

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 1, 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. 2008AP2419

Cir. Ct. No. 2003CF41

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH D. FECHT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Grant County:
ROBERT P. VAN DE HEY, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Joseph Fecht appeals an order denying his motion for habeas corpus relief in the form of the reinstatement of his postconviction

rights under WIS. STAT. RULE 809.30 (2007-08)¹ and the reappointment of counsel. Fecht contends that he was denied his right to file a supplemental plea withdrawal motion and/or a direct appeal due to the abandonment of counsel. As we will explain below, we agree that Fecht was entitled to a writ of habeas corpus reinstating his postconviction rights on the grounds that he was denied a direct appeal, but we conclude that, regardless of that error, the circuit court properly determined that Fecht was not entitled to the reappointment of counsel. We further conclude that, between the evidentiary hearing already conducted by the circuit court and this court's review on the present appeal, Fecht has now obtained all the relief to which he was entitled.

BACKGROUND

¶2 The State charged Fecht with first-degree intentional homicide based on allegations that he had stabbed his wife to death during a domestic dispute. Fecht eventually agreed to withdraw a plea of not guilty by reason of mental disease or defect and to enter a guilty plea to a reduced charge of second-degree intentional homicide. The circuit court sentenced Fecht to thirty years of initial confinement followed by twenty years of extended supervision.

¶3 After counsel appointed by the State Public Defender informed Fecht that she saw no meritorious issues for appeal, Fecht discharged her and filed his own pro se postconviction motion seeking to withdraw his plea based on alleged ineffective assistance of trial counsel. The circuit court denied the plea withdrawal motion without a hearing, explaining that Fecht's allegations were

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

conclusory and insufficient to establish a claim of ineffective assistance of trial counsel.

¶4 Fecht then filed a pro se appeal. Prior to filing a brief, he retained Attorney Christopher Van Wagner, who moved to dismiss the appeal without prejudice and to extend the time to file a postconviction motion so that he could investigate potential appellate issues. Van Wagner subsequently came to the conclusion that there were no issues of arguable merit, and he let the extended deadline pass without taking further action on Fecht's behalf.

¶5 Fecht sought a writ of habeas corpus in this court, arguing that counsel had abandoned him. We directed Fecht to the circuit court on the theory that counsel's conduct after Fecht's postconviction deadline had been extended related to counsel's performance as postconviction counsel, rather than appellate counsel. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 679-81, 556 N.W.2d 136 (Ct. App. 1996). Fecht then filed a postconviction motion for habeas corpus relief in the circuit court, seeking the reinstatement of his postconviction rights under WIS. STAT. RULE 809.30 and the reappointment of counsel on the grounds of ineffective assistance of postconviction counsel.

¶6 At the hearing on Fecht's motion, Attorney Van Wagner, at Fecht's request, both testified and acted as counsel for Fecht. Van Wagner acknowledged that he had essentially abandoned Fecht once he had concluded there were no meritorious issues, and suggested that the court should proceed to determine whether Fecht had been prejudiced by counsel's abandonment. Fecht informed the court that, if his postconviction rights were reinstated, he would seek to withdraw his plea on three grounds: that counsel failed to adequately advise him about a possible defense based on intoxication delirium; that he was incompetent

and unable to understand the plea colloquy because he was under the influence of excessive prescription medications at that time; and that the trial court should have sua sponte called for a competency determination before accepting the plea.

¶7 The circuit court proceeded to take evidence relating to whether Fecht had any meritorious grounds for plea withdrawal. After listening to Fecht's testimony and reviewing a defense-ordered doctor's evaluation, the court found that Fecht's claim that he had been incompetent or too impaired by medication to understand the plea colloquy was not credible and appeared to be an attempt to fabricate facts to fit theories developed by jailhouse lawyers, because his assertions conflicted with the transcript and the court's own recollection of the plea proceeding, and were different from the claims he had raised in his prior pro se motion. The court also determined that Fecht's belief that an intoxication defense could be used to reduce first-degree intentional homicide to reckless homicide was simply legally incorrect. The court concluded that, even assuming Van Wagner had performed deficiently by allowing Fecht's postconviction deadline to lapse, there was no reasonable probability that a plea withdrawal motion would have been successful. The court denied Fecht any further relief, and he appeals.

