COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1724-CR **Cir. Ct. No. 2006CF663**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAWN M. LUDWIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dawn Ludwig pled no contest to two counts of homicide by intoxicated use of a motor vehicle, three counts of first-degree reckless endangerment, and one count of operating a motor vehicle while intoxicated, third offense. Ludwig appeals the circuit court's judgment of

conviction and order denying postconviction relief. She argues Wisconsin's homicide by intoxicated use of a motor vehicle statute, WIS. STAT. § 940.09,[1] is unconstitutional. She also contends the circuit court erred by denying her ineffective assistance of counsel claim and her motion to withdraw her no contest pleas without an evidentiary hearing. We affirm.

BACKGROUND

¶2 In the early morning hours of June 25, 2006, Ludwig's motor vehicle was traveling southbound in the northbound lane of United States Highway 41. Another motorist honked his horn at Ludwig in attempt to get her attention, but Ludwig continued driving the wrong way without deviating or changing direction. Minutes later, Ludwig collided head-on with a vehicle traveling northbound, killing the two occupants of that vehicle.

¶3 At the accident scene, sergeant Nathan Thompson noted that Ludwig's speech was "slurred" and "thick-tongued" and that she had difficulty controlling her fine motor skills. Ludwig told officer Zachary Roush that she had consumed a few drinks before the accident. Officer Ryan Glime observed that Ludwig's eyes were red and her breath smelled of alcohol. A preliminary breath test indicated Ludwig had a .20% blood alcohol concentration.

¶4 Ludwig pled no contest and was convicted of two counts of homicide by intoxicated use of a motor vehicle, three counts of first-degree reckless endangerment, and one count of operating a motor vehicle while

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

intoxicated, third offense. Ludwig sought postconviction relief, contending that WIS. STAT. § 940.09 is unconstitutional and that she was denied effective assistance of counsel. She also moved to withdraw her no contest pleas, alleging they were not entered knowingly and voluntarily due to ineffective assistance of counsel. The circuit court dismissed Ludwig's claims of unconstitutionality, and denied her ineffective assistance claim and motion to withdraw her pleas without a hearing. Ludwig appeals the judgment of conviction and the circuit court's order denying postconviction relief.

DISCUSSION

¶5 On appeal, Ludwig argues WIS. STAT. § 940.09 is unconstitutional. She further contends she was denied effective assistance of counsel. She finally argues the circuit court erred by denying her request to withdraw her no contest pleas.

I. The constitutionality of WIS. STAT. § 940.09

¶6 WISCONSIN STAT. § 940.09(1)(a) states that a person commits a class D felony who "[c]auses the death of another by the operation or handling of a vehicle while under the influence of an intoxicant." However, the statute provides an affirmative defense if the defendant proves by a preponderance of the evidence that the death would have occurred even if the defendant had been exercising due care and had not been under the influence of an intoxicant. WIS. STAT. § 940.09(2)(a).

¶7 Ludwig contends WIS. STAT. § 940.09(1)(a) is unconstitutional in that it does not require a causal connection between the intoxicated condition of the motor vehicle operator and another person's death. She also asserts the

affirmative defense provision in § 940.09(2)(a) invades her right to be presumed innocent and her Fifth Amendment right against self-incrimination. As such, Ludwig argues the constitutional defect in § 940.09(1)(a) is not cured by the affirmative defense.

¶8 In ***State v. Caibaiosai***, 122 Wis. 2d 587, 363 N.W.2d 574 (1985), our supreme court considered and rejected the same constitutional arguments Ludwig now raises. ***Caibaiosai*** held that WIS. STAT. § 940.09(1)(a) is not rendered unconstitutional by its failure to require a causal connection between the defendant's intoxication and the victim's death. ***Id.*** at 593-94. ***Caibaiosai*** also held that the affirmative defense provision in § 940.09(2)(a) does not violate a defendant's Fifth Amendment right against self-incrimination. ***Id.*** at 596-98. The ***Caibaiosai*** majority did not adopt the dissent's belief that "the effect of sec. 940.09(2) is that the accused must prove himself or herself innocent." ***Id.*** at 606 (Abrahamson, J., dissenting). In 2005, the supreme court declined to overrule ***Caibaiosai***, noting, "Our reasoning in ***Caibaiosai*** is sound." ***State v. Fonte***, 2005 WI 77, ¶38, 281 Wis. 2d 654, 698 N.W.2d 594.

