COURT OF APPEALS
DECISION
DATED AND RELEASED

July 3, 1997

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, STATS.

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

Nos. 96-1937-CR and 96-2789-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD J. PARKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed.*

ROGGENSACK, J.[1] Edward J. Parker appeals from a judgment convicting him of a fifth offense of operating a motor vehicle while intoxicated (OMVWI) and a fifth offense of operating after revocation (OAR), the resulting sentence, and an order denying his motion for postconviction relief. He claims

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

that he was subjected to double jeopardy and that his due process right to a fair trial was violated when evidence of his prior convictions was admitted at trial and available to the jury during their deliberations. He also contends he was denied effective assistance of counsel because his attorney failed to cross examine the arresting officer about the officer's opportunity to observe the driver of the vehicle at the time of the incident. For the reasons discussed below, this court rejects appellant's assignments of error and affirms the judgment of conviction and order denying postconviction relief.

BACKGROUND

Monroe County Police Officer Laird Raiten stopped a vehicle owned by Thomas Slater on the evening of December 28, 1994 to investigate his suspicion that the driver was intoxicated. When Raiten initially pulled up behind the Slater vehicle, he observed that the driver had short hair and the passenger had shoulder length hair. As the officer was preparing to exit his squad car, the Slater vehicle started again and proceeded through a gas station parking lot, where Raiten cut the car off and approached with his weapon drawn.

Raiten opened the driver's door and ordered the short-haired Parker out of the car from the driver's side. He recognized both Parker and Slater, who was sitting on the passenger side of his car, from prior police contacts. Parker insisted that he was not the driver. However, Raiten arrested him for OMVWI and took him to a local hospital for blood tests, which showed an alcohol concentration of .318%. The officer issued citations for OMVWI, PAC, and OAR.

Parker was charged in a criminal complaint with fifth offenses of OMVWI and PAC as a habitual offender contrary to §§ 346.63(1)(a) and (1)(b), STATS., and a fifth offense of OAR contrary to § 343.44(1), STATS. Prior to trial,

the State moved to introduce evidence of Parker's prior convictions to show knowledge of revocation. The court ruled that the evidence could be used as rebuttal, if the defendant testified that he had no knowledge of the revocation or suspension.

The matter was tried to a jury on March 17, 1995. Raiten testified about the events leading to Parker's arrest. The State also used its direct examination of Raiten to introduce evidence of Parker's driving record, without objection from Parker's defense counsel, William Flottmeyer. Additionally, even though Parker had told Flottmeyer prior to trial that there was a pile of tarps in the back seat of the car which could obstruct Raiten's view of Parker, Flottmeyer never questioned Raiten about the tarps.

Slater testified that he was a long time friend of Parker's. He stated that he was not driving (or, at the least, could not remember driving) the night Parker was arrested, but that Parker had approached him prior to trial and asked him to testify that he was the driver. He admitted that he had told defense counsel that he was the driver in order to help his friend. He also testified that Parker had approached him during a break in his testimony and called him a rotten bastard.

Parker took the stand and denied that he had been driving. On cross-examination, the prosecution questioned Parker about his prior convictions for other crimes in addition to drunk driving, again without objection from defense counsel. The trial court instructed the jury, among other things, that evidence that the defendant had been convicted of other crimes had been admitted "solely because it bears upon the credibility of the defendant as a witness."

The jury convicted Parker on all three counts,[2] and the court sentenced him to twelve months in jail, a $2,700 fine, and a thirty-six-month license revocation for the fifth OMVWI count; and a consecutive nine months in jail, a $3,145 fine and a six-month revocation on the fifth OAR count.

Parker moved for postconviction relief. At the hearing on Parker's motion for a new trial, Parker's stepfather, John Foley, testified that earlier in the day on December 28, 1994, he gave Slater and Parker several tarps to place around Slater's trailer. Slater testified that the tarps were piled all the way up to the window level, in the rear of his car at the time of the traffic stop. He stated that his rear defroster did not work, and that both the driver's and passenger's seats had headrests. Flottmeyer testified that he didn't pursue this obstruction of view evidence because, until shortly before trial, he thought that Slater would be testifying that he had been driving. The trial court denied Parker's motion, concluding that he had failed to show prejudice from any of the alleged errors.

