COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2435-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM E. CONLEY,

DEFENDANT-APPELLANT,

CHARLES E. CONLEY,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. William E. Conley appeals from a judgment of conviction after a jury found him guilty of attempted first-degree homicide, party

to a crime and attempted armed robbery, party to a crime, and from an order denying him postconviction relief. He claims that trial counsel was ineffective for failing to investigate his theory of defense and failing to present available expert testimony in support of it. We affirm.

I. BACKGROUND.

On October 9, 1991, Conley entered a Citgo Quick Mart in the city of Milwaukee with his brother. Conley shot the clerk and attempted to take money from the cash register and the store safe while his brother acted as the lookout. Both then fled. The victim, who was shot in the chest, survived and, although significantly disabled because of the shooting, identified Conley in a police line-up and again at trial. This identification was corroborated by others who witnessed Conley leaving the station immediately after the shooting. The Quick Mart's surveillance system also recorded the incident on a time-lapse camera.

The eight-millimeter tape from the security camera at the gas station was viewed by police investigators at the scene and taken into custody. Because the eight-millimeter tape was not a tape size used by the police department and the police did not have facilities to view the tape, a reproduction was made by recording the incident from the gas station monitor onto a VHS videotape.

Conley was apprehended in Akron, Ohio in April 1992, and tried in December 1994. Before trial, Conley's initial attorney obtained a court order for a medical examination of Conley in order to support a defense of not guilty by reason of mental disease or defect. That attorney withdrew, apparently at Conley's request, because Conley disagreed with his attorney's advice. Attorney Dennis Cimpl was then appointed and served as Conley's attorney throughout the

trial and sentencing hearing. Although Cimpl remained Conley's attorney, on the first day of trial, Cimpl informed the court that Conley wanted him to withdraw as counsel. He claimed that Conley wanted new counsel because Cimpl would not assert a defense of not guilty by reason of mental disease. Cimpl explained that he investigated this defense and discovered that the doctor who had been appointed to examine Conley could offer no support. Cimpl related that the previous attorney had found no basis to go forward with such a defense either. The trial court denied the request to withdraw, finding that Conley's request to hire a new attorney was dilatory. The trial proceeded and a jury found Conley guilty of both counts.

Conley then appealed and a no merit report was submitted by his appellate counsel, which was rejected by this court with the directive that appellate counsel move for postconviction relief pursuant to RULE 809.30 STATS., on the grounds of ineffective assistance of counsel. At the postconviction hearing, the trial court held a ***Machner***[1] hearing and postconviction relief was denied. Conley now appeals, claiming counsel was ineffective for failing to investigate and present testimony to support a defense that the shooting was accidental. In furtherance of his contention, he claims that trial counsel should have called an expert to testify to technical difficulties involved in the police reproduction of the eight millimeter tape because he believed the original video would have revealed that he was suffering from psychomotor agitation which resulted in involuntary muscle movements which caused the shooting. Conley further asserts that trial counsel was deficient for failing to call as a witness a psychologist who examined

[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (1979).

Conley prior to the shooting and who could have testified that alcohol and drug withdrawal can result in psychomotor agitation.

II. ANALYSIS.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986); *see also* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding ***Strickland*** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***id.*** We will "strongly presume" counsel to have rendered adequate assistance. ***Id.*** Additionally, counsel will not be found to be deficient for failing to make meritless motions or arguments. *See* ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). But proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. *See* ***id.*** at 634, 369 N.W.2d at 715. If this court concludes that the defendant has not proven one prong, we need not address the other. *See* ***Strickland***, 466 U.S. at 697.

A. Theory of Defense.

Conley asserts that his attorney was ineffective for failing to investigate his contention that the shooting was accidental. Conley essentially

claims that due to psychomotor agitation, or involuntary muscle movements of his fingers in this case, the gun went off by accident. However, this was not the defense Conley wished to pursue at trial. Initially, Conley did not admit to the shooting. In fact, it was not until the day of trial that Conley admitted to counsel that he was the shooter. The defense that Conley originally demanded—not guilty by reason of mental disease or defect—was also inconsistent with Conley's repeated claim that he was not the shooter. Cimpl indicated at the ***Machner*** hearing that he had nothing to support the defense of not guilty by reason of mental disease or defect, nor could other defenses be developed because of Conley's repeated refusal to communicate with him. Cimpl testified that he explored the possibility that the shooting was accidental, but Conley refused to admit he was the shooter or discuss such a defense. Given Conley's actions, we conclude Cimpl went forward with the best defense possible when, in opening statement, he asserted that Conley did not commit the crime because he was not there, but if the jury found he was there and was the shooter, he urged them to find that Conley did not intentionally shoot the victim. Under these circumstances, defense counsel's actions and the election of defenses were not "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690.

