

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 15, 2012**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal No. 2011AP1424-CR**

**Cir. Ct. No. 2008CF5664**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RALPH S. STEWART,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Reversed and cause remanded.*

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

¶1 KESSLER, J. Ralph S. Stewart appeals from a judgment convicting him of possession of a firearm by a felon after a jury trial, and from an order denying his postconviction motion for a new trial based on ineffective

assistance of counsel. Because we agree with Stewart that his trial counsel was ineffective, we reverse the judgment of conviction and remand for a new trial.

### BACKGROUND

¶2 This case is before us for a second time. Stewart previously appealed his judgment of conviction following the denial of his postconviction motion for relief. We rejected most of Stewart's arguments, but concluded that he was entitled to a *Machner*<sup>1</sup> hearing based on his allegations of ineffective assistance of counsel. See *State v. Stewart*, No. 2010AP785, unpublished slip op. (WI App Nov. 18, 2010). Following a *Machner* hearing, the trial court found that Stewart's trial counsel was not ineffective and his request for a new trial was again denied.

¶3 The facts underlying this case are not complicated. Stewart and a companion, Corey Smith, were driving in the City of Milwaukee on the night of November 10, 2008, when they were stopped by police. When the police stopped the car, both Stewart and Smith exited the car from the passenger side and ran towards a nearby fence. Both Stewart and Smith attempted to climb over the fence. One of them dropped a gun in the process. Stewart was subsequently charged with being a felon in possession of a firearm. It is undisputed that both Stewart and Smith are African-American and that on the night of Stewart's arrest, both men were wearing similar clothing and it was dark outside.

¶4 At trial, the jury heard testimony from the arresting officers, David Bublitz and Xavier Luna. Bublitz testified that he saw Stewart, who he said was the driver of the car and the second person to exit the car, drop a gun as he was

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<sup>1</sup> See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

attempting to climb the fence. He further testified that he was “positive” Stewart was the one who dropped the gun—not Smith—and that he did not state otherwise to other investigating officers.

¶5 Luna corroborated Bublitz’s testimony to the extent that he testified the driver, and therefore the second person to exit the car, dropped the gun; however Luna testified that he did not see who the driver actually was.

¶6 Detective Jerome Sims also testified at trial. Sims testified that approximately thirty minutes after Stewart’s arrest, Sims interviewed Bublitz about the incident. Sims stated that Bublitz gave Sims a detailed account of the incident, including his observation that the passenger of the car—not the driver—was the one who dropped a gun while attempting to climb the fence. Sims further stated that he spoke with another officer, Sergeant Rochelle Gawin, who told Sims that she (Gawin) was told that the passenger dropped the gun.

¶7 The jury found Stewart guilty and he was convicted. As stated, Stewart filed a postconviction motion based, in part, on ineffective assistance of trial counsel. Specifically, Stewart’s motion argued that his trial counsel failed to introduce evidence that would have impeached Bublitz’s credibility. Stewart’s motion was denied; however, on appeal, we remanded for a *Machner* hearing.

¶8 At the *Machner* hearing, Stewart, through new counsel, argued that his trial counsel failed to introduce a report prepared by Sims, based on statements made by Luna to Sims, which twice identified Smith as the driver of the car. Stewart also argued that his trial counsel failed to introduce a report prepared by Officer Reginald Thompson, describing information provided by Bublitz, that also identified Smith as the driver. Stewart argued that because Bublitz testified at trial

that Stewart was the driver and that the driver dropped the gun, his trial counsel was ineffective for failing to introduce the reports as impeachment evidence.

¶9 Stewart's trial counsel, John Glover, testified at the *Machner* hearing. Glover initially stated that his main goal during trial was to impeach Bublitz and that he could not recall having strategic reasons for omitting the evidence at issue. He also testified that the omitted evidence might have been helpful to the defense. Later at the hearing, however, Glover stated that he "was trying to make the trial as clean and clear as possible for the jury." Introducing Luna's statement and Thompson's report, Glover stated, would have confused the jury. Instead, he testified that he chose to rely on Sims's testimony to impeach Bublitz.