DISCUSSION

Standard of Review.

This court reviews allegations of double jeopardy and due process violations *de novo*. ***State v. Sauceda***, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992) (double jeopardy); *see* ***State v. Evans***, 187 Wis.2d 66, 82, 522 N.W.2d 554, 560 (Ct. App. 1994) (due process right to a fair trial).

[2] Conviction of OMVWI and PAC for the same conduct is permissible, but sentencing may be done for only one of the convictions. Section 346.63(1)(c), STATS.; ***Menasha v. Bastian***, 178 Wis.2d 191, 195, 503 N.W.2d 382, 383 (Ct. App. 1993).

Whether to permit an exhibit to go into the jury room during their deliberations rests in the discretion of the circuit court. ***State v. Jensen***, 147 Wis.2d 240, 259, 432 N.W.2d 913, 921-22 (1988). A circuit court also has broad discretion when instructing a jury. ***Fischer v. Ganju***, 168 Wis.2d 834, 849-50, 485 N.W.2d 10, 16 (1992). Therefore, we will not overturn the circuit court, unless it has erroneously exercised its discretion. *See* ***Jensen***, 147 Wis.2d at 260, 432 N.W.2d at 922.

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 Smith'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).

Double Jeopardy.

Parker claims that admitting evidence of his prior convictions subjects him to double jeopardy. The Fifth Amendment of the United States Constitution provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause includes three distinct constitutional guarantees: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution

after a conviction; and (3) protection against multiple punishments for the same offense. ***State v. Kurzawa***, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717 (1994).

The concentration of alcohol sufficient to violate § 346.63(1)(b), STATS., is dependent, to some degree, on whether there have been prior PAC convictions. Section 340.01(46m), STATS., 1993-94.[3] For example, § 340.01(46m) defines what constitutes a prohibited blood alcohol concentration as follows:

> (a) If the person has one or no prior convictions, suspensions or revocations, as counted under s. 343.307(1), a blood alcohol concentration of 0.1% or more by weight of alcohol in the person's blood or 0.1 grams or more of alcohol in 210 liters of the person's breath.
>
> (b) If the person has 2 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), a blood alcohol concentration of 0.08% or more by weight of alcohol in the person's blood or 0.08 grams or more of alcohol in 210 liters of the person's breath.

However, proving the fact of a prior conviction in no way relitigates the underlying issues supporting that conviction. Thus, the defendant is not being prosecuted or punished again for the prior offense. ***Kurzawa***, 180 Wis.2d at 525, 509 N.W.2d at 722. Furthermore, the constitutionality of admitting prior drunk driving convictions has been upheld in ***State v. Ludeking***, 195 Wis.2d 132, 141, 536 N.W.2d 392, 396 (Ct. App. 1995). The appellant urges this court to overturn or modify ***Ludeking***. However, a published decision by the court of appeals is binding and must be followed as precedent by all other intermediate courts, even if

[3] This provision was amended by 1995 Act 436, § 12, eff. Oct. 1, 1996. The changes do not affect our analysis.

wrongly decided. ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997). Therefore, we reject Parker's invitation to disregard ***Ludeking***. The admission of Parker's prior OMVWI convictions did not subject him to double jeopardy.

Due Process.

The right to a fair trial is protected by the Fifth Amendment's due process guarantees which are applied to the states through the due process clause of the Fourteenth Amendment. ***Evans***, 187 Wis.2d at 82-83, 522 N.W.2d at 560. The right of confrontation and compulsory process grant the defendant the constitutional right to present relevant evidence that is not substantially outweighed by its prejudicial effect. ***Id.***

1. Admission of prior convictions.

Parker argues that the jury was unfairly prejudiced by hearing the evidence of his prior convictions from a law enforcement officer on the stand, rather than from the clerk of courts as occurred in ***Ludeking***. However, the appellant cites no authority for the novel proposition that the admissibility or constitutionality of otherwise relevant evidence declines as the credibility of the witness from whom it is elicited increases. Arguments unsupported by references to legal authority will not be considered by this court. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

2. Jury instruction.

A conviction will not be reversed based on an erroneous instruction, unless it is probable that the jury was mislead. ***Fischer***, 168 Wis.2d at 849, 485 N.W.2d at 16. Parker claims that the jury could have been confused by the

instruction that his prior convictions of other crimes were to be considered only for credibility purposes, when they were actually admitted pursuant to a pre-trial ruling to show his knowledge that he was operating after revocation.

