

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 8, 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. 96-0999-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES J. WARDELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. James Wardell appeals from a judgment convicting him on eight felony and misdemeanor counts and from an order denying postconviction relief. The issue is whether Wardell received effective assistance of trial counsel. We conclude that he did and therefore affirm.

After a day of heavy drinking, Wardell confronted several police officers on premises belonging to his friend, Keith Welsh. Using a sawed-off shotgun, Wardell shot two of the officers. A short time later, another officer fired two shots at Wardell, who was still holding the shotgun. Wardell returned fire. He was then disarmed by Welsh and arrested. When Wardell was later searched at the Grant County jail, officers discovered marijuana and drug paraphernalia.

Wardell's subsequent jury trial resulted in a conviction on three counts of attempted first-degree intentional homicide by using a dangerous weapon, one count of second-degree recklessly endangering safety, one count of resisting or obstructing an officer, and two misdemeanor drug counts resulting from the search. Wardell also pleaded no contest as a felon in possession of a firearm.

Wardell filed a postconviction motion alleging ineffective assistance of trial counsel. He contended that counsel should have raised a self-defense claim on the attempted homicide charge for shooting at the officer who had just fired at him. He also contended that counsel should have moved to sever the two drug charges and should have raised defense of property as a defense against all three attempted homicide charges. The trial court rejected those arguments and denied relief, resulting in this appeal.

To prove effective assistance of counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. *See State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *Id.* at 636-37, 369

N.W.2d at 716. Prejudice results when there is a reasonable probability that but for counsel's errors the result of the proceeding would have differed. *Id.* at 642, 369 N.W.2d at 719. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 637, 369 N.W.2d at 716. Whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law. *Id.* at 634, 369 N.W.2d at 715.

Counsel reasonably chose not to raise a self-defense claim to the attempted homicide charge. Wardell claims that the defense had a reasonable chance of succeeding because he was just looking around and not pointing his gun at any of the officers when Deputy Krohn fired at him. The trial court characterized self-defense in those circumstances as "beyond an imaginative defense." We agree. A person is privileged to use force against another to prevent or terminate what the person reasonably believes to be an unlawful interference with his or her person by the other person. Section 939.48(1), STATS. Here, when Krohn fired, Wardell had shot two other officers seconds before and still held the gun. Evidence from several witnesses established that Wardell knew that the persons he shot were police officers. Under those circumstances, no reasonable jury could have found that Wardell reasonably believed that Krohn was acting unlawfully.

Under § 939.48(2)(a), STATS., a person who unlawfully provokes others to attack him may still claim the privilege of self-defense when the provoked attack causes the provoking person to reasonably believe that he or she is in imminent danger of death or great bodily harm. That privilege is not available, however, unless the provoking person reasonably believes that he or she has exhausted every other reasonable means to escape from or otherwise avoid

death or great bodily harm. *Id.* Here, no reasonable jury would have concluded that Wardell reasonably believed that he had exhausted every other reasonable means of resolving the situation, such as dropping his gun and surrendering.

Counsel reasonably chose not to request severance of the two misdemeanor drug counts. Counsel testified that she believed the jury might convict Wardell on lesser included crimes on the more serious charges if it also had the option of convicting him on the drug counts. That was a reasonable strategic decision. Additionally, Wardell has failed to reasonably explain how excluding the two relatively insignificant drug charges would have resulted in a different verdict on the felony counts.

Counsel reasonably chose not to advance a defense of property claim to defend the attempted first-degree intentional homicide charges. Under § 939.49(2), STATS., a person is privileged in certain circumstances to defend a third person's property from real or apparent unlawful interference, provided that the person reasonably believes that the third person was privileged to defend his or her own property and that the intervention is necessary for the protection of the third person's property. As noted, witnesses testified that Wardell knew that the people he attacked were police officers. Additionally, the privilege does not extend to force intended or likely to cause death or great bodily harm if the sole reason for the act is the defense of property. Section 939.49(1). All of Wardell's felony charges derived from the nonprivileged use of lethal force. Counsel reasonably concluded that a defense of property claim could not succeed.

By the Court.—Judgment and order affirmed.

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