¶10 In its oral decision, the trial court acknowledged that Glover did not "have clear recall of details, and ... that does include specific recall of specific trial strategy," but found that Glover had "some general recall of what his intentions were." The trial court determined that Glover provided effective assistance and denied Stewart's motion. This appeal follows. Additional facts are provided as necessary to the discussion.

## DISCUSSION

¶11 On appeal, Stewart argues that he is entitled to a new trial based on ineffective assistance of counsel and in the interest of justice. Because we conclude that Stewart's trial counsel was ineffective, we do not address whether Stewart is entitled to a new trial in the interest of justice. *See State v. Rice*, 2008 WI App 10, ¶15 n.4, 307 Wis. 2d 335, 743 N.W.2d 517 (court of appeals decides cases on the narrowest possible grounds). Therefore, we address whether Glover rendered ineffective performance by not introducing: (1) Sims's report, based on

Luna's statements, which twice identifies Smith as the driver; and (2) Thompson's report which states "P.O. Bublitz explained in his supplemental report that Smith was in fact operating and that Stewart was a passenger." (Some capitalization omitted.) We conclude that under the facts of this case, Glover was ineffective.

### **Standard of Review.**

¶12 In order to demonstrate ineffective assistance of counsel, the defendant must prove that his trial counsel's performance was deficient, and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The issues of deficient performance and prejudice constitute mixed questions of law and fact. *See State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). We will not upset findings of fact unless they are clearly erroneous, but whether counsel's performance was deficient and whether the deficient performance prejudiced the defendant are legal questions we decide *de novo*. *See id.* at 236-37.

### **Deficient Performance.**

¶13 An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting *Strickland*, 466 U.S. at 687). Stated differently, performance is deficient if it falls outside the range of professionally competent representation. *State v. Pitsch*, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See id.*; *Strickland*, 466 U.S. at 688. We indulge in a strong presumption that counsel acted reasonably within professional norms. *Pitsch*, 124 Wis. 2d at 637.

¶14 At the *Machner* hearing, Glover stated that his primary goal at trial was to impeach Bublitz. When testifying about Luna's statement in Sims's report, Glover stated:

I ... cannot think of a reason why at this time why I would not have brought this up. Just give me a second. If I would have seen this and I can't recall, but I believe the reason why I would not have included that is because I did not want to throw out, from a strategic perspective; strategy, tactic, too much contradictory evidence that would question Sims' testimony itself. It looks like you are not clear.

Upon further questioning, the following exchange took place between Stewart's postconviction counsel and Glover:

[Stewart's counsel]: My question is, yes or no, do you or do you not remember reading [Sims' report with Luna's statement] before trial?

[Glover]: I can't recall now whether I observed this 25 months or more ago.

[Stewart's Counsel]: So, then the testimony you gave about a possible reason for not using it is something that you are speculating about today. You don't know whether that was your actual thought process back then, right?

[Glover]: No. My thought process was to try to keep it as basic as possible ... but I don't recall. In other words, I wanted to focus on Detective Sims' testimony and how it impeached Officer Bublitz's testimony and I was always concerned about any other information that made the case too complicated that would raise the potential that I don't know what the witnesses are going to testify about.

¶15 Glover further testified that pointing out inconsistencies between Luna's testimony at trial and his statement to Sims would "confuse the jury," "show [the] incompetency of the police," and go against his strategy of "mak[ing] the trial as clean and clear as possible for the jury."

¶16 With regard to Thompson’s report stating “P.O. Bublitz explained in his supplemental report that Smith was in fact operating and that Stewart was a passenger[,]” Glover reiterated that his “strategy was [to] try to use Sims to penetrate Officer Bublitz’s testimony,” and that he did not want “it to get too complicated for the jury.” Bublitz testified that he never prepared a supplemental report. Indeed our record does not contain a supplemental report by Bublitz.

