

NO: 20-8408 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
JUN 16 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SCOTT R. DEICHSEL - PETITIONER

VS.

LIZZIE TEGELS, WARDEN - RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis.

The petitioner has previously been granted leave to proceed in forma pauperis in the following courts:

United States District Court For The Eastern District Of Wisconsin

United States Court Of Appeals For The seventh Circuit

The petitioner's affidavit or declaration in support of this motion is attached hereto.



Scott R. Deichsel

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, SCOTT R. DEICHSEL, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>540.80</u>	\$ <u>N/A</u>	\$ <u>56.88</u>	\$ <u>N/A</u>
Self-employment	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Income from real property (such as rental income)	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Interest and dividends	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Gifts	\$ <u>500.00</u>	\$ <u>N/A</u>	\$ <u>-0-</u>	\$ <u>N/A</u>
Alimony	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Child Support	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Disability (such as social security, insurance payments)	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Unemployment payments	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Public-assistance (such as welfare)	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Other (specify): <u>Stimulus Checks</u>	\$ <u>3,200</u>	\$ <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Total monthly income:	\$ <u>4240.80</u>	\$ <u>N/A</u>	\$ <u>56.88</u>	\$ <u>N/A</u>

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<u>Jackson Corr. Inst.</u>	<u>N6500 Haipek Rd.</u>	<u>11-20 to present</u>	<u>\$ 56.88</u>
<u>New Lisbon Corr. Inst.</u>	<u>2000 Progress Road</u>	<u>4-18 to 10-20</u>	<u>\$ 41.60</u>
			<u>\$</u>

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	<u>\$ N/A</u>
<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	<u>\$ N/A</u>
<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	<u>\$ N/A</u>

4. How much cash do you and your spouse have? \$ _____

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
<u>Savings Account</u>	<u>\$ 1,000</u>	<u>\$ N/A</u>
<u>Inmate Release Account</u>	<u>\$ _____</u>	<u>\$ N/A</u>
	<u>\$ _____</u>	<u>\$ _____</u>

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home
Value _____

Other real estate
Value _____

Motor Vehicle #1
Year, make & model _____
Value _____

Motor Vehicle #2
Year, make & model _____
Value _____

Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	\$ N/A	\$ N/A
N/A	\$ N/A	\$ N/A
N/A	\$ N/A	\$ N/A

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
N/A	N/A	N/A
N/A	N/A	N/A
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ 0	\$ N/A
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ 0	\$ N/A
Home maintenance (repairs and upkeep)	\$ 0	\$ N/A
Food	\$ 10.00	\$ N/A
Clothing	\$ 0	\$ N/A
Laundry and dry-cleaning	\$ 2.00	\$ N/A
Medical and dental expenses	\$ 7.50 co-pay	\$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ 0	\$ N/A
Recreation, entertainment, newspapers, magazines, etc.	\$ 0	\$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ 0	\$ N/A
Life	\$ 0	\$ N/A
Health	\$ 0	\$ N/A
Motor Vehicle	\$ 0	\$ N/A
Other: <u>NONE</u>	\$ 0	\$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): <u>NONE</u>	\$ 0	\$ N/A
Installment payments		
Motor Vehicle	\$ 0	\$ N/A
Credit card(s)	\$ 0	\$ N/A
Department store(s)	\$ 0	\$ N/A
Other: <u>NONE</u>	\$ 0	\$ N/A
Alimony, maintenance, and support paid to others	\$ 34.12	\$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ 0	\$ N/A
Other (specify): <u>RESTITUTION</u>	\$ 11.38	\$ N/A
Total monthly expenses:	\$ 65.00	\$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

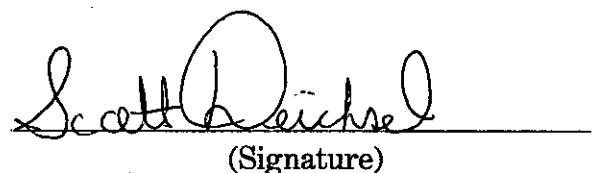
If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 15, 2021


(Signature)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SCOTT R. DEICHSEL,
Petitioner,

v.

