COURT OF APPEALS
DECISION
DATED AND FILED

August 7, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2672-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GARY E. WOLFGRAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Monroe County: MICHAEL J. MC ALPINE, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Gary Wolfgram appeals his convictions for felony possession of a controlled substance with intent to manufacture, felony warehousing of a controlled substance, and misdemeanor obstructing an officer, as well as two orders denying his motions for a new trial on the basis of newly discovered evidence and ineffective assistance of counsel. Wolfgram's primary

claims on appeal are that his defense attorney failed to properly investigate information that someone other than the defendant had cut marijuana stalks seized by the police from the farmland he was leasing, and that the circuit court erroneously refused to grant him a new trial when, two months after his conviction, an itinerant farm worker allegedly admitted to Wolfgram's parents that he had cut the marijuana. However, Wolfgram cannot prevail on these contentions because he failed to show what steps defense counsel could have taken which would have revealed the farm worker's identity, and he failed to produce the farm worker at his postconviction hearing. Instead, he requested the court to set aside his conviction on the basis of hearsay testimony. For the reasons discussed below, we conclude that Wolfgram's other assignments of error are similarly without merit. Accordingly, we affirm the judgment and orders of the circuit court.

BACKGROUND

Wolfgram leased and operated a 28-acre cattle farm on which marijuana[1] had grown wild for years. The police were aware of the marijuana, and past efforts had been made to control it by burning. In September of 1992, the police received a tip that marijuana was being grown and harvested on the farm. On September 22, the police entered the property, and found cut marijuana stalks drying in the milk house and other marijuana plants from which the leaves and buds had been stripped.

On September 25, 1992, during surveillance of the property, police officers observed Wolfgram arrive at the farm and enter the milk house. He came

[1] Wild marijuana contains telrahydrocannabinols (THC), a controlled substance, just as the more cultivated variety of the marijuana plant does.

out with a number of marijuana stalks. The officers observed Wolfgram tie up the bundle of marijuana, then head in the direction of a nearby pasture and a ravine. The police moved to arrest Wolfgram, but he dropped the stalks and ran, notwithstanding the officers' orders directing him to stop and identifying themselves as police officers. He was apprehended in a nearby farm field, and eventually charged with one count of possession with intent to manufacture the controlled substance THC, contrary to § 161.41(1m)(h)3., STATS.,[2] one count of warehousing THC contrary to § 161.42(1), STATS.,[3] and one count of obstructing an officer, contrary to § 946.41(1), STATS.

In June of 1994, approximately eleven days before trial, Wolfgram's attorney interviewed Remberto Gonzales, who claimed to know who had really cut the marijuana. However, he refused to identify the alleged marijuana-cutter, because he was on probation and did not want to get involved. Wolfgram convinced his attorney not to subpoena Gonzales for trial for fear that he would flee to Mexico, and defense counsel did not tell the trial court of Gonzales' existence or ask for a continuance when he subsequently failed to appear for trial, as he had represented he would.

Wolfgram testified at trial, and denied that he had cut the marijuana. He said he was simply carrying the stalks to a nearby ravine to rot. During his testimony, he began to hyperventilate from nervousness; however, his attorney did not ask for a recess. Defense counsel did object when the prosecution questioned

[2] Section 161.41, STATS., was amended and renumbered to § 961.41, STATS., by 1995 Act 448 § 245, eff. July 9, 1996.

[3] Section 161.42, STATS., was renumbered to § 961.42 by 1995 Act 448, § 267, eff. July 9, 1996.

whether Wolfgram had requested that someone tell the police that he previously had cut weeds for his neighbor and put them in the ravine. However, counsel failed to ask the questions which the trial court suggested he could ask, which would have clarified that the weeds Wolfgram had cut in the past were not marijuana and were not located on the same farm. As a result, Wolfgram's next to last testimony before the jury was "I did cut them for him," arguably contradicting his prior assertions that he did not cut the marijuana stalks.

Wolfgram was convicted on all three counts. The trial court sentenced him to six years on the manufacturing count, but stayed the sentence with a ten-year probation period conditioned on serving one year in jail with Huber privileges. The court withheld sentence on the warehousing and obstruction counts, imposing four and two-year concurrent probation terms, respectively.

