

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 11, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3360-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BERNARD GRAEF,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown County: N. PATRICK CROOKS, Judge. *Affirmed.*

LaROCQUE, J. Bernard Graef appeals criminal convictions for operating a motor vehicle while under the influence and operating a motor vehicle while revoked, and an order denying a new trial.¹ Graef contends that trial counsel was ineffective (1) for failing to verify Graef's contention that an alleged escaped Huber law prisoner, Ray Delaney, was the driver; (2) failing to hire an investigator to search for Delaney; and (3) failing to introduce a police videotape to impeach the arresting officer. The trial court found that Graef

¹ This case was submitted for decision on the basis of Graef's brief alone by order dated May 14, 1996. By earlier order, dated April 25, 1996, the Brown County district attorney's office was given notice that it must request an extension to file a late brief pursuant to RULES 809.19 and 809.82, but did not respond.

failed to establish either deficiency of trial counsel or prejudice as required by *State v. Pitsch*, 124 Wis.2d 628, 369 N.W.2d 711 (1985). This court affirms.

BACKGROUND

At trial, Green Bay police patrolman Anthony Bloom testified that after a passerby stopped him to advise of a fight between a man and a woman "involving a pickup truck," a truck matching the description drove past. Bloom claimed that he got a good look at the driver, whom he said was alone and wore glasses, that he never lost sight of the vehicle and would have seen someone exit the truck. As soon as the truck stopped in Graef's driveway, Graef exited the truck on the driver's side wearing glasses. Bloom stated that his practice is to have the subject remove his glasses while performing certain field sobriety tests so that he can see the subject's eyes, and that afterward he would let the subject "hang on to [the glasses]." Bloom took Graef to the station for processing and left the task of securing the truck to two other officers. Bloom then called Graef's girlfriend, Debbie Noack, to inquire about domestic abuse. Noack declined to pursue a complaint but reported that she and Graef had been alone in the truck before Graef drove off.

Noack testified at trial, however, that she did not tell Bloom that she and Graef were alone. She said Delaney was a passenger when she left the vehicle following an argument, and that Delaney drove the truck away. According to her, Delaney called the next day to tell Noack he had the keys to the truck. A friend, Eugene Brux, drove her to a truck stop where she retrieved the truck keys. She then returned to the locked truck where she found Graef's glasses on the seat. Brux corroborated driving Noack to the truck stop, and he observed a man he assumed to be Delaney deliver a set of keys. Graef also testified that Delaney drove the truck. Graef explained that Delaney was wanted by authorities in Appleton as a Huber law walkaway, and when he saw the police car he jumped out and ran away. Graef then exited from the driver's side because he had to reach over and apply the brakes to stop the truck. Graef said he was not wearing glasses at the time because they had been knocked off when he and Noack exchanged slaps, and "I didn't have time to find them." Graef said Delaney later called him collect a couple of times, but when Delaney was asked to testify, he responded: "You've got to be nuts." Graef told the jury that Delaney had no home and lived in his semi-truck as he traveled nationwide.

The jury found Graef guilty. He then moved for a new trial on grounds of ineffective counsel. He maintained counsel failed to produce the videotape taken at the police station on the night of the incident to show Graef was not wearing glasses. Graef also asserted ineffective assistance of counsel for failing to verify that Delaney was in fact a Huber law walkaway and failing to hire an investigator to find him. Presumably, Graef is arguing that evidence that Delaney was a walkaway prisoner would have strengthened Graef's credibility.

At the motion hearing, trial counsel testified that he had viewed the video and did not produce it because "we were trying to stay away from the intoxication issue and concentrate on the fact that it didn't matter whether he was intoxicated." Counsel also testified Graef told him that Delaney was only in the area on rare occasions and "was probably staying out of the area." Graef was unable to provide him with any leads to Delaney's whereabouts.

Graef did not produce the videotape at the postconviction hearing. During argument, however, counsel made an "offer of proof" that the tape showed Graef without glasses, as an alternative to a motion to reopen the evidence. The trial court tacitly accepted as a fact counsel's assertion that Graef was not wearing glasses in the video. The court then found that failure to produce the tape for the jury was neither deficient performance nor prejudicial.

Graef also failed to produce evidence at the hearing to verify that Delaney was in fact an escapee. Again, the trial court tacitly accepted Graef's assertion as true. It then found that failure to investigate was neither deficient nor prejudicial.

Finally, new counsel contended that trial counsel should have engaged an investigator to try to locate Delaney. The postconviction evidence does not disclose whether steps were taken to locate Delaney for the motion hearing. The trial court found that even if Delaney were produced and claimed to have been the driver, his testimony would be merely cumulative to Graef's and Noack's testimony.

DISCUSSION

The two-part test for assessing counsel's representation under the Sixth Amendment in *Strickland v. Washington*, 466 U.S. 668 (1984), requires a defendant to show that counsel performed deficiently and that the deficient performance prejudiced the defense. *Id.* at 687. The court adopted a "reasonably effective assistance" of counsel standard. *Id.* The Supreme Court also issued a caution:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction ... and it is all too easy for a court, examining counsel's performance after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. ... [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (citation omitted).

In addition to deficient performance, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. The Wisconsin Supreme Court recently held that a defendant bears the burden of proving prejudice in an ineffective counsel claim under both the Wisconsin and United States Constitutions. *State v. Sanchez*, No. 94-0208-CR, slip op. at 1 (Wis. May 22, 1996). "Determining whether particular actions constitute ineffective assistance of counsel is a mixed question of law and fact. *Id.* at 6.

Trial counsel's decision regarding the video was not deficient performance. Contrary to Graef's contention, the tape is at best marginally relevant. The video only indirectly relates to whether Graef wore glasses when the officer first observed him. Bloom did not indicate that Graef put the glasses on after the field tests. Bloom's statement that he allowed subjects of OWI field tests to "hang on to" their glasses is not necessarily inconsistent with either the video or Noack's claimed discovery of the glasses in the truck. The jury could still draw reasonable inferences unfavorable to Graef: He may have placed the glasses on the seat before he was taken away, or Noack's testimony was inaccurate. Noack's testimony was suspect in several respects. Initially, she inaccurately recalled the time of the incident in question and the circumstances of Bloom's telephone conversation with her.

The record still fails to establish Graef's assertion of Delaney's escaped prisoner status. There is therefore no basis to conclude that failure to investigate was prejudicial.

Finally, trial counsel's failure to hire an investigator to search for Delaney was not deficient performance. Graef reported that Delaney was unwilling to return voluntarily and was living out of a truck while traveling throughout the country. Moreover, there is no basis to believe Delaney would corroborate Graef's contentions. Trial counsel need not exhaust all efforts to produce evidence without consideration of the likelihood of success. Graef's description of Delaney's conduct and telephone statements allowed counsel to reasonably conclude that finding Delaney would be an unrealistic task. Because counsel's performance in this respect was not deficient, it is unnecessary to discuss the trial court's finding that Delaney's testimony would be cumulative and unlikely to change the result.

By the Court. – Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.