B. Videotape testimony

Conley claims that a reproduction of the original eight-millimeter tape would show images of the shooting more accurately as they related to time lapse and would have supported his defense of an accidental shooting. Conley asserts his attorney was ineffective because an expert was available and should have explained and shown his copy of the reproduced videotape. As noted, Conley did not admit to trial counsel that he was the shooter until the trial began; thus, Conley prevented trial counsel from effectively pursuing a defense of

accidental shooting because Conley made the decision to deny shooting the victim. Moreover, Conley's refusal to discuss the events of the shooting with his attorney, only insisting on a not guilty by reason of mental disease or defect theory of defense, made the defense of an accidental shooting unlikely to succeed and foreclosed any possibility of retaining an expert to support the theory. It was only at trial, after the trial had begun, that his attorney learned of Conley's change of heart. Nevertheless, as the trial court stated in its postconviction decision, the failure to call a video expert at trial was not deficient performance because the reproduced tape now advanced by Conley would have been more helpful to the State than to the defense Conley now wishes he had undertaken.

> Defendant's [video] expert admitted that images from the original source … were not capable of exhibiting or displaying whether a person was trembling … I find a jury could not determine whether or not there was any hand trembling from the tape that was presented by the defense saying this is the tape that the [sic] — Mr. Cimpl should have brought into court with this expert and explained it. I looked at it, in fact I thought the tape clear — more clearly showed the defendant doing the shooting, identified him more clearly, and I understand why Mr. Cimpl wanted to keep it out.

We note, too, that Cimpl made an attempt to keep the videotape from being seen by the jury. He made a motion to exclude the videotape altogether, but it was denied by the trial court. Cimpl then urged the trial court to have only the original eight millimeter tape viewed by the jury, arguing that the reproduction "distorts what actually went on there." This request was also denied by the trial court.

Conley also argues that the reproduction of the tape shown to the jury does not show the actual time that elapsed during the shooting, but he fails to discuss how this affected the outcome of his case. We conclude this argument is

specious because, as the trial court pointed out in its postconviction decision, the reproduction of the tape that was shown to the jury included the original time monitor which showed the actual time elapsed during the robbery, permitting the jurors to keep track of the time involved.

In sum, none of Cimpl's conduct cited by Conley with respect to the videotape was deficient. Trial counsel attempted to exclude the tape. His failure to call a video expert was due to Conley's actions and, had he called one, the expert would not have supported Conley's theory as the video expert who testified at the ***Machner*** hearing explained that hand trembling could not be discerned from either tape. Finally, the actual time lapse was shown by the time monitor on the reproduction.

C. Testimony of Psychologist

Conley claims that he was also denied effective assistance of counsel because trial counsel failed to call a psychologist, Dr. Paquette, who examined Conley prior to the shooting for an unrelated matter and issued a report concluding that Conley suffered from alcohol and drug withdrawal which caused psychomotor agitation. Conley argues that Dr. Paquette would have testified that he observed "psychomotor agitation" in Conley, and that Dr. Paquette's testimony that "it was likely that Mr. Conley would have continued to suffer from psychomotor agitation at the time of the shooting" would have been crucial to his defense. Conley is wrong. Dr. Paquette testified at the ***Machner*** hearing that he never personally viewed Conley suffering from hand tremors; he included it in his report only because Conley complained of it. Further, Dr. Paquette testified he had no way of knowing whether Conley suffered from this problem on the day of the robbery.

Dr. Paquette speculated that had Conley been withdrawing from alcohol and drugs on the day of the crime, it was likely that the psychomotor agitation would persist.

The trial court found, and we agree, that "Dr. Paquette's testimony would be speculative and irrelevant" as to whether Conley suffered psychomotor problems on the day of the crime. First, Dr. Paquette could not testify that Conley was having psychomotor agitation on the date in question. In fact, Dr. Paquette had never actually seen any psychomotor agitation in Conley. Second, Conley never complained or testified about the tremors causing the shooting until after trial. Third, Conley confessed to have been consuming beer and cocaine on the day of the offense, making symptoms of withdrawal unlikely. Further, the trial court determined that the doctor's testimony would have been excluded from the trial had Conley attempted to introduce it. Consequently, trial counsel was not deficient for failing to call Dr. Paquette as a witness.

For the reasons stated above, we affirm the judgment of conviction and the order denying Conley postconviction relief.

By the Court.—Judgment and order affirmed.

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