On July 7, 1994, about three weeks after the trial, Wolfgram's father asked an itinerant farm worker, Pablo Milian, whether he had cut the marijuana stalks, and Milian allegedly admitted that he had. Wolfgram moved for a new trial on the basis of new evidence, but did not produce Milian at the hearing on his motion. Instead, he relied on his mother's testimony regarding her conversation with Milian, and some secretly recorded tapes of a conversation with Milian. After the motion for a new trial was denied, Wolfgram filed another motion for a new trial based on ineffective assistance of counsel, which was also denied.

DISCUSSION

Standard of Review.

The question of whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994) (citing ***Strickland v. Washington***, 466 U.S. 668, 698 (1984)). The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985); § 805.17(2), STATS. However, the ultimate conclusion of whether counsel's conduct violated the defendant's right to effective assistance of counsel is a question of law, which this court decides without deference to the circuit court. ***State v. Johnson***, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986).

The circuit court's decision to deny Wolfgram a new trial on the basis of newly discovered evidence was a discretionary determination. Section 805.15(1), STATS.; ***State v. Kimpel***, 153 Wis.2d 697, 702, 451 N.W.2d 790, 792 (Ct. App. 1989). We will uphold a discretionary determination by the trial court so long as the record shows that the trial court logically interpreted the facts and applied the proper legal standard to them. ***State v. Rogers***, 196 Wis.2d 817, 829, 539 N.W.2d 897, 901 (1995). However, we may independently determine whether the denial of a new trial deprived the defendant of constitutionally guaranteed due process. ***State v. Coogan***, 154 Wis.2d 387, 394-95, 453 N.W.2d 186, 188 (Ct. App. 1990). In addition, we will independently consider the record to determine whether to exercise our own discretionary reversal power under § 752.35, STATS.

Ineffective Assistance of Counsel.

The right to effective assistance of counsel stems from the Sixth Amendment to the United States Constitution, which guarantees a criminal defendant a fair trial.[4] *See* ***Strickland***, 466 U.S. at 684-86. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Id***. at 687. The defendant has the burden of proof on both components of the test. ***Id.*** at 688.

To prove deficient performance, a defendant must establish that his or her counsel "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) (citing ***Strickland***, 466 U.S. at 687). The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id***. Professional norms require only that counsel's performance be adequate, not error free. ***State v. Williquette***, 180 Wis.2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993).

To satisfy the prejudice prong, the defendant must show that "counsel's errors were serious enough to render the resulting conviction unreliable." ***State v. Toliver***, 187 Wis.2d 346, 359, 523 N.W.2d 113, 119 (Ct. App. 1994). This means that "there is a reasonable probability that, but for

[4] The Wisconsin Constitution also guarantees a criminal defendant a fair trial. WIS. CONST. art. 1, § 7. However, Wisconsin courts use the same analytical framework for state ineffective assistance of counsel claims as is used for federal claims. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 at 693.

1. Failure to Subpoena Gonzales.

Wolfgram first alleges that his counsel was ineffective because he failed to subpoena Gonzales, the man who had told defense counsel that another individual had admitted cutting and storing the marijuana. However, the defendant himself advised counsel that Gonzales was likely to flee to Mexico if he were subpoenaed and requested that he not be subpoenaed. Therefore, the decision not to issue a subpoena was a reasonable strategic decision within the norms of professional conduct, and did not constitute deficient performance. *See* ***Strickland***, 466 U.S. at 691 (noting that "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable"). Nor did the decision prejudice Wolfgram, because Gonzales' testimony about statements made by an unidentified third party would have been inadmissible hearsay. *See* §§ 908.01 and 908.02, STATS.

2. Failure to Investigate.

Wolfgram next complains that his defense counsel should have tried harder to locate the man to whom Gonzales had referred. Counsel testified that because Gonzales' conversation occurred in the jail, he did contact the jail to learn whether there might be any tape recordings of Gonzales' conversation with the unidentified man. However, he admitted that he did not request any assistance from the district attorney, the court, or the probation or parole agents because he did not wish to disclose his defense to the State.

