COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2545-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TERRY PENNY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN and JEFFREY A. KREMERS, Judges. *Affirmed.*

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

PER CURIAM. Terry Penny appeals from a judgment of conviction after a jury found him guilty of armed robbery contrary to § 943.32(1)(b) & (2), STATS., and from an order denying his postconviction motion requesting a new trial based on ineffective assistance of counsel. Penny

claims he was denied effective assistance of counsel because trial counsel: (1) failed to consult with Penny prior to and during trial and swore at Penny just before trial, damaging their relationship to the extent that they could not work together; (2) failed to put on a meaningful defense; (3) failed to impeach various witnesses; (4) failed to request a speedy trial; and (5) failed to preserve voir dire, opening statements and closing statements for the record. Penny also claims that his case should have been dismissed because his trial was not commenced within the statutorily required 120 days, pursuant to § 971.11, STATS. We affirm.

I. BACKGROUND.

This case arises from an armed robbery which occurred at the Galano Club in the City of Milwaukee on June 26, 1994. On the evening of June 26, 1994, an individual, later identified as Terry Penny, entered the Galano Club and asked Larry Walter, a volunteer at the club that night, who was alone in the front area of the club, for a glass of water. Walter gave Penny a glass of water from behind the bar and began walking into another area of the club when Penny produced a knife and demanded money. Walter proceeded towards the register and continued past it to the back meeting room, where a meeting was taking place. Walter testified that Penny was on his right side when he raised his right hand to shield his face and opened the door to the meeting room. Upon entering the meeting room and exclaiming "he's got a knife," Walter realized he had been cut on his right wrist. Shortly thereafter, Eric Buske, another individual at the meeting, gave Penny money from the cash register and Penny fled from the club.

Father Shaun Brown, who was attending the meeting at the club, chased Penny as he fled. While the two were running, Debbie Karow, a woman who was walking a dog, witnessed Penny running. Fr. Brown followed Penny for

several blocks, losing him at some intervals and then seeing him reappear, until he finally lost sight of Penny. Police arrested Penny in the general vicinity some time later.

When Fr. Brown returned to the club, the police were there and Walter was being taken to the hospital to receive medical attention for his wrist injury. The police recovered the backpack that Penny had been carrying. It contained a knife identified as the one Penny used in the robbery.

Penny was arrested and charged with armed robbery, pursuant to § 943.32(1)(b) & (2), STATS. The warden at Waupun Correctional Institution, where Penny was incarcerated before trial, on another conviction, filed a request for prompt disposition of Penny's case with the District Attorney's office, which was received on September 30, 1995. The case was scheduled for trial on October 30, 1995, but a State's witness was ill and the trial was rescheduled for February 5, 1996. After a jury trial, Penny was convicted of the charge of armed robbery. Penny filed a postconviction motion, which was denied. He now appeals.

II. ANALYSIS.

A. Ineffective Assistance of Counsel Claims

For the various reasons stated, Penny claims he was denied effective assistance of counsel. The trial court denied Penny's request for a ***Machner***[1] hearing. Penny renews his request for an evidentiary hearing or a new trial.

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

If a motion alleges facts which, if true, would entitle the defendant to relief, the trial court has no discretion and must hold an evidentiary hearing. ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996). Whether a motion alleges such facts is a question of law which we review *de novo*. ***Id.*** However, if the motion fails to allege sufficient facts, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has the discretion to deny the hearing. ***Id.*** at 309-10, 548 N.W.2d at 53. We will only reverse a trial court's decision upon an erroneous exercise of discretion. ***Id.*** at 311, 548 N.W.2d at 53.

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, 687 (1984); ***Bentley***, 201 Wis.2d at 311-12, 548 N.W.2d at 54. 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's claim will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id.*** We will "strongly presume" counsel to have rendered adequate assistance. ***Id.***

To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***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*. ***Id.*** at 634, 369 N.W.2d at 715. If a court concludes that a defendant has not proven one of the prongs, either deficient

performance or prejudice, we need not address the other. ***Strickland***, 466 U.S. at 697.

1. Failure to Consult with Penny

Penny contends that because Attorney Michael Sandy failed to confer with him prior to trial, swore at him minutes before trial and refused to consult with him during the trial, he was denied effective assistance of counsel.

