 We deny Mascaretti's requested relief and affirm the trial court's orders. A defendant is not entitled to an evidentiary hearing merely because he alleges ineffective assistance of counsel. See *State v. Curtis*, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). A trial court may deny a postconviction motion without a hearing "if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief." *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433 (footnote omitted). A postconviction motion alleging ineffective assistance of counsel must allege sufficient material facts to permit a reviewing court to meaningfully assess the defendant's claim. *Id.*, ¶¶21-22. In other words, such a motion must allege "who, what, where, when, why, and how." *Id.*, ¶23. The determination of whether a motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief presents a question of law which we review de novo. *Id.*, ¶9.

³ In challenging the trial court's analysis, Mascaretti points out that in his amended motion, he alleged that the issues being raised by him in his WIS. STAT. § 974.06 motion were so "overt and apparent on the record" that they should not have escaped notice by reasonable postconviction counsel. The trial court relied on this argument in denying the amended motion, stating that if the issues being raised for the first time were so obvious, there was no justification for not having previously raised them. Although we are affirming the trial court's orders, we agree with Mascaretti that this reasoning does not provide an adequate basis for denial of the motion. It ignores the fact that, in some circumstances, postconviction counsel's failure to recognize and raise issues in the original postconviction proceedings constitutes a sufficient justification for the defendant to raise those issues in a subsequent postconviction motion. See *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996).

¶9 Based upon these standards, we affirm the trial court's orders denying Mascaretti's motion and amended motion without a hearing. In his WIS. STAT. § 974.06 motion, Mascaretti contended that he was entitled to a new trial or new sentencing because his trial counsel rendered ineffective assistance when he: (1) elicited testimony from Mascaretti at trial indicating that Mascaretti was imprisoned for a parole violation; (2) failed to ensure that Mascaretti's leg irons were concealed during trial; (3) failed to provide Mascaretti with an opportunity to review the presentence report (PSI) and correct errors in the report; and (4) failed to adequately prepare for the sentencing hearing, depriving Mascaretti of his right to present witnesses at the hearing. In his amended § 974.06 motion, Mascaretti contended that his original postconviction counsel rendered ineffective assistance by failing to raise these issues in the 1999 postconviction motion.

¶10 Further proceedings were warranted on Mascaretti's claims only if his motion and amended motion passed muster under *Allen*, 274 Wis. 2d 568, ¶12. We therefore address Mascaretti's claims within the context of deciding whether his motion and amended motion set forth sufficient facts to warrant further proceedings on the question of whether his original postconviction counsel rendered ineffective assistance by failing to raise the issues he now enumerates. In essence, Mascaretti was required to set forth facts which, if true, demonstrated that his original postconviction counsel rendered ineffective assistance by failing to argue in the 1999 postconviction motion that trial counsel was ineffective for failing to raise the issues now enumerated by Mascaretti. We conclude that the allegations in Mascaretti's motion and amended motion were insufficient to

warrant further proceedings under *Allen*, 274 Wis. 2d 568, ¶12. We therefore affirm the trial court's orders denying relief.⁴

¶11 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. To prove 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Thiel*, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting *Strickland*, 466 U.S. at 694). The focus of this inquiry is the reliability of the proceedings. *Thiel*, 264 Wis. 2d 571, ¶20.

¶12 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. *State v. McDowell*, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. When findings of fact are made by a trial court, we will not disturb those findings unless they are clearly erroneous. *Id.* However, the ultimate determination of whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel presents a question

⁴ We recognize that this court is not relying on the same grounds as were relied upon by the trial court when it denied relief to Mascaretti. However, an appellate court may uphold a trial court's decision based on a theory or reasoning not presented in the trial court. *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985). In addition, a respondent may raise issues which provide an alternative basis for upholding the trial court's order. *Id.* at 124-25. The State argues in its respondent's brief that this court should affirm the trial court on the ground that the allegations in the motions, even if true, provide no basis for relief, and because the record conclusively demonstrates that Mascaretti is not entitled to relief. We agree with the State's reasoning.

of law. *Thiel*, 264 Wis.2d 571, ¶21. This court reviews de novo the legal questions of whether deficient performance has been established and whether the deficient performance led to prejudice rising to a level undermining the reliability of the proceedings. *Id.*, ¶24. Moreover, in analyzing an ineffective assistance claim, we may choose to address either the deficient performance prong or the prejudice prong first. *State v. Williams*, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11.

¶13 No basis exists to conclude that postconviction counsel rendered ineffective assistance by failing to allege that trial counsel rendered ineffective assistance when he elicited trial testimony from Mascaretti indicating that he was incarcerated in the prison at Waupun, and had been there for three months because his parole had been revoked. The record reveals that Mascaretti gave this testimony immediately after testifying that he had been convicted of a crime fourteen times. Because the jury was already informed that Mascaretti had been convicted fourteen times, his additional testimony indicating that he had been the subject of parole revocation and incarceration cannot be deemed to have surprised the jury and prejudiced him. Trial counsel's elicitation of this testimony, even if deficient, therefore did not undermine the reliability of the proceedings. Because the record conclusively demonstrates that Mascaretti is not entitled to relief on this issue, postconviction counsel cannot be deemed ineffective for having failed to raise it in the 1999 postconviction motion. See *State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App.1994) (holding that it is not ineffective assistance to fail to make a motion that would have failed).