Assuming for the sake of argument that counsel's performance in this regard could be deemed deficient, Wolfgram must still show prejudice. In order to show that a failure to investigate prejudiced a defendant, the defendant "must [demonstrate] with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." ***State v. Flynn*** 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994). Wolfgram has failed to demonstrate that further investigation by any of the cited individuals would have revealed the identity of Pablo Milian.[5] Rather, he maintains that his lawyer "should have followed the trail and Mr. Gonzales' information even if it led nowhere." While this may have been good practice, counsel's failure to conduct a futile investigation did not alter the outcome of the trial, and thus was not prejudicial.

3. Failure to Seek Adjournment.

Wolfgram also claims that he was prejudiced by counsel's failure to seek an adjournment either prior to trial, or after Gonzales failed to show up, and by his failure to request that a bench warrant or material witness warrant be issued under §§ 968.09(1)[6] or 969.01(3),[7] STATS. However, these contentions must fail for the reasons already discussed above: Wolfgram made no showing that further investigation would have yielded any useful results, and Gonzales could not have

[5] In fact, in the newly discovered evidence portion of his brief, Wolfgram argues the opposite – that counsel could not have anticipated the discovery of Milian's identity.

[6] Section 968.09(1), STATS., was amended to include gender neutral language by 1993 Act 486, § 683, eff. June 11, 1994.

[7] Section 969.01(3), STATS., was amended to include gender neutral language by 1993 Act 486, § 691, eff. June 11, 1994.

testified to the hearsay conversation, even if he had been compelled to appear. No prejudice resulted from counsel's decision not to pursue any of these options.

4. Failure to Ask for Recess.

Wolfgram next alleges that he was denied effective assistance of counsel when his attorney failed to request a recess after the defendant exhibited signs of hyperventilation or nervousness while testifying on his own behalf. The State concedes that Wolfgram's panic attack likely damaged his credibility with the jury. However, defense counsel testified at the postconviction hearing that his intention at that point was to get Wolfgram off the stand as soon as possible. He said that a recess would have only prolonged and accentuated Wolfgram's difficulty on the stand. This assessment was within the range of appropriate professional judgment, and did not constitute deficient performance. Moreover, the State aptly notes that there is no reason to believe that Wolfgram would not have continued to display similar signs of nervousness after a recess. In short, Wolfgram has failed to show a reasonable probability that the outcome of the trial would have been different if defense counsel had interrupted his testimony by requesting a recess.

5. Failure to Object to the "Falsus in Uno" Instruction.

Wolfgram's final[8] allegation of ineffective assistance of counsel rests on his attorney's failure to object to the trial court's instruction that the jury could use its discretion to disregard all of his testimony if it found that he had

[8] Wolfgram's appellate brief also alleges, for the first time, that counsel failed to ask proper clarifying questions regarding testimony about the defendant cutting weeds for a neighbor. However, we decline to address issues which were not properly raised before the circuit court. ***State v. Schultz***, 148 Wis.2d 370, 379 n.3, 435 N.W.2d 305, 309 n.3 (Ct. App. 1988).

willfully testified falsely as to any material fact. However, counsel is not obligated to object to an instruction which correctly states the law. ***State v. Traylor***, 170 Wis.2d 393, 405, 489 N.W.2d 626, 631 (Ct. App. 1992). Although disfavored, the *falsus in uno, falsus in omnibus* instruction may be given when there has been a willful and intentional false testimony on a material point. ***State v. Lagar***, 190 Wis.2d 423, 434, 526 N.W.2d 836, 840 (Ct. App. 1994). Therefore, the trial court did not misstate the law in its instruction. Furthermore, the instruction was warranted by evidence in the record, since Wolfgram denied knowing that the arresting officers from whom he fled were police, despite the officers' testimony that they repeatedly identified themselves as police officers and had a marked police vehicle. The jury could have found that Wolfgram lied on this point, which was material to the obstructing an officer charge on which he was convicted. Counsel's failure to object to the instruction did not constitute deficient performance.

In light of our determination that few, if any, of counsel's acts constituted deficient performance, and that none of the complained of conduct was prejudicial in and of itself, Wolfgram's argument that the cumulative effect of counsel's errors was prejudicial must fail. *See* ***State v. Simpson***, 185 Wis.2d 772, 786, 519 N.W.2d 662, 667 (Ct. App. 1994) ("[Z]ero plus zero equals zero.") (citation omitted).

