COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 98-1338-CR
98-2356-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLARD E. LOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed.*

BROWN, J. Willard E. Lott appeals his conviction for driving while intoxicated (fourth offense) on grounds of ineffective assistance of counsel. He argues that his trial counsel conducted an inadequate investigation leading to Lott's plea of no contest. Assuming for argument's sake that counsel was ineffective, we agree with the trial court that he was not prejudiced.

Counsel's performance does not undermine our confidence in the outcome. This court affirms.

The facts leading up to the arrest are not important for purposes of this decision. All we need recite are Lott's complaints against his trial attorney. He argues that his attorney did not ask Lott what he had to drink or the amount of time he was drinking, did not make copies of the police reports or take notes regarding their contents, failed to notice that the intoxilizer used to take Lott's breath sample was the same type as was at issue in ***State v. Baldwin,*** 212 Wis.2d 245, 569 N.W.2d 37 (Ct. App. 1997), *rev'd,* 217 Wis.2d 429, 576 N.W.2d 904 (1998), failed to ask Lott if there were any witnesses who saw him drinking and/or driving and was not aware that ***State v. Alexander***, 214 Wis.2d 628, 571 N.W.2d 662 (1997), was pending before the supreme court at the time of Lott's plea.

We turn to ***State v. Voss***, 205 Wis.2d 586, 596, 556 N.W.2d 433, 436 (Ct. App. 1996), *review denied*, 207 Wis.2d 284, 560 N.W.2d 274 (1997), for the answer to most of Lott's complaints. In that case, Voss claimed several instances of ineffective assistance of counsel just as Lott does. We noted that the law mandates a defendant to show prejudice even if counsel is ineffective. *See* ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); ***State v. Pitsch,*** 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). In Voss' case, he claimed that counsel failed to review evidence prior to the plea. *See* ***Voss,*** 205 Wis.2d at 596, 556 N.W.2d at 436. We wrote: "But, as the State rhetorically asks: what was in the reports that would have changed the outcome?" ***Id.*** Voss claimed that trial counsel failed to investigate certain witnesses. We wrote: "But what witnesses would have helped the case? None are mentioned. There is no offer of proof about what the 'witnesses' would have been able to do which would be relevant to Voss' guilt or innocence." ***Id.*** We found no evidence submitted by Voss that

would have us conclude that counsel's presumed errors would have cast doubt on the reliability of the outcome. *See* ***id.*** at 598, 556 N.W.2d at 437.

As in ***Voss***, we ask the same rhetorical questions. What significance is it that Lott's counsel did not ask about how much he had to drink or the amount of time he was drinking? Lott does not tell us. What information could Lott's attorney have gleaned from the police reports that would have made a significant exculpatory impact in Lott's defense? Lott does not tell us. Were there, in fact, witnesses to Lott's drinking and/or driving that would have helped his case? We do not know. No offer of proof regarding any of these matters and no evidence regarding any of these matters was submitted.

Lott argues that at the time of his plea, the law in Wisconsin was that the intoxilizer which was used in his case did not receive the benefit of an automatic presumption of reliability. *See* ***Baldwin***, 212 Wis.2d at 245, 569 N.W.2d at 37. Lott acknowledges that while the supreme court eventually reversed the court of appeals in that case, it would have been the law at the time and the trial court would have been duty-bound to use it. So, Lott contends, the case is still viable for purposes of his ineffective assistance of counsel argument.

But Lott assumes too much. First, he assumes that the State would not have asked for and received a stay of proceedings until the supreme court, which had the court of appeals decision under review, had determined whether to affirm or reverse the case.

Second, he assumes that the State would not have been able to prove that the intoxilizer used in Lott's case was accurate and reliable. It was Lott's burden to show by offer of proof or by evidence at the postconviction hearing that he was prejudiced by trial counsel's lack of attention to ***Baldwin.*** Therefore, it

was his responsibility to prove to the trial court's satisfaction that the State would not have been able to show how the intoxilizer was inaccurate and unreliable. At the postconviction hearing, Lott complained that his trial counsel did not obtain the maintenance history of the intoxilizer used in Lott's case. While that may be true, it was Lott's burden to obtain that history for the postconviction hearing and use that evidence, along with whatever other evidence he could obtain, to undermine the trial court's confidence in the State's ability to prove the accuracy and reliability of the intoxilizer. He did not attempt to do so. It was not the State's burden to prove to the postconviction court that it would have been able to prove the accuracy and reliability of the intoxilizer. This court's confidence in the reliability of the conviction is not undermined.

Finally, while it is true that ***Alexander*** explains how the State may not offer proof of previous operating while intoxicated convictions if the defendant concedes the element of prior convictions, our confidence in the reliability of the proceedings is not shaken. Lott drove through a red light. The arresting officer smelled a strong odor of alcohol on his breath even as he approached Lott's vehicle. Lott's speech was slurred, his eyes were glazed and he stumbled when he exited his vehicle. He stumbled again during a field sobriety test and could not perform the one-leg test. The officer ceased asking Lott to perform more tests because he was concerned that Lott might stumble again and hurt himself. We are satisfied that even if a jury had heard about his prior driving while intoxicated convictions, it would have convicted based upon the facts at hand, not past acts. And as we have already stated, if not for the plea, the State would have had the opportunity to prove the accuracy and reliability of the intoxilizer. Had the State been successful, the jury would also have had the 0.20% result to consider. The argument fails.

The law in this state is that it is not enough for a defendant to show ineffective assistance of counsel. The defendant must show prejudice. Of course it is true that the defendant need not prove that the outcome would have been different. But it is the defendant's duty to prove that the error was material—that some evidence not previously used or found was in fact out there that would have been beneficial to the defendant. That duty was not met here.

Lott contends that under Wisconsin law, prejudice may be assumed as a matter of law—the unwritten argument being that the above paragraph we have just written is wrong. He cites the supreme court's opinion in ***State v. Smith***, 207 Wis.2d 258, 278-79, 558 N.W.2d 379, 388-89 (1997), in support. But what the ***Smith*** court actually wrote is that prejudice will be presumed only in those rare instances where there is "difficulty in measuring the harm caused by the error or the ineffective assistance." ***Id.*** at 280, 558 N.W.2d at 389. We do not have that here. It would be easy to show the postconviction court how many drinks Lott really had and over what amount of time and how that knowledge would have benefited his case. It would have been easy to show how the copies of police reports might have helped Lott's cause. And while it may have been costly and time consuming, nothing prevented Lott the opportunity to discover the maintenance records of the intoxilizer and obtain expert evidence concerning the accuracy and reliability of the intoxilizer used in his case. While Lott was not obligated to prove beyond doubt or even by a preponderance that the intoxilizer was actually inaccurate and unreliable, it *was* his burden to provide enough evidence to shake the postconviction court's confidence in the judgment. That Lott has failed to do.

By the Court.—Judgment and order affirmed.

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