¶9 We are bound by prior Wisconsin Supreme Court decisions. ***State v. Lossman***, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984). The Wisconsin Supreme Court is the only state court with the power to overrule, modify, or withdraw language from a previous supreme court decision. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). We therefore decline Ludwig's request to "revisit" the constitutionality of WIS. STAT. § 940.09.

II. Ineffective assistance of counsel

¶10 To establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that counsel's performance was deficient.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must identify specific acts or omissions that form the basis of ineffective assistance and must show that counsel's performance fell below objective standards of reasonableness. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994) (citing ***Strickland***, 466 U.S. at 687-88, 690). The court must then determine whether, under the circumstances, the act or omission was outside the range of professionally competent assistance. ***Strickland***, 466 U.S. at 690. The court must presume that counsel provided adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. ***Id.***

¶11 Second, a defendant must show that counsel's deficient performance prejudiced the defendant. ***Id.*** at 687. The defendant must demonstrate "there is a reasonable probability that, but for [the errors], the result of the proceeding would have been different." ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 694). When a defendant has entered a no contest plea, the defendant must show there is a reasonable probability that, but for counsel's errors, the defendant would not have pled no contest and would have insisted on going to trial. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶12 We will not review a claim of ineffective assistance of counsel unless trial counsel has testified at a postconviction evidentiary hearing. *See* ***State v. Cox***, 2007 WI App 38, ¶6, 300 Wis. 2d 236, 730 N.W.2d 452 (citations omitted). A defendant raising a claim of ineffective assistance of counsel is not automatically entitled to an evidentiary hearing. A circuit court is only required to conduct a hearing when the defendant alleges sufficient material facts that, if true, entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). If the defendant does not raise sufficient facts, if the allegations are merely conclusory, or if the record conclusively shows the

defendant is not entitled to relief, the circuit court has the discretion to deny a request for an evidentiary hearing. ***Id.*** at 309-10. Whether a postconviction motion alleges sufficient facts to warrant an evidentiary hearing is a legal issue that we review independently. ***Id.*** at 310.

¶13 Ludwig argues she was denied effective assistance of counsel because her trial counsel: (1) failed to investigate how her medical condition, benign positional vertigo, affected her ability to drive; (2) failed to advise her that her medical condition could constitute an affirmative defense under WIS. STAT. § 940.09(2)(a); (3) failed to conduct an accident reconstruction; and (4) failed to discover discrepancies in the blood alcohol testing. The circuit court concluded Ludwig's postconviction motion failed to allege sufficient facts which, if true, would entitle her to relief. It therefore denied Ludwig's ineffective assistance claim without an evidentiary hearing. We agree with the circuit court.

¶14 First, contrary to Ludwig's assertions, her trial counsel did investigate her medical condition, benign positional vertigo. Within two months after the State filed its criminal complaint against Ludwig, her trial counsel had written multiple letters to her medical providers requesting health records pertaining to her condition. Thus, it cannot be said that Ludwig's trial counsel did not investigate her medical condition and consider it as a possible defense. Ludwig has not explained why it was unreasonable for her attorney to fail to pursue this avenue of defense. Her trial counsel's performance was not deficient in this respect.

¶15 While Ludwig makes much of the fact that she has a history of suffering from benign positional vertigo, she has never alleged that she suffered from symptoms associated with that condition on the night of the crash. She has

not made any effort to explain how the symptoms associated with benign positional vertigo—dizziness, veering to the left, and loss of balance—would cause her to enter the freeway from the wrong direction, ignore another motorist's honking, and continue driving her vehicle without deviating until she crashed into another car head-on. Given these facts, a reasonable attorney could have concluded that Ludwig's medical condition did not constitute an affirmative defense under WIS. STAT. § 940.09(2)(a).

