

“Trial/Appellate Attorneys Just Don’t Understand”: A Discussion of Common Misconceptions and How We Can Better Work Together

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Waiver in Wisconsin and Claims of Ineffective Assistance of Counsel

- Wisconsin’s strict waiver rules shape how an issue which was not raised at the trial level must be raised post-conviction.
- Many other jurisdictions have a broad “plain error” doctrine which allows a litigant on appeal to raise unpreserved issues directly—not the case in Wisconsin. While “plain error” does technically exist in Wisconsin, it is typically reserved for extreme circumstances. Even then, a claim is often alternatively raised as ineffective assistance of counsel to prevent a finding of waiver or forfeiture. *See, e.g., State v. Miller*, 2012 WI App 68, 341 Wis. 2d 737, 816 N.W.2d 331.
- *What does this mean for trial and appellate attorneys in Wisconsin? It means that, for the most part, any existing issue which was not preserved at the trial level must be raised post-conviction through ineffective assistance of counsel.*
 - If an appellate attorney does not raise an unpreserved issue through ineffective assistance of counsel, a court will declare that this issue was waived or forfeited.
- *A guilty or no contest plea waives most issues for appeal, including many constitutional issues.*
 - “The general rule is that a guilty, no contest, or *Alford* plea waives all nonjurisdictional defects, including constitutional claims.” *State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886

- In criminal cases, a general exception is suppression motions: “An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest to the information or criminal complaint.” WIS. STAT. § 971.31(10)
 - **Be careful though, as the Court of Appeals has before applied a harmless error analysis (i.e. would the defendant have nevertheless entered the plea?) to an evaluation of a suppression claim in a plea case. *See, e.g., State v. Dawson*, 2014 WI App 16 (unpublished).
- *Trial attorneys should therefore be careful to make sure to correctly advise clients about whether an important issue will or will not be preserved for appeal—if you have any questions, contact an appellate attorney.*
- If your client enters a plea, and later seeks to withdraw that plea on grounds of ineffective assistance of counsel (for reasons such as inaccurate advice, failure to investigate, etc.), your client will have the burden to establish not only deficient performance on you as the trial attorney’s part, but also that but for the deficiency, the client would not have entered a plea and would have instead gone to trial. *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).
 - Case law makes clear that conclusory allegations (re what your client would or would not have done) are insufficient to meet this burden. *See, e.g., State v. Allen*, 2004 WI 106, ¶ 274 Wis. 2d 568, 682 N.W.2d 433.
 - It is often very difficult to meet this burden.
- For all claims of ineffective assistance, the defense must show that (1) trial counsel performed deficiently and (2) the deficient performance prejudiced the outcome of the client’s case. *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984).
 - The defense must be able to establish both components, otherwise the motion will be denied.

- Prejudice is assessed based on the cumulative effect of counsel's deficiencies. *State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305.
- Before a claim for ineffective assistance of counsel may succeed, the trial attorney must be given the opportunity to explain whether he or she had a strategic reason for the action/inaction. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).
 - It is the obligation of appellate counsel to ensure that trial counsel is present at the hearing, and to give trial counsel the opportunity to explain whether he/she had a strategic reason.
 - This means that it is appellate counsel's obligation to subpoena the trial attorney to be present. If the trial attorney agrees, service may be made via mail.
- Note: it is extremely challenging to raise a novel challenge, including novel constitutional claims, through ineffective assistance of counsel (as it is hard to argue that a trial attorney performed deficiently by failing to raise an issue that has never before been raised).

Trial Counsel's Obligations to the Client and Appellate Counsel Post-Conviction

- While this relationship can at times seemingly become adversarial, it is important to remember that a trial attorney still has obligations to a former client.
 - Keep in mind Wisconsin Rules of Professional Conduct, SCR Rule 20:1.6, Confidentiality, and Rule 20:1.9, Duties to Former Clients. Remember that the file belongs to the client.
- Trial counsel's post-sentencing obligations:
 - If not addressed at sentencing, it is trial counsel's obligation to ensure that the client has received the proper amount of sentence credit.
 - It is also trial counsel's obligation to address any issues related to restitution.

- If there is a good faith basis for seeking a motion for release pending appeal, it is the trial attorney's responsibility to litigate such a motion in the circuit court.
- It is also trial counsel's responsibility to advise the client of the right to appeal and file the notice of intent to pursue post-conviction relief, if the client so chooses.
- Additionally, though not post-sentencing, if there is an issue warranting pursuit of an interlocutory appeal, it is the trial attorney's responsibility to file the petition for leave to appeal in the court of appeals; if the petition is granted, and your case has been appointed through the SPD, contact the Appellate Division immediately. An interlocutory appeal is litigated by the trial attorney unless the appellate division agrees to take the case.
- If you are a trial attorney handling an SPD-appointment (or a SPD staff trial attorney), the agency's performance standards require that you "cooperate fully" with successor counsel.
 - "This includes promptly delivering the client file and answering questions about the earlier representation, unless the client has directed counsel not to do so."
 - Note: While you may wish to ask appellate counsel to provide some sort of receipt reflecting that you have provided him or her with the client's file, the agency's position is that you do not need a waiver from the client to provide the file to appellate counsel.