COURT OF APPEALS DECISION DATED AND FILED

March 3, 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. 2008AP2542-CR | **Cir. Ct. No. 2005CF6674**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY EDWARD OLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and JOHN A. FRANKE, Judges. *Affirmed*.

¶1 KESSLER, J.[1] Jeffrey Edward Olson, *pro se*, appeals from a judgment of conviction for two counts of fourth-degree sexual assault, contrary to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

WIS. STAT. § 940.225(3m) (2005-06), and from an order denying his motion for postconviction relief.[2] Olson, who entered ***Alford***[3] pleas to the crimes, argues that he was denied the effective assistance of counsel and that the State illegally suppressed evidence that was favorable to the defense. We affirm the judgment and order.

BACKGROUND

¶2 On November 28, 2005, Olson was charged with one count of repeated sexual assault of a child under the age of sixteen, contrary to WIS. STAT. § 948.025(1)(b) (2005-06), a class C felony. Counsel was appointed for Olson. After the alleged victim, a family member, testified at the preliminary hearing, the charge was amended to third-degree sexual assault, contrary to WIS. STAT. § 940.225(3) (2005-06), and Olson was bound over for trial. Ultimately, the parties reached a plea agreement, whereby the State amended the charge to two counts of fourth-degree sexual assault and recommended probation, without jail time as a condition of probation. In exchange, Olson entered ***Alford*** pleas to the two misdemeanors.

¶3 On August 23, 2006, the trial court accepted Olson's pleas and found him guilty. On count one, Olson was sentenced to nine months in jail. On count two, the court imposed and stayed a nine-month consecutive sentence and placed

[2] The Honorable Jeffrey A. Wagner presided over the plea hearing and sentencing, while the Honorable John A. Franke considered Olson's motion for postconviction relief.

[3] *See* ***North Carolina v. Alford***, 400 U.S. 25, 37-38 (1970) (allowing a defendant to agree to accept conviction while simultaneously maintaining his or her innocence).

Olson on probation for two years, with jail time as a condition of probation. Olson did not file a notice of appeal.

¶4 On April 4, 2007, Olson filed a *pro se* motion to modify his sentence on grounds that his sentence was being computed incorrectly. The trial court denied the motion in a written order dated April 6, 2007. Olson subsequently filed a *pro se* motion for postconviction relief, which was denied on grounds that his appellate rights had expired. Ultimately, the Court of Appeals reinstated Olson's appeal rights and the public defender appointed counsel to represent Olson in postconviction proceedings.

¶5 Postconviction counsel proceeded to evaluate Olson's case. Subsequently, counsel moved to withdraw at Olson's request so that he could proceed with his appeal *pro se*. After corresponding with Olson to advise him of the potential risks of proceeding *pro se*,[4] the trial court granted counsel's motion to withdraw and Olson was permitted to proceed *pro se*.

¶6 Now representing himself, Olson filed a four-page motion for postconviction relief. It asserted:

> In discussions with trial counsel after the sentence was completed, the defendant found that the trial counsel had failed to investigate any of the avenues of defense that [counsel] had been informed of, nor did he investigate the false accusations contained in the police reports, the police report of July 3, 2005, the computer files contained on the family computer, nor were the results from the victim[']s

[4] The trial court wrote a detailed letter to Olson outlining the challenges of proceeding *pro se*. Olson responded with a letter to the court in which he reaffirmed his interest in proceeding *pro se*, stating that he was "fully aware of the risks and consequences, as discussed, involved with proceeding pro se." (Emphasis omitted.) Olson asserted that he was competent to represent himself and would comply with appellate procedures, time limits and rules of the court.

> Medical Exam obtained. Trial counsel also failed to obtain a copy of the defendant's lease, which conclusively proved that the defendant and the victim did not live at the address of the complaint.
>
> The defendant was led to believe, by trial counsel, that appropriate investigations [w]ere done and that they were done in a timely manner.
>
> The defendant has, since the time of his sentencing, found that this is not true.

(Emphasis omitted.) Olson then argued that trial counsel's "failures to investigate, and the misleading statements made to him by trial counsel constitute Ineffective Assistance of Counsel and render his plea of Alford involuntary." In support, Olson cited case law concerning a trial counsel's obligations to his client. Finally, he argued that due to trial counsel's failures to investigate, the defense was damaged. He moved to vacate the convictions and dismiss the complaint with prejudice.