Case No. 03-CV-1050

DON STRAHOTA, Warden,
New Lisbon Correctional Institution,
Respondent.

DECISION AND ORDER

Scott Deichsel is a Wisconsin state prisoner currently incarcerated at the New Lisbon Correctional Institution. In 2001, he pled no contest to one count of attempted first-degree intentional homicide and was sentenced to 40 years in state prison followed by 20 years of extended supervision. He petitions this court for a writ of habeas corpus under 28 U.S.C. § 2254, arguing that he was denied his Sixth Amendment right to effective assistance of counsel during the plea process and on direct appeal.

I. BACKGROUND

On January 8, 2001, Deichsel drove, with his wife and their daughter, to the home of Shantel Quick, the custodial mother of his young son. Deichsel knocked on the door and asked to speak with Quick. She let him in, and they spoke in the kitchen. When Quick got up from the kitchen table to get their son some juice, Deichsel attacked her from behind. He choked her, then repeatedly struck her with the claw end of a hammer. She lost consciousness. Deichsel reportedly told their son, "I'm sorry . . . but I have to do it."

Deichsel's wife was waiting in the car. She says that when Deichsel came back, he said, "She better be dead." They drove away and tossed the hammer and some of Deichsel's clothes in a dumpster at an apartment building where they knew the garbage would be picked up that day. Quick survived the attack but suffered multiple skull fractures and 14 distinct wounds.

Deichsel pled no contest to one count of attempted first-degree intentional homicide. At sentencing, his attorney asked the court for leniency. Deichsel apologized to Quick and her family. The court found that Deichsel planned the attack, conducted "dry runs," and cut the electricity and phone lines to Quick's home before entering and sentenced him to the maximum period of imprisonment for the offense.

Deichsel sought post-conviction relief. His attorney filed a no-merit report pursuant to Wisconsin Statutes section 809.32(1) and *Anders v. California*, 386 U.S. 738 (1967), asserting that he found no basis for seeking post-conviction relief on Deichsel's behalf. Deichsel filed a pro se response to the no-merit report, primarily arguing that trial counsel failed to properly investigate and advise him of possible defenses and lesser included offenses before he pleaded. The Wisconsin Court of Appeals reviewed the no-merit report, Deichsel's response, and the record and concluded that there was no arguable merit to any issue that could be raised on appeal. The court affirmed Deichsel's conviction. Deichsel appealed to the Wisconsin Supreme Court, which denied review. He then filed this petition but asked that the case be stayed to give him time to exhaust his available state-court remedies.

In 2013, Deichsel petitioned the Wisconsin Court of Appeals for a writ of habeas corpus, arguing that his appellate counsel failed to discover and brief issues of arguable

He asserts that Paxil can cause serious side effects, including memory loss and unusual changes in mood or behavior. He argues that his trial attorney, Joseph Hildebrand, advised him to plead no contest without properly investigating or advising him of the viability of an involuntary intoxication defense due to the effects of Paxil.

Strickland applies to counsel's conduct during the pleading stage. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Deichsel must show that Hildebrand's performance was deficient and that "there is a reasonable probability that, but for counsel's errors," he would not have pleaded but "would have insisted on going to trial." *Id.* at 59. Deichsel does not make either showing here.

The record reflects that Hildebrand ably represented Deichsel prior to his plea. He worked on Deichsel's case over the course of several months, wrote letters to Deichsel updating him on the progress of the case, met with Deichsel to discuss various defense strategies, and sought and obtained Deichsel's medical records and funding for an investigator and a doctor. At Deichsel's request, he met with the prosecutor assigned to the case and tried to negotiate a plea deal. Deichsel was willing to plead guilty to a lesser offense, but the prosecutor said that he was under considerable pressure to keep the charge as it was, so Hildebrand could not finalize a deal. After all this, Hildebrand advised Deichsel that he did not see a basis for any kind of defense and recommended that Deichsel enter a plea, accept responsibility, and seek leniency at sentencing.