¶14 Mascaretti's claim that postconviction counsel rendered ineffective assistance by failing to argue that trial counsel was ineffective in regard to the leg irons also fails. In support of this argument, Mascaretti submitted an affidavit

attesting that he wore leg irons throughout the trial, and that the defense table was open underneath with nothing obscuring the leg irons from the jury's view. Mascaretti further attested that before jury selection, he asked his trial counsel to request that his leg irons and handcuffs be removed. Mascaretti attested that after some discussion between counsel and the trial court, his trial counsel told him that the jurors would not care if he was in shackles and that it would look like he was trying to hide something if the table was draped. Mascaretti further attested that his trial counsel never advised him that being seen by the jury in shackles could prejudice him.

¶15 Even accepting the allegations in Mascaretti's affidavit as true, Mascaretti's motion and amended motion were properly denied without a hearing. The record establishes that trial counsel's discussions with Mascaretti were preceded by a discussion between trial counsel, the prosecutor, and the trial court as to whether Mascaretti should wear restraints at trial. During that discussion, trial counsel requested that Mascaretti's handcuffs be removed, but stated: "I think the leg irons are okay. You can't really see those as long as he's not facing the jury." The trial court then raised the possibility of screening the table, while the prosecutor expressed his opinion that Mascaretti presented a security concern, noting that he had several felony convictions and had pistol-whipped another person. After discussing various measures to obscure the leg irons and additional discussion between the trial court and counsel that was not recorded, trial counsel interjected that he had talked to Mascaretti and that, while they wanted the handcuffs removed, "[t]he leg ones are fine." The trial court then stated that the leg irons would remain, taking note of Mascaretti's lack of objection and stating that "it's not real noticeable from over here by the jury."

¶16 The allegations in Mascaretti's motions and affidavit, when considered with the record, are inadequate to support a conclusion that Mascaretti's original postconviction counsel was ineffective for failing to pursue this issue in the 1999 postconviction proceedings.⁵ The record establishes that trial counsel obtained removal of the handcuffs, that the leg irons were not "real noticeable" from the jury box, and that the jury was not present in the courtroom when Mascaretti was seated at the witness stand. The testimony also informed the jurors that Mascaretti had been convicted of crimes fourteen times. Under these circumstances, postconviction counsel could reasonably conclude that the jury would not have been surprised by the leg irons, and that failing to completely conceal them, assuming they were visible to the jurors, did not impact or prejudice Mascaretti's defense.⁶ Mascaretti's motion and amended motion therefore provided no basis for concluding that postconviction counsel rendered deficient performance and prejudiced Mascaretti by failing to raise this issue in the original postconviction proceedings.

¶17 Mascaretti's contention that postconviction counsel rendered ineffective assistance by failing to allege ineffective assistance of trial counsel

⁵ The prejudice analysis in the context of a claim of ineffective assistance of counsel is different than the situation when a defendant challenges the propriety of a restraint on direct appeal. *State v. Champlain*, 2008 WI App 5, ¶28 n.9, 307 Wis. 2d 232, 744 N.W.2d 889, review denied, 2008 WI 40, 308 Wis. 2d 611, 749 N.W.2d 662. In a direct appeal, prejudice against the restrained person is presumed because the threshold inquiry is whether there was an extreme need for restraints. *Id.* However, when raised in the context of a claim of ineffective assistance of counsel, the query is whether confidence in the outcome is undermined. *See id.*

⁶ In reaching this conclusion, we also note that Mascaretti's allegations concerning prejudice from the leg irons are purely conclusory. In his motion and amended motion, he did not discuss the evidence presented at trial. Absent an explanation of how the alleged visibility of the leg irons impacted his trial in light of all of the evidence presented, Mascaretti's motions failed to provide a basis for concluding that postconviction counsel's failure to raise the issue undermines confidence in his conviction.

concerning the PSI is also belied by the record. In his motions, Mascaretti alleged that trial counsel provided him with no opportunity to review the PSI, and that the PSI contained material inaccuracies concerning his juvenile and criminal history. However, the record indicates that after trial counsel's motion to postpone sentencing to another day was denied, the trial court adjourned the sentencing hearing until the early afternoon to afford counsel time to review the PSI with Mascaretti. When the sentencing hearing reconvened after the adjournment, trial counsel commenced his sentencing argument with corrections and clarifications regarding Mascaretti's juvenile and criminal record, correcting errors in the PSI and providing additional information in support of his argument that Mascaretti's record was much less serious than it appeared.