From the time that Sandy was appointed counsel for Penny, Penny attempted to contact Sandy many times regarding his case, without a response from Sandy. Finally, Sandy responded before trial and some additional letters were exchanged between the two. Penny asserts that because of this lack of communication with his attorney, Penny himself was unprepared to go to trial. Penny further contends that it was impossible to participate in his defense because of the break-down in communication between the two, and Sandy's attitude that Penny had no say in the matter. Specifically, Penny contends that Sandy swore at him just before voir dire and further refused to discuss his case with him. Penny advised the court of this situation:

> DEFENDANT: I think we have a bit of a conflict, Your Honor, that I need to make you aware of – make you aware of, if I may.
>
> THE COURT: If you wish.
>
> DEFENDANT: Umm, prior – After this morning's proceedings, because I was unwilling to discuss my case through the bars of the bullpen, umm, Mr. Sandy, I guess to paraphrase me [sic], told me to get fucked.
>
> Umm, I just am having a real difficult time with some of the occurrences that have happened prior to this trial.
>
> I think there's been more than reasonable amount of time to prepare for this trial, and as you can plainly see, I am not prepared for a jury trial.

> Umm –
>
> THE COURT: Wait, I don't plainly see that, what do you mean?
>
> DEFENDANT: Ah, well, these are not my clothes. Umm, these are clothes that were –
>
> I don't know where they came from, they're not mine.
>
> Umm, just a lot of different things have happened that I don't think I'm getting a fair deal here, and I would like the Court to made aware of it.
>
> THE COURT: Well, I'm not sure what you're telling me yet this morning, you said you wanted to go ahead with the trial, and ah, so we got the jury here and I'm prepared to proceed, the witnesses are here, everybody's ready to go. Your lawyer said he's ready to go, you said you were ready to go; so, as far as I'm concerned, we're going to start the trial.

Penny established that he and Sandy did not get along and that Sandy's behavior may have been unprofessional. He does not specifically allege, however, how these facts would entitle him to relief. Penny also does not explain how Sandy's failure to consult with Penny entitles him to relief. *See* ***Bentley***, 201 Wis.2d at 309-10, 548 N.W.2d at 53.

Under ***Strickland v. Washington***, 466 U.S. at 687, Penny must show that Sandy's performance was deficient and that the deficiency prejudiced him at trial. The fact that Sandy swore at Penny minutes before trial and then ignored him throughout, was unreasonable. Given these facts, Sandy's performance was deficient in his effort to confer with Penny. Sandy's actions were unprofessional and "outside the range of professionally competent assistance." ***Strickland***, 466 at 690.

Whether this deficiency prejudiced Penny depends on whether, absent this deficiency, the outcome of the case would have been different. Penny also makes an unsubstantiated claim that Sandy failed to interview him, without

alleging how, if this is true, it prejudiced Penny at trial. He seems to argue that Sandy's failure to interview him resulted in Penny being unprepared for trial. This leads to the claim that Sandy failed to prepare Penny to testify on his own behalf. Penny did not testify. It is unclear whether Penny is arguing that he did not testify because he was unprepared to do so. Penny claims that Sandy failed to formulate a theory of defense, without pointing to anything to substantiate this, or offering what Penny thinks would have been an appropriate defense theory. We will not address ill-formulated arguments. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995) (court of appeals need not address "amorphous and insufficiently developed" arguments). Thus, we decline to address the above issues.

Penny also complained that he was unprepared to go to trial because, among other reasons, he did not have well-fitting civilian clothes and he had to wear his orange jumpsuit. Penny was given the opportunity to wear civilian clothes that, apparently, his attorney brought for him. The record indicates Penny felt the clothes were ill-fitting and that he would rather wear his orange jumpsuit. In fact, the court specifically addressed the issue with him:

> MR. SANDY: Ask that the record reflect, my client appears in County Jail uniform.
>
> I've done my best to make civilian clothing available to him.
>
> THE COURT: Well, he's got civilian clothing available for him.
>
> MR. SANDY: Yes.
>
> …
>
> THE COURT: …You can proceed wearing your jail clothes or the clothes that you had here yesterday. Your choice.
>
> You want to proceed with your orange jumpsuit, that's fine with me.

DEFENDANT: Yes, Your Honor.

THE COURT: Okay.

Do you want to proceed with the clothes you have on [the County Jail uniform]?

DEFENDANT: Yes.

Although Penny was not given his own clothes to wear, it was his choice to wear the orange jumpsuit. If this somehow prejudiced him, which he does not explain, it was not because of the deficiency of his attorney, who apparently brought civilian clothes for him.