Deichsel does not show that Hildebrand failed to properly investigate involuntary intoxication. The record suggests, and *Strickland* requires me to presume, that Hildebrand either made a strategic choice not to pursue that defense "after thorough investigation of law and facts relevant" to it, a choice that would be "virtually

unchallengeable," or that he made a reasonable decision not to investigate the defense further than he did. 466 U.S. at 690–91. I find no fault with his conduct either way.

Involuntary intoxication is a difficult defense to raise. It is only a defense to criminal liability if it "renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed." Wis. Stat. § 939.42(1) (2001–02). To earn a jury instruction on it, a defendant must produce evidence of intoxication that is "credible and sufficient to warrant the jury's consideration of the issue," which "must be more than a mere statement that the defendant was intoxicated." *State v. Gardner*, 601 N.W.2d 670, 676 (Wis. Ct. App. 1999) (quoting *State v. Strege*, 343 N.W.2d 100, 105 (Wis. 1984)). Even expert testimony from a psychiatrist is not necessarily enough. See *id.* at 675–76.

There was virtually nothing available to Hildebrand to suggest that involuntary intoxication was a viable defense in this case. There is nothing in Deichsel's medical records to suggest that he ever experienced any side effects from Paxil, and apart from his claim that he briefly experienced memory loss, he does not seem to have ever claimed that Paxil affected him in any way. In fact, he says that his dosage was increased shortly before the attack because he did not feel that the medication was working at all. Further, even if Deichsel did have a brief amnesiac spell due to Paxil, whether he remembers attacking Quick says little if anything about whether a Paxil-induced intoxication rendered him incapable of distinguishing right from wrong at that moment. Deichsel argues that Hildebrand did not properly investigate whether it *could* have, but the issue here is whether Hildebrand made a reasonable decision not to raise the defense or investigate it further. Deichsel has not shown that he didn't.

Deichsel is thus left to argue, in effect, that Hildebrand "should have told him that he had at least a theoretical defense of [involuntary] intoxication, should have explained to him the unlikelihood that the defense would be accepted in a trial, but should have left to him the ultimate decision whether to raise the defense." *Evans v. Meyer*, 742 F.2d 371, 374 (7th Cir. 1984). Perhaps that would have been the better course, but the issue here is whether Deichsel was denied "reasonably effective assistance" of counsel under prevailing professional norms. *Strickland*, 466 U.S. at 690. "It is not the normal practice of lawyers to advise their clients of every defense or argument or tactic that while theoretically possible is hopeless as a practical matter," so failure to do so is not objectively unreasonable. *Evans*, 742 F.2d at 374.

Even if Hildebrand did err by either not investigating involuntary intoxication or not advising Deichsel of it, an isolated error does not amount to deficient performance unless it is "sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (citing *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984)). And even then, "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 562 U.S. 86, 111 (2011). The record here indicates that Hildebrand ably represented Deichsel, diligently pursued a plea deal on his behalf, sufficiently investigated possible defenses, reasonably concluded that Deichsel's best option was to forego trial and enter a plea, and competently (if not perfectly) advised him to do so. His failure to exhaustively investigate or advise Deichsel of a likely inapplicable defense is "not the sort of inexplicable omission" or "terrible blunder" that renders otherwise competent advocacy constitutionally deficient. See *Bland v. Hardy*, 672 F.3d 445, 451 (7th Cir. 2012).

Finally, even if Hildebrand's performance was somehow deficient, I cannot find that Deichsel was prejudiced by it because he fails to show (or even clearly argue) that there is a reasonable probability that he would have insisted on going to trial but for Hildebrand's alleged errors. Instead, Deichsel argues that Hildebrand "deprived [him] of the *opportunity* to present *potential* evidence from a medical expert witness that Paxil rendered him incapable of distinguishing between right and wrong, in support of an involuntary intoxication" defense. Docket No. 12, at 14 (emphasis added). This is insufficient to show prejudice under *Strickland*.

Determining whether a habeas petitioner was prejudiced by his attorney's alleged failure to investigate or advise him of a possible affirmative defense depends largely on the likelihood that further investigation or discussion would have "led counsel to change his recommendation as to the plea," which itself "depend[s] largely on whether the affirmative defense likely would have succeeded at trial." *Hill*, 474 U.S. at 59 (citing *Evans*, 742 F.2d at 375). There is nothing here to suggest that any amount of further investigation or discussion would have led Hildebrand to change his plea recommendation. Thus, Deichsel's claim fails.