STANDARD OF REVIEW

¶8 An order denying a petition for writ of habeas corpus presents a mixed question of fact and law. *State v. Pozo*, 2002 WI App 279, ¶6, 258 Wis. 2d 796, 654 N.W.2d 12. We will uphold the circuit court's factual determinations unless they are clearly erroneous, but will independently determine whether habeas relief is available under those facts. *Id.*

DISCUSSION

¶9 As noted above, a writ of habeas corpus is the appropriate mechanism to raise a claim of ineffective assistance of postconviction counsel. *Rothering*, 205 Wis. 2d at 679-81. To prevail on a claim of ineffective assistance of counsel, a defendant must ordinarily show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. It is well established, however, that when counsel's actions result in the complete denial of an appeal, prejudice is presumed. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 620, 516 N.W.2d 362 (1994). There does not need to be any additional showing that an appeal would have been meritorious. *Betts v. Litscher*, 241 F.3d 594, 597 (7th Cir. 2001) (citing *Penson v. Ohio*, 488 U.S. 75, 85-89 (1988)).

¶10 Here, the State concedes that postconviction counsel abandoned Fecht by failing to file a postconviction motion or an appeal after voluntarily dismissing the pro se appeal Fecht had filed. The State argues that this court should not presume prejudice, however, because Fecht was not "completely denied" an appeal since the matter is now before this court. We do not find that reasoning persuasive.

¶11 At the time Fecht filed his motion in the circuit court, his right to file a supplemental postconviction motion or a direct appeal under WIS. STAT. § 974.02 had expired without either having been filed. That is the commonly understood meaning of the complete denial of an appeal. Appellate review of Fecht's ineffective assistance claim would not be sufficient in and of itself to replace his lost right to file a plea withdrawal motion. We therefore conclude that the circuit court erred in refusing to grant habeas relief.

¶12 The question remains, however, precisely what relief should have been granted. Habeas relief may be tailored to achieve a fair and just remedy to the given factual circumstances, provided that the remedy does not itself violate the constitution. *See State v. Knight*, 168 Wis. 2d 509, 520-21, 484 N.W.2d 540 (1992).

¶13 Here, Fecht sought both the reappointment of counsel and the reinstatement of his postconviction rights. As the State points out, however, Fecht had already waived his right to counsel, including his right to have appointed counsel file a no-merit report, before he privately retained Van Wagner. Van Wagner's subsequent actions in no way affected the validity of Fecht's prior waiver of counsel. In other words, while we see no reason that Fecht could not retain counsel on his own if he was able to do so, he had no further constitutional right to appointed counsel. Since Van Wagner's actions could not logically have deprived Fecht of a right he had already waived, Fecht had no claim to the remedy of the reappointment of counsel when Van Wagner subsequently provided ineffective assistance in other respects.

¶14 Rather, because counsel's actions deprived Fecht of his right to file his own supplemental plea withdrawal motion and a subsequent direct appeal after this court had extended the time to do so, that is the right that any habeas remedy should have been tailored to restore. Here, however, the circuit court has already taken testimony with respect to the plea withdrawal issues Fecht said that he wanted to raise.² While the circuit court considered Fecht's testimony under an

² Fecht now claims that he was not properly informed that he might have an NGI defense, but he specifically told the circuit court that he was not making such a claim when the court inquired.

erroneous legal framework, the court's factual findings remain valid. Given the circuit court's determinations that Fecht was not incompetent or unable to understand the proceedings at his plea withdrawal hearing, and that trial counsel did not misinform Fecht about the availability of an intoxication defense, Fecht could not prevail on a plea withdrawal motion. In other words, if the circuit court had reinstated Fecht's right to file a plea withdrawal motion as it should have done, the court still would have denied the plea withdrawal motion based on its factual findings. We have now reviewed those factual findings and conclude that they are not clearly erroneous. We therefore affirm the circuit court's order concluding that Fecht was entitled to no further relief.

By the Court.—Order affirmed.

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