2. Failure to Put on a Meaningful Defense

Penny claims that Sandy failed to put on a meaningful defense because he did not conduct an investigation, nor did he inspect, examine or test any physical evidence.

Sandy moved to compel discovery prior to trial. Penny claims that his attorney's actions came too late, and since the motion was made after the first trial was scheduled, this constitutes ineffective assistance of counsel. Since the motion was made before his trial, it is unclear how this prejudiced Penny. On the day of the trial, the motion was further discussed in court. Sandy informed the court that several of the items he requested were never provided. In response, the State informed the court that the blood evidence was not preserved, and further, that DNA testing would not be done in this case because of cost concerns. The State also pointed out that even if DNA testing could be accomplished in this case, it would take over a year and a half to complete. Sandy thus requested the opportunity to do fingerprint analysis on the knife. The following then took place:

THE COURT: You're aware, since I just handed you the letter that was written by Mr. Penny … in which he

> expresses some concern about not getting this case to trial and he wants it tried.
>
> MR. SANDY: It's –
>
> If that's what my client wants today, given the state of the evidence, I certainly am willing to try the case today. I explained the speedy statute right with my client at various points, I'm satisfied he understands what his remedy would be.
>
> ….
>
> If that's my client's wishes to try, given the state of the evidence, I'm ready and willing to try the case today.
>
> THE COURT: I guess it's up to you then, Mr. Penny.
>
> ….
>
> … Do you want to go ahead today, Mr. Penny?
>
> THE DEFENDANT: Yes, I would.

This colloquy clearly demonstrates that Penny had a choice; if he wished to have the fingerprinting analysis done, he could not go to trial that day. He chose to go to trial. Moreover, Penny fails to allege what the fingerprint analysis would have revealed. Indeed, at trial, one of the witnesses, Officer Carrera, testified that with this type of knife, "you probably wouldn't get any fingerprints off of it anyhow due to the type of material it's made out of." Thus, Penny's allegations, if true, are insufficient to establish that Penny was prejudiced by the lack of fingerprint analysis. *See* ***Bentley***, 201 Wis.2d at 310, 548 N.W.2d at 53.

Penny also claims that Sandy was ineffective for failing to subpoena witnesses to trial, specifically one witness at the club, Eric Buske, who failed to identify Penny at the lineup. Penny asserts that, had Sandy called Buske as a witness, this information could have been used to show that Penny was not the robber. Penny's logic is faulty. Buske did not identify *any* individual in the lineup. Further, the jury was provided with documentation showing Buske failed

to identify Penny in the lineup. Thus, Penny has not shown that Sandy's performance was deficient in failing to call Buske, nor can he establish that this failure prejudiced him at trial when three other witnesses who did testify identified Penny in the lineup.

Penny further contends that Sandy's assistance was ineffective because he failed to introduce evidence of a lesser included offense and this left the jury with no alternative theory other than the charged offense. Penny's trial counsel did request the lesser included offense of theft from a person while armed, but the trial court denied his request. Moreover, Penny fails to explain how Sandy's supposed failure to request a lesser included offense would have made a difference in the outcome of his case. Penny also does not offer what other lesser included offenses he thinks should have been requested. We, therefore, decline to address this issue further. *See* ***Pettit***, 171 Wis.2d at 646, 492 N.W.2d at 642 ("We may decline to review issues inadequately briefed.").

Penny finally claims that his trial counsel should have objected to the introduction of the backpack at trial on chain of custody grounds. "The degree of proof necessary to establish a chain of custody is a matter of trial court discretion." ***State v. Buck***, 210 Wis.2d 115, 127 n.7, 565 N.W.2d 168, 172 n.7 (Ct. App. 1997). Further, "as long as sufficient testimony is received that renders it improbable that the original item has been exchanged or tampered with, the evidence is properly received." ***Id.*** Although there was some discrepancy at trial as to how the backpack made its way back to the club after Fr. Brown chased Penny, there was no suggestion of tampering by the police or any other witness in the case. Further, the knife described by several witnesses was in the backpack. The court could have reasonably determined this established a sufficient link between Penny and the backpack. We therefore conclude that counsel's failure to

object to the introduction of the backpack on chain of custody grounds was not prejudicial because it would not have affected the outcome of the case.

