

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 29, 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. 2008AP2380-CR

Cir. Ct. No. 2007CF777

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYREE D. STARLIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Tyree Starlin appeals a judgment of conviction and an order denying his motion for postconviction relief. We affirm.

¶2 Starlin pled no contest to one count of felon in possession of a firearm. He filed a postconviction motion to withdraw the plea on grounds of coercion and ineffective assistance of counsel. The circuit court denied the motion.

¶3 Starlin argues that he was coerced into accepting the plea because his trial counsel refused to pursue a particular legal argument as to a potential federal sentence. According to Starlin, if his attorney had been willing to pursue that issue, Starlin would have rejected the State's plea agreement and would have allowed the federal government to charge him with the crime instead. Starlin argues that, as a result of his attorney's refusal, he was coerced because he was not given a fair or reasonable alternative to choose from. *See State v. Goyette*, 2006 WI App 178, ¶30, 296 Wis. 2d 359, 722 N.W.2d 731.

¶4 The circuit court concluded that Starlin was given a fair and reasonable choice because, instead of accepting the State's plea offer, he could have discharged his attorney and hired another attorney to pursue the federal sentencing issue, or he could have pursued the federal issue *pro se*. The court found "not credible" Starlin's testimony that he did not know he could seek representation by another attorney.

¶5 Starlin's opening brief on appeal offers only a cursory response to the possibility that he could have sought other counsel. He asserts that he had already paid trial counsel a retainer and had "put a lot of trust and faith" in trial counsel. Starlin does not challenge the circuit court's finding that he knew he could have hired other counsel. In his reply brief, Starlin does not address this issue, but continues to maintain that his only choices were to accept the State's plea deal or face federal prosecution with an attorney who was refusing to pursue

the sentencing issue. And, Starlin does not provide us with any case law to the effect that postconviction counsel's refusal to pursue an issue, by itself, is considered coercion. In short, Starlin has not given us any reason to conclude that the circuit court erred in holding that Starlin had a reasonable alternative to accepting the State's plea deal, namely, seeking other counsel.

¶6 Starlin also argues that his trial counsel was ineffective by refusing to pursue the federal sentencing issue. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. *Id.* at 697. We affirm the circuit court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the circuit court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶7 The test for deficient performance is an objective one that asks whether trial counsel's performance was objectively reasonable under prevailing professional norms. See *State v. Kimbrough*, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. Therefore, even if trial counsel lacked a strategic reason at the time, a claim of deficient performance fails if counsel's action was one that an attorney could reasonably have taken after considering the question, in light of the information available to trial counsel at the time.

¶8 Starlin argues that his trial counsel's performance was deficient because counsel refused to pursue the federal sentencing issue, which was later decided in favor of defendants, and did so without sufficient research into its merits. We conclude that counsel's performance was not deficient because

counsel is not required to argue “unclear” or “unsettled” points of law. *State v. Maloney*, 2005 WI 74, ¶¶24-30, 281 Wis. 2d 595, 698 N.W.2d 583. We will not attempt to set out the merits of the federal issue here, but it is discussed in *United States v. Chambers*, 473 F.3d 724 (7th Cir. 2007), *rev’d*, 129 S. Ct. 687 (2009). It is sufficient to say that, during the relevant time, the sentencing issue was unsettled. Indeed, even though there were reasonable arguments to be made, the established precedent in the Seventh Circuit was against Starlin’s position. Therefore, regardless of trial counsel’s view of the issue, counsel’s refusal to raise it was objectively reasonable.

By the Court.—Judgment and order affirmed.

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