¶17 While matters of trial strategy are generally left to counsel’s professional judgment, counsel may be found ineffective if the strategy was objectively unreasonable. *See State v. Felton*, 110 Wis. 2d 485, 501-03, 329 N.W.2d 161 (1983). Here, we conclude that Glover’s “keep it as basic as possible” strategy is objectively unreasonable. The strategy, as implemented, involved Sims’s testimony as to what Bublitz reported to him. Sims was not questioned about Luna’s statement, nor was Luna confronted about the inconsistency between his trial testimony and his statement to Sims. Because the jury heard both Bublitz and Luna testify that the driver dropped the gun, it was incumbent upon trial counsel to put forth all evidence undermining the possibility that Stewart was the driver. Doing so would have further challenged Bublitz’s credibility.

¶18 Put another way, the question of whether Stewart dropped the gun centered around the credibility of the officers, particularly Bublitz. The State even acknowledged in its closing argument that “this case comes down to Officer Bublitz.” The State further requested that the jury find Stewart guilty based specifically on Bublitz’s testimony, stating: “And based upon the testimony of Officer Bublitz, I ask that you find the defendant guilty as charged of possessing the firearm.” Any information that would serve to undermine Bublitz’s testimony was essential to an effective defense. Glover acknowledged the importance of

challenging Bublitz's testimony by stating that his main goal at trial was to impeach Bublitz. Glover unreasonably failed to use significant available evidence that would have furthered this goal. See *State v. Thiel*, 2003 WI 111, ¶¶46, 50, 264 Wis. 2d 571, 665 N.W.2d 305 (concluding that "it was objectively unreasonable for [defendant]'s counsel not to pursue further evidence to impeach" the alleged victim).

¶19 Glover's concern for the appearance of police incompetence is also objectively unreasonable because Glover had already introduced evidence of police inconsistencies. Bublitz's testimony that Stewart was the driver and Luna's testimony that the driver dropped the gun already ran contrary to Sims's testimony that Bublitz identified Smith as the driver. Glover's explanation of the goal of simplicity defies the sound logic of the defense strategy to impeach Bublitz.

### **Prejudice.**

¶20 To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694).

¶21 As stated, the central question in this case—whether Stewart dropped the gun—hinged on Bublitz's credibility. Glover had information available which could have cast additional doubt on Bublitz's testimony. The jury did not hear this information. Introducing Sims's report would have challenged Bublitz's statements and forced Luna to confront the inconsistency between his

testimony and Sims's report. Glover stated at the *Machner* hearing that he was unsure of what Thompson would have testified to at trial because Thompson's report referenced Bublitz's non-existent report. However, Thompson's report both impeaches Bublitz and could be used to refresh Thompson's recollection if his testimony deviated from his report.

¶22 Bublitz was the only witness at trial who positively identified Stewart as the driver *and* as the person who dropped the gun. Luna corroborated Bublitz's testimony that the driver dropped the gun, but testified that he did not see whether the driver was Stewart or Smith. Bublitz stated that both Stewart and Smith are African-American, both were wearing similar clothing the night of their arrest, and that it was dark outside while Bublitz was chasing them. Bublitz also testified that he was familiar with Stewart prior to the night of the incident, but did not recognize him at the time of the chase. Therefore, evidence of Stewart's guilt was weak at best. The importance of credibility evidence in a case that depends so heavily on the credibility of one witness cannot be ignored.

¶23 Based on our review of the record, we conclude that Glover's failure to present available impeachment evidence that would cast doubt on the credibility of the State's principal witness undermines our confidence in the verdict. We conclude that there is a reasonable probability that the jury would have found Stewart not guilty if it had heard all of the available impeachment evidence. *See State v. Smith*, 207 Wis. 2d 258, 275, 558 N.W.2d 379 (1997) ("The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different.").

## CONCLUSION

¶24 For all the foregoing reasons, we reverse the judgment of conviction and remand for a new trial.

*By the Court.*—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