Newly Discovered Evidence.

Wolfgram next contends that the circuit court erroneously exercised its discretion when it refused to grant his postconviction motion for a new trial based on Milian's alleged confession to Wolfgram's parents that he had actually cut the marijuana stalks. In order to warrant a new trial on the basis of newly

discovered evidence, Wolfgram must show by clear and convincing evidence: (1) that he was unaware of the evidence until after the trial; (2) that he was not negligent in seeking to discover the evidence; (3) that the evidence was material to an issue at trial; (4) that the evidence would not be merely cumulative to that already produced at trial; and (5) that it is reasonably probable that the evidence would lead to a different result at a new trial. ***State v. Eckert***, 203 Wis.2d 497, 516, 553 N.W.2d 539, 546-47 (Ct. App. 1996); ***State v. Brunton***, 203 Wis.2d 195, 200-08, 552 N.W.2d 452, 456-57 (Ct. App. 1996). The proffered evidence must qualify to be admitted at the new trial which is being requested.

The State does not contest the first or fourth criteria, that Wolfgram was unaware of Milian's possible role prior to trial, and that Milian's testimony would have been more than merely cumulative. However, it maintains that Wolfgram has failed to meet his burden of proof on the second issue regarding negligence. The State claims that the record is insufficient to establish whether or not Wolfgram was negligent, because, absent his father's testimony, there is no way to know what prompted his father to ask Milian about cutting the marijuana stalks. We agree. It is impossible to determine whether someone should have questioned Milian sooner without knowing what information led to questioning him in the first place. Since Wolfgram carried the burden of proof, his motion for a new trial would fail on this criterion alone.

Additionally, Wolfgram failed to satisfy the third and fifth criteria, relating to materiality and probability of producing a different outcome, because he failed to produce Milian at the postconviction hearing. Milian's absence at the evidentiary hearing not only raised a question as to his availability for a new trial, it also left unanswered such basic questions as whether the marijuana which he purportedly admitted cutting was the same marijuana for which Wolfgram was

arrested two years earlier, and if so, whether Wolfgram had any knowledge of Milian's activities. The latter question is especially important because Wolfgram was charged with drying and storing the marijuana, not just cutting it. The tape recording of Milian's alleged confession, even if objections to its admissibility could be overcome, does not answer these questions. Therefore, we cannot conclude it is more likely than not that Wolfgram would have been acquitted at a new trial, without knowing if Milian would testify, and if so, what he would say.

Discretionary Reversal.

Section 752.35, STATS., allows this court to reverse a judgment by the circuit court "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." These require separate analyses. ***State v. Wyss***, 124 Wis.2d 681, 732, 370 N.W.2d 745, 770 (1985). We may conclude that the controversy has not been fully tried either when the jury was not given the opportunity to hear testimony relating to an important issue in the case, or when the jury had before it improperly admitted evidence which confused a crucial issue. ***Id***. at 735, 370 N.W.2d at 770-71. The miscarriage of justice standard requires a showing that a different result would be substantially probable upon retrial. ***Id***. at 741, 370 N.W.2d at 773. In either case, however, we will exercise our discretionary reversal power only sparingly. ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990).

Wolfgram argues that he is entitled to a new trial under each prong of § 752.35, STATS. However, we have already discussed why the defendant has failed to show that a different outcome would be probable upon retrial. Therefore, the interests of justice do not require reversal.

Similarly, Wolfgram has failed to show that the real controversy was not fully tried. As noted above, Gonzales' testimony would have been inadmissible, and there has been no showing that Milian would have been available for trial. Therefore, there is no reason to believe that the jury would hear new, significant testimony at a new trial.

CONCLUSION

Wolfgram failed to demonstrate that he was prejudiced by defense counsel's failure to subpoena Gonzales or use the State's resources to investigate his information. His decision not to ask for a recess when Wolfgram had difficulty breathing on the stand, and his failure to object to the *falsus in uno* jury instruction are insufficient for us to conclude that counsel was ineffective. Wolfgram also failed to show that he would be able to present the testimony of his newly discovered, exculpatory witness at a new trial. Therefore, we conclude that Wolfgram received effective assistance of counsel and that the circuit court properly exercised its discretion when it denied Wolfgram's motion for a new trial.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.