3. Failure to Impeach Witnesses

Penny contends that Sandy should have impeached a witness at trial.[2] Penny asserts Sandy's assistance was ineffective because he failed to impeach Walter in his description of the knife. In Walter's treatment records for his wound, he described the knife as a "butcher" knife and at trial he referred to it simply as a "knife." Penny fails to explain how this minor discrepancy impeaches Walter. Walter testified that he did not recall if the knife had a serrated blade and further, he did not recognize the knife at trial as the actual knife used by Penny. Given these facts and the other incriminating evidence given by Walter and other witnesses, we conclude that impeachment of Walter's statement with the medical report would not have made a difference in the outcome of Penny's case, thus the record conclusively demonstrates that there was no prejudice.

[2] Penny raises these apparent impeachment arguments in the statement of facts section of his brief, without legal citation, and does not further address them in his argument section. In his statement of facts, Penny discusses the discrepancies in descriptions given by witnesses of the backpack worn by the assailant. It is unclear whether Penny asserts this should have been raised for impeachment purposes when witnesses identified the backpack at trial as the one worn by Penny, or for some other reason. Penny apparently argues that the defense counsel should have called another witness, Kelly Svetic, to show she misidentified the color of the backpack worn by the assailant. Penny claims that because the backpack recovered by the police was red and the description given by Svetic was that it was green, this undermines the evidence against him. Other witnesses described the backpack differently as well. The backpack was multi-colored, thus some described it as blue and others as green with some red on it, or just green. In light of this, Sandy's failure to impeach any witness with regard to the color of the backpack, does not amount to deficient performance. Further, any failure to impeach these witnesses did not amount to prejudice such that the outcome of the case would be different had he done so.

4. Failure to Request a Speedy Trial

Penny argues that he did not receive effective assistance of counsel because Sandy did not file a speedy trial demand. Penny himself filed a speedy trial demand and pursued a prompt trial under § 971.11, STATS. In the record transcript, Attorney Sandy tells the court that he advised Penny of his speedy trial right. Penny exercised that right. Although the failure of Attorney Sandy to actually request a speedy trial may have been deficient performance,[3] there was no prejudice because Penny was not denied a speedy trial.[4]

5. Failure to Preserve Voir Dire, Opening Statements and Closing Statements for the Record

Penny claims that Sandy's failure to preserve the attorneys' portion of voir dire, and opening and closing statements on the record, amounted to ineffective assistance of counsel because it denied Penny and "any reviewing court the ability to determine if any defect occurred therein that affected the defendant's rights." Penny does not point to any portion of these proceedings that specifically affected his rights or impacted the outcome of his trial, we, therefore, decline to address this claim. *See* ***Bentley***, 201 Wis.2d at 314-16, 548 N.W.2d at 55-56 (a defendant is required to give specific facts when alleging prejudice so that "a reviewing court may meaningfully assess his or her claim.").

[3] Sandy was apparently disciplined by the Supreme Court for his conduct in this case. Penny claims that discipline revolved around his failure to request a speedy trial. This is not shown in the record and further, has no bearing on this case.

[4] *See* Section B, argument on prompt disposition of intrastate detainers.

B. Section 971.11, STATS., Prompt Disposition of Intrastate Detainers

Penny claims that under the Intrastate Detainers Act,[5] the "State failed to ensure that the trial was timely commenced, therefore the judgment must be vacated and the case dismissed with prejudice."

The request for prompt disposition of Penny's case by the warden at the Waupan Correctional Institution was received in the district attorney's office on September 30, 1995. Trial was scheduled on October 30, 1995, but was rescheduled because a state's witness was ill. The defense did not object to the adjournment.

The State contends that a continuance of trial for cause is allowable in this case under the speedy trial statue, § 971.10(3), STATS., which reads: "A court may grant a continuance in a case … if the ends of justice served by taking action outweigh the best interest of the public and the defendant in a speedy trial." Further, citing ***State v. Aukes***, 192 Wis.2d 338, 345, 531 N.W.2d 382, 385 (Ct. App. 1995), the state asserts that Penny waived the 120-day time limit when he failed to object to the rescheduling of the trial date. We agree. The case was delayed for a proper reason and all parties, including the defense, agreed to the new trial date.

[5] Section 971.11(2), STATS. reads: "If the crime charged is a felony, the district attorney … shall bring the case on for trial within 120 days after receipt of the request [by the warden or superintendent, on the request of the inmate, for prompt disposition of the case, *see* § 971.11(1), STATS.], subject to s. 971.10."

For the reasons stated, this court affirms the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

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