

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 16, 1997

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, STATS.

NOTICE

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

No. 96-0573-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK C. HOLT,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Mark C. Holt appeals from a judgment of conviction for aggravated battery and a postconviction order denying his motion for a new trial for the claimed ineffective assistance of counsel. The

issue is whether Holt waived review of the ineffective assistance issue by failing to present his trial counsel's testimony at the postconviction hearing. We recently held that a defendant's failure to secure trial counsel's presence at a postconviction hearing waives review of an ineffective assistance of trial counsel claim. *State v. Mosley*, 201 Wis.2d 36, 50, 547 N.W.2d 806, 812 (Ct. App. 1996). Therefore, we affirm.

A jury found Holt guilty of the aggravated battery of Anthony Fiorucci. The State's principal witness who observed the altercation was James Skilling, a friend to both Holt and Fiorucci. Holt was staying at Skilling's apartment. Skilling watched Holt leave the apartment to get some beer from his car. In the street, Holt and Fiorucci argued, but Holt ultimately returned to Skilling's apartment with the beer. About thirty minutes later, Fiorucci arrived at Skilling's apartment with a baseball bat, "to beat Mark [Holt] up." Skilling observed the fight between Holt and Fiorucci and Holt was charged with aggravated battery, as a habitual offender. Holt claimed self-defense.

The focus of the ineffective assistance claim arises from trial counsel's failure to impeach Skilling on his prior record.¹ Rather than presenting the testimony of trial counsel, postconviction counsel filed trial counsel's affidavit. Trial counsel averred that, although aware of Skilling's prior convictions, Skilling's trial testimony was more helpful than harmful to Holt's defense, convincing counsel that it would not have been prudent to impeach

¹ In support of his postconviction motion, Holt filed the Wisconsin Department of Justice Criminal History Search Report which indicated that Skilling had been convicted of two misdemeanors, disorderly conduct and battery.

Skilling's credibility. The trial court denied the motion because it determined that Holt had not met his burden of proving that trial counsel's performance was deficient in his investigation of the case, and that his decision not to impeach Skilling on the prior convictions was a "reasonable and competent trial strategy decision...." Holt appeals.

To maintain a claim for ineffective assistance of trial counsel, "it is the duty and responsibility of subsequent counsel to go beyond mere notification and to require counsel's presence at the hearing in which his conduct is challenged." *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). This is required to provide a record of trial counsel's reasons for how the case was handled. On review, that record will enable us to determine whether the decisions and conduct in issue were the result of counsel's incompetence, or a deliberate trial strategy. *See id.* In *Mosley*, we held that the failure to procure trial counsel's presence at a postconviction hearing on an ineffective assistance claim waives review of that issue. 201 Wis.2d at 50, 547 N.W.2d at 812.

Holt contends that there may be certain instances, such as the one at bar, to which *Mosley* does not apply. However, Holt acknowledges that trial counsel's testimony is necessary "to protect against general, unsubstantiated opinions of dissatisfied defendants," but those are not the circumstances presented here because he has identified the manner in which the presentation was defective. Holt has not convincingly distinguished *Mosley*. The submissions in this case are insufficient to avoid producing trial counsel, as *Mosley* requires.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.