¶7 The trial court denied Olson's motion in a written decision. The court found that Olson's allegations of ineffective assistance were "conclusory and insufficient to warrant relief." The court explained:

> By entering no contest pleas in this case, the defendant waived his opportunity to challenge the allegations of the complaint as well as his right to put the State to its burden of proving guilt beyond a reasonable doubt. The defendant also waived his right to raise any possible defenses to the charges. Although the defendant alleges that trial counsel failed to conduct an adequate investigation into his case, he has not provided sufficient factual support for this contention. The defendant has not identified the witnesses whom he claims counsel should have interviewed or what they would have stated. He has not provided any police reports, computer files, medical examination reports or a copy of his lease. Furthermore, he has not demonstrated that he was prejudiced by counsel's performance (i.e. that counsel's failure to investigate affected his decision to accept the State's offer to plead to the lesser charges). Based upon the foregoing, the courts finds that the

> defendant has failed to allege a viable ineffective assistance claim.

(Record citations omitted.) This appeal follows.

DISCUSSION

¶8 Olson presents two arguments on appeal. First, he argues that he is entitled to reversal because his trial counsel provided ineffective assistance. For reasons addressed below, we reject this argument. Second, Olson asserts that the State suppressed evidence that was favorable to the defense. This issue was not raised at the trial court and will not be addressed. *See* ***C. Coakley Relocation Sys., Inc. v. City of Milwaukee***, 2007 WI App 209, ¶26, 305 Wis. 2d 487, 740 N.W.2d 636 ("[W]e will not consider an issue for the first time on appeal."); *see also* ***Marotz v. Hallman***, 2007 WI 89, ¶16, 302 Wis. 2d 428, 734 N.W.2d 411 ("As a general rule, 'issues not raised in the circuit court will not be considered for the first time on appeal.'") (citation omitted).

¶9 Olson asserts his trial counsel was ineffective. The two-pronged test for ineffective assistance of counsel claims requires defendants to prove: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a 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." ***Id.*** at 694. If a reviewing court determines that a defendant has failed to satisfy either prong of the ***Strickland*** test, it need not consider the other one. ***Id.*** at 697.

¶10 Specifically at issue in this case is the trial court's denial of Olson's motion for postconviction relief. A trial court, in its discretion, may deny a postconviction motion without a hearing "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations." ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The same rubrics apply to an ineffective assistance of counsel claim. ***State v. Allen***, 2004 WI 106, ¶¶13, 15, 274 Wis. 2d 568, 682 N.W.2d 433. To meet this burden, a postconviction movant should specifically allege in factual form "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Id.***, ¶23.

¶11 In ***Allen***, our supreme court summarized the applicable standard of review of a trial court's decision to deny a motion for postconviction relief:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.

Id., ¶9 (citations omitted).

¶12 In his postconviction motion, Olson based his ineffective assistance claim on trial counsel's failure to investigate numerous avenues of defense. We affirm the denial of Olson's motion for postconviction relief because we agree

with the trial court that Olson has failed to prove he was prejudiced by counsel's alleged deficiencies.

¶13 Olson asserts that trial counsel's failure to investigate, as well as "misleading statements made to him by trial counsel," constituted ineffective assistance and rendered his pleas involuntary. However, as the trial court aptly noted, Olson's motion did not explain what the investigation would have revealed and, most importantly, how the results of the investigation would have affected his decision to enter ***Alford*** pleas. Olson does not identify the "misleading statements" he claims his trial counsel made, or explain how they influenced his decision to accept the plea bargain. In short, Olson has failed to include sufficient facts to "allow the reviewing court to meaningfully assess" his claim. *See* ***Bentley***, 201 Wis. 2d at 314. To the extent that Olson asserts facts in his brief without citation to the record, or facts that were not presented to the trial court, those facts are not properly before us and we do not consider them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court may decline to consider arguments not supported by appropriate citation to the record); ***Parr v. Milwaukee Bldg. & Constr. Trades***, 177 Wis. 2d 140, 144 n.4, 501 N.W.2d 858 (Ct. App. 1993) ("Ordinarily, assertions of fact that are not part of the record will not be considered."). For these reasons, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.