¶18 Based on trial counsel's review of the PSI with Mascaretti and his correction of inaccuracies, Mascaretti's motion and amended motion provide no basis for concluding that material information before the sentencing court was inaccurate.⁷ No basis therefore exists to conclude that postconviction counsel

⁷ In his postconviction motion, Mascaretti asserted that the PSI erroneously indicated that he was convicted of more burglaries than was the case. He also asserted that the PSI incorrectly stated that he was convicted of felony robbery and residential burglary in a 1991 case, when in fact he was charged only with attempted armed robbery in that case.

At sentencing, trial counsel informed the court that the PSI incorrectly listed two burglary adjudications in 1986, rather than just one. In addition, trial counsel's sentencing argument made clear that Mascaretti was convicted only of attempted armed robbery in Lake County, Illinois, not felony robbery and residential burglary. In reference to this latter issue, we also note that while the amended complaint attached to the PSI incorrectly stated that Mascaretti had been convicted of robbery and residential burglary in the 1991 Lake County, Illinois case, the body of the PSI repeatedly and accurately related that the conviction was for attempted armed robbery.

rendered ineffective assistance by failing to argue that trial counsel's handling of the PSI was deficient or prejudicial.⁸

¶19 Mascaretti's contention that postconviction counsel rendered ineffective assistance by failing to challenge trial counsel's presentation of witnesses at sentencing also fails. As noted above, a postconviction motion alleging ineffective assistance of counsel must allege material facts which permit the trial court to meaningfully assess the defendant's claim. *Allen*, 274 Wis. 2d 568, ¶23. In particular, when a defendant contends that trial counsel was deficient for not presenting a witness, the defendant's postconviction motion must allege sufficient material facts that identify the witness, the reason for the witness' importance, and the material facts that can be proven relating to the witness. *See id.*, ¶¶23-24.

¶20 In his motion and amended motion, Mascaretti objected to his trial counsel's failure to arrange for his fiancé and aunt to speak on his behalf at sentencing. However, in his motions he did not explain what these witnesses would have said, or how it would have impacted his sentencing. His argument concerning these witnesses is therefore purely conclusory, and provides no basis for determining that postconviction counsel was ineffective for failing to raise an issue regarding them.⁹

⁸ While Mascaretti also alleged that the PSI incorrectly stated that he was waived to adult court at age seventeen rather than age sixteen, such an error, even if true, was not so significant as to warrant relief.

⁹ Mascaretti also makes reference to a fourth witness that should have been called at sentencing. As with his fiancé and aunt, Mascaretti fails to clarify what additional information would have been provided, and how and why it would have impacted his sentencing.

¶21 In his motion and amended motion, Mascaretti also argued that trial counsel's lack of preparation deprived him of his sister's in-person testimony at sentencing. However, the record establishes that Mascaretti's sister was able to testify on his behalf via telephone at the sentencing hearing. She testified concerning the abuse she and Mascaretti were subjected to while growing up and Mascaretti's response to that abuse.

¶22 Although Mascaretti filed an affidavit from his sister stating that she would have said more on his behalf if she had testified in person, he did not specify what additional information she would have provided, or explained how and why it would have had an impact on his sentence. Moreover, the sentencing transcript reveals that the prosecutor stipulated that Mascaretti was abused as a child. The trial court considered the evidence regarding abuse, but determined that it did not excuse Mascaretti's behavior or justify a lesser sentence. Instead, it concluded that Mascaretti's history demonstrated that he was a danger to the public. Based on its determination that the offenses were extremely serious, Mascaretti's history of criminal involvement, and his return to criminal conduct after multiple opportunities on supervision, probation, and parole, the trial court concluded that a lengthy sentence was necessary to protect the public and rehabilitate Mascaretti.

¶23 The trial court's discussion indicates that it considered proper sentencing factors. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Its sentencing discussion also clearly indicates that it did not believe a lesser sentence was warranted because Mascaretti suffered abuse as a child. Under these circumstances, no basis exists to conclude that postconviction counsel rendered ineffective assistance by failing to argue that trial counsel's

representation at sentencing was prejudicial to Mascaretti. *See State v. Voss*, 205 Wis. 2d 586, 597-98, 556 N.W.2d 433 (Ct. App. 1996).

¶24 As a final matter, we note that in his reply brief, Mascaretti chose not to respond to the State's argument that the trial court's orders should be upheld because the claims set forth in Mascaretti's motion and amended motion were conclusory or refuted by the record. By choosing not to respond to the State's argument, Mascaretti failed to address the State's argument that he waived his objection to the leg irons, and its argument that the record refuted his arguments regarding the PSI. When an appellant fails to dispute the respondent's assertions in his reply brief, this court will assume that the appellant implicitly accepts those assertions. *Capoun Revocable Trust v. Ansari*, 2000 WI App 83, ¶4 n.5, 234 Wis. 2d 335, 610 N.W.2d 129; *Charolais Breeding Ranches, Ltd. v. FPC Sec Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Although we have upheld the trial court's orders for the reasons discussed in the body of our decision, Mascaretti's failure to refute the State's arguments in his reply brief constitutes an additional ground for upholding the trial court's orders.

By the Court.—Orders affirmed.

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

