

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 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. 2009AP1005-CR

Cir. Ct. No. 2007CF779

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLAUDE AMIL KOMOROWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY and THOMAS E. DONEGAN, Judges.
Affirmed.

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

¶1 PER CURIAM. Claude Amil Komorowski appeals from a judgment, entered upon a jury's verdicts, convicting him of five felony offenses.

He also appeals from an order denying his postconviction motion.¹ He claims that the verdicts should be set aside because his trial counsel performed ineffectively during the plea bargaining process by failing to convey an offer from the State to resolve the case short of trial. Because the record supports the circuit court's conclusion that the State did not extend the alleged offer, we affirm.

BACKGROUND

¶2 The State charged Komorowski with one count of taking and driving a vehicle without owner's consent, one count of fleeing an officer, one count of robbery with threat of force, and two counts of false imprisonment. A jury found him guilty on all counts. The circuit court imposed an aggregate sentence that required Komorowski to serve a minimum of twelve years and six months in initial confinement and a maximum of nine years on extended supervision.

¶3 Komorowski moved to set aside his convictions, alleging that his trial counsel performed ineffectively by failing to make a timely disclosure of an offer from the State to resolve the case. At the postconviction hearing, Komorowski described a conversation that he claimed he had with this trial counsel while awaiting the jury's verdicts. According to Komorowski, trial counsel told him that the State at one time agreed to recommend "twelve years [in] prison" if he pled guilty to all five charges but trial counsel elected not to convey the offer, believing that Komorowski would reject it. Komorowski testified that

¹ The Honorable William Sosnay presided over the jury trial in this matter and entered the judgment of conviction. The Honorable Thomas E. Donegan presided over the postconviction proceedings and entered the order denying postconviction relief.

he “would have been interested” in such a recommendation had he known about it before trial.

¶4 The prosecutor and Komorowski’s trial counsel both testified and denied that the State ever made an offer to recommend a twelve-year sentence. Trial counsel further denied discussing such an offer with Komorowski at any time. The circuit court believed the attorneys, and concluded that Komorowski failed to prove that his trial counsel performed ineffectively in regard to plea negotiations. This appeal followed.

DISCUSSION

¶5 We review claims of ineffective assistance of counsel under the two-prong test described in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, the defendant must prove that the attorney’s performance was deficient and that the deficiency was prejudicial. *State v. Allen*, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. “[B]oth the performance and prejudice components ... are mixed questions of law and fact.” *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985) (citation omitted). The circuit court’s findings of fact will not be overturned unless clearly erroneous. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Whether the attorney’s performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review *de novo*. *Id.* at 128.

¶6 To prove deficiency, a defendant must show that trial counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Allen*, 274 Wis. 2d 568, ¶26 (citations omitted). Failure to convey a plea offer constitutes deficient performance. *State v. Ludwig*, 124 Wis. 2d 600, 610-11, 369 N.W.2d 722 (1985).

¶7 To prove prejudice, the defendant must show ““that there is a reasonable probability that, but for the counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.”” *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (citation omitted). When a defendant contends that trial counsel performed deficiently by failing to convey a plea offer, the defendant must show a reasonable probability that he or she would have accepted the offer in order to establish prejudice. *See State v. Winters*, 2009 WI App 48, ¶36, 317 Wis. 2d 401, 766 N.W.2d 754.

¶8 The defendant must satisfy both the deficiency and the performance prongs of the *Strickland* test to be afforded relief. *Allen*, 274 Wis. 2d 568, ¶26. We may address either prong first, and if the defendant fails to satisfy one prong, we need not address the other. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶9 We begin by considering whether Komorowski demonstrated that his trial counsel performed deficiently. We conclude that he did not.

¶10 The circuit court noted that an offer to recommend twelve years in prison does not take into account the requirement that Wisconsin prison sentences must include both a period of initial confinement and a period of extended supervision. *See* WIS. STAT. § 973.01 (2007-08).² The circuit court therefore did not believe Komorowski when he testified that the State offered to recommend a sentence that was not bifurcated or when he testified that his trial counsel belatedly disclosed such an offer. We defer to the circuit court’s assessment of

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

witness credibility. *Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998).

¶11 Based on the testimony of the prosecutor and Komorowski's trial counsel, the circuit court found that the State did not offer to recommend a twelve-year sentence and that Komorowski's trial counsel did not disclose such an offer while the jury deliberated. These findings are not clearly erroneous, and we must accept them. *See Johnson*, 153 Wis. 2d at 127. The facts as found by the circuit court do not permit a conclusion that Komorowski's trial counsel performed deficiently by failing to convey a pretrial offer to resolve the case.

¶12 Komorowski's failure to demonstrate that his trial counsel performed deficiently obviates the need for us to address the prejudice prong of the *Strickland* analysis. *See Sanchez*, 201 Wis. 2d at 236. We do so briefly, however, for the sake of completeness. We conclude that Komorowski was not prejudiced by any failure of his counsel to timely convey an alleged offer from the State because he did not prove to the circuit court that he would have accepted the offer he claimed was not promptly disclosed. *See Winters*, 317 Wis. 2d 401, ¶36.

¶13 The circuit court found that Komorowski was unwilling to plead guilty to all five charges. The circuit court also found that the State would not resolve the case short of trial unless Komorowski pled guilty to all five charges. These findings are fully supported by the record.

¶14 First, the prosecutor testified that he "refus[ed]" to dismiss counts and "never contemplated dismissing charges." Second, Komorowski's trial counsel testified that the prosecutor rejected Komorowski's proposal to resolve the case by pleading guilty to only two charges. Third, Komorowski conceded in his moving papers that he knew the State was not willing to enter into any "plea

agreement other than guilty on all charges.” At the postconviction hearing, Komorowski acknowledged that he “wanted to accept responsibility ... to the extent of [his] guilt but not to all of the charges.” During cross-examination, he agreed that his position remained unchanged. The circuit court therefore determined that “the State wanted [Komorowski] to plead to all five ... but he has never changed his position that he didn’t want to plead to all five.” We have no basis to disturb these findings.

¶15 Komorowski did not prove that he would have accepted an offer from the State to recommend twelve years in prison if the offer included a requirement that he plead guilty to all five charges. Therefore, he suffered no prejudice from any failure of his trial counsel to convey such an offer. *See Id.*

By the Court.—Judgment and order affirmed.

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

