COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-0540

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL AGUILAR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Daniel Aguilar appeals pro se from an order denying his WIS. STAT. § 974.06 (1997-98)[1] motion. We affirm.

¶2 In 1996, Aguilar was convicted of two counts of armed robbery and attempted armed robbery, and five counts of first-degree recklessly endangering safety, all as party to the crime. Aguilar appealed after his postconviction motion was denied. We affirmed Aguilar's convictions in ***State v. Aguilar***, No. 97-0516-CR, unpublished slip op. (Wis. Ct. App. Mar. 11