¶16 Second, although Ludwig contends she was never advised of the affirmative defense under WIS. STAT. § 940.09(2)(a), the trial court's plea colloquy suggests otherwise. Ludwig's plea questionnaire included the jury instruction for homicide by operation of a vehicle while under the influence. That jury instruction specifically detailed the affirmative defense set forth in § 940.09(2)(a). Ludwig confirmed to the trial court that she had reviewed the jury instruction with her attorney in its entirety and had no questions about it. Ludwig cannot now credibly claim that she was unaware of the affirmative defense set forth in § 940.09(2)(a). Therefore, her trial counsel's performance was not deficient in this respect.

¶17 Third, while Ludwig's trial counsel did not conduct his own accident reconstruction, he did seek information from the State regarding its reconstruction. On September 14, 2006, Ludwig's counsel moved to compel discovery of the State's accident reconstruction report. On March 7, 2007, he filed another motion requesting the underlying data used in the State's reconstruction. On August 3, 2007, he again moved to compel discovery of specific information about the reconstruction. He attached a letter from a consulting engineer to his motion outlining information missing from the State's reconstruction report. Ludwig's

trial counsel adequately explored this topic, and Ludwig has not shown how his performance in this respect was deficient.

¶18 Furthermore, even if Ludwig's trial counsel was deficient in not conducting his own accident reconstruction, Ludwig cannot show prejudice. The affirmative defense under WIS. STAT. § 940.09(2)(a) was only available if Ludwig could prove by a preponderance of the evidence that the deaths would have occurred even if she had been exercising due care and had not been under the influence of an intoxicant. Ludwig could not have met this burden because, had she been exercising due care on the night in question, the deaths would not have occurred. Had Ludwig exercised due care, she would have realized that she was driving the wrong way down a highway before the head-on collision. Thus, even if her counsel had conducted his own accident reconstruction, it is doubtful that Ludwig would have been entitled to an instruction on § 940.09(2)(a). Without such an instruction, Ludwig cannot credibly maintain that she would have exercised her right to a jury trial. Indeed, Ludwig fails to identify any errors or omissions in the State's report that an independent reconstruction would have cured. Trial counsel's failure to conduct his own accident reconstruction therefore did not prejudice Ludwig.

¶19 Fourth, although Ludwig mentions her trial counsel's failure to discover discrepancies in the blood alcohol testing, she does not develop this claim adequately in her brief. We therefore disregard this argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

¶20 Ludwig has not alleged sufficient material facts that, if true, entitle her to relief on her ineffective assistance of counsel claim. Given the facts, a

reasonable attorney could have concluded that Ludwig did not exercise due care on the night of the crash, was highly intoxicated, and had no affirmative defense under WIS. STAT. § 940.09(2)(a), or that any such defense had little likelihood of success. Accordingly, the circuit court properly denied Ludwig's ineffective assistance of counsel claim without an evidentiary hearing.

III. Ludwig's motion to withdraw her no contest pleas

¶21 To withdraw a no contest plea after sentencing, a defendant "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. A defendant can establish manifest injustice by proving ineffective assistance of counsel, ***Bentley***, 201 Wis. 2d at 311, or by showing that the plea was not entered knowingly, intelligently, and voluntarily. ***Brown***, 293 Wis. 2d 594, ¶18.

¶22 Ludwig contends the circuit court erred in denying her motion to withdraw her no contest pleas because she did not enter them knowingly, intelligently, and voluntarily due to the ineffective assistance of her trial counsel. This argument parallels Ludwig's ineffective assistance argument and fails for the same reasons. Just as Ludwig cannot establish that the circuit court erred in denying her ineffective assistance claim, she cannot establish that the circuit court erred in denying her motion to withdraw on the same basis. The circuit court did not err in denying Ludwig's motion to withdraw her no contest pleas.

By the Court.—Judgment and order affirmed.

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