The court's other crimes standard Criminal Instruction No. 327 was appropriate because convictions, in addition to those involving driving while intoxicated, were admitted. Additionally, the record does not show Parker ever requested the court to give standard Criminal Instruction No. 2660B. And while it may have been an appropriate instruction, we cannot conclude that the jury was mislead due to its absence.

3. Driving record to jury.

When deciding whether or not to permit certain exhibits to go to the jury, a circuit court should consider: (1) whether the exhibits will aid the jury in proper consideration of the case, (2) whether permitting the jury to view them would be unduly prejudicial to a party, and (3) whether the exhibits could be used improperly by the jury. ***Jensen***, 147 Wis.2d at 259, 432 N.W.2d at 921-22. Parker complains that the judge failed to make any findings about the application of these factors before permitting certified copies of his prior conviction records to be seen by the jury. However, Parker did not object to permitting the exhibits to be reviewed by the jury during their deliberations. When no objection is made to an alleged error, the trial court has no opportunity to exercise its discretion, and the error is deemed waived. ***State v. Fawcett***, 145 Wis.2d 244, 256, 426 N.W.2d 91, 96 (Ct. App. 1988). Given the exhibits at issue and the circumstances of this case, we conclude the trial court did not erroneously exercise its discretion by permitting them to go to the jury.

Ineffective Assistance of Counsel.

The right to effective assistance of counsel stems from the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution, which guarantee a criminal defendant a fair trial. *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***. To satisfy the prejudice prong, the defendant must show that "counsel's errors were serious enough to render the resulting conviction unreliable." ***State v. Smith***, 198 Wis.2d 820, 827, 543 N.W.2d 836, 838 (Ct. App. 1995).

Parker argues that he was prejudiced by defense counsel's failure to investigate the possible visual obstructions caused by the tarps, or headrests. However, even if counsel's performance could be held deficient, Parker cannot meet the prejudice prong. The arresting officer was very clear about his observations of the car, and which of the two men was driving when he first stopped the car. Furthermore, it was uncontroverted that Parker was sitting behind the wheel when Raiten opened the driver's side door.

Parker had a blood alcohol content of .318%, and large blanks in his recollections of the incident. He was properly impeached with his convictions for several non-traffic crimes. Slater's memory of the evening was similarly impaired. Thus, it is not probable that the jury would have credited the obstruction of view testimony of either man over the testimony of Raiten. Moreover, the jury heard that Parker had solicited Slater to commit perjury, and called him a rotten bastard when he declined to do so. In light of all of the evidence, the outcome was not rendered unreliable by the absence of evidence regarding tarps in the back seat.

Cumulative Effect.

Parker argues that even if none of his alleged errors is individually sufficient to warrant reversal, the cumulative effect entitles him to a new trial in the interests of justice under § 752.35, STATS. However, in light of our decision that the conviction was reliable, this court declines to exercise its discretionary reversal power.

CONCLUSION

Admitting evidence of prior convictions as an element of a current offense does not violate the principle of double jeopardy. Furthermore, evidence of Parker's prior convictions was properly admitted as impeachment evidence in this case. Therefore, even if the convictions could have been excluded earlier in the case or kept from the jury during its deliberations upon proper objection, no prejudice resulted, and the proceeding was not made fundamentally unfair so as to deprive Parker of due process of law. Finally, Parker was not denied effective assistance of counsel when his attorney relied on a witness who changed his story shortly before trial, because there was no reasonable probability that the outcome

of the case would have been different had defense counsel pursued another avenue.

By the Court.—Judgment and order affirmed.

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