B. Appellate Counsel

Deichsel asserts that the trial court accepted his plea without fully complying with procedural requirements set forth in *State v. Bangert*, 389 N.W.2d 12 (Wis. 1986), and later Wisconsin cases. He concedes that this is a matter of state law—*Bangert's* protections are mandated by Wisconsin statutory law, not the federal constitution, see *id.* at 20—but argues, nonetheless, that the trial court's failure to adhere to *Bangert* rendered his plea invalid and his appellate lawyer, Len Kachinsky, should have raised

this issue on appeal rather than filing a no-merit report. He also argues that Kachinsky should have raised ineffective assistance of trial counsel in the trial court and on appeal.

Strickland governs this claim. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citing *Smith v. Murray*, 477 U.S. 527, 535–36 (1986)). Deichsel must show that “counsel was objectively unreasonable in failing to find arguable issues to appeal.” *Id.* (citing *Strickland*, 466 U.S. at 687–91). He must then show “a reasonable probability that, but for” counsel’s errors, “he would have prevailed on his appeal.” *Id.* (citing *Strickland*, 466 U.S. at 694). Deichsel, again, cannot make either showing.

I cannot find that Kachinsky performed deficiently in not challenging Deichsel’s plea under *Bangert*. The Wisconsin Court of Appeals twice reviewed the transcript of Deichsel’s plea hearing and, citing *Bangert* both times, concluded that there was no arguable merit to any challenge to the validity of his plea. Thus, I cannot find that this was an arguable issue without “disagree[ing] with a state court’s resolution of an issue of state law,” which I cannot do on habeas review. *King v. Pfister*, 834 F.3d 808, 814 (7th Cir. 2016) (citing *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). Further, the Wisconsin Court of Appeals roundly rejected any possible *Bangert* challenge in this case, and Deichsel has given me no reason to think that his appeal would have ended any differently had Kachinsky raised the issue in a merits brief, so I cannot find that he was prejudiced by Kachinsky’s performance here.

I also cannot find that Kachinsky performed deficiently in not raising ineffective assistance of trial counsel. The Wisconsin Court of Appeals noted that there was nothing to suggest that Deichsel raised this issue with Kachinsky, and Deichsel has not indicated that he did. Deichsel’s initial ineffective-assistance claim was based on

Hildebrand's alleged failure to properly investigate and advise him of various affirmative defenses and lesser included offenses. Kachinsky could not have been expected to discover this issue other than through Deichsel. Thus—without even considering whether ineffective assistance of trial counsel was an arguable issue, which I doubt—I cannot find that Kachinsky was objectively unreasonable in failing to find it.

Further, as with Deichsel's *Bangert* challenge, I cannot find that he was prejudiced by Kachinsky's failure to raise ineffective assistance of counsel. Deichsel argues that Kachinsky's failure to raise the issue in a post-conviction motion in the trial court precluded him from raising it on appeal and precluded the Wisconsin Court of Appeals from considering it on the merits under Wisconsin procedural law, which requires that such a claim be raised in the trial court first. See, e.g., *State v. Machner*, 285 N.W.2d 905, 908–09 (Wis. Ct. App. 1979). However, Deichsel did raise the issue in his pro se filing on appeal, and the Wisconsin Court of Appeals considered it, at least as to whether the claim had enough merit to justify requiring Kachinsky to raise it in the trial court. The court applied *Strickland*, found that there was no arguable merit to Deichsel's claim, and discharged Kachinsky from his duties as appellate counsel. Deichsel has not shown (or even argued) that there is a reasonable likelihood that his appeal would have ended any differently had Kachinsky raised the issue in the trial court or briefed it on the merits on appeal, so I cannot find that he was prejudiced by Kachinsky's performance.

Deichsel points to no other issues that Kachinsky should have raised on appeal, and I cannot find any. Thus, Deichsel's claim fails.

**Additional material
from this filing is
available in the
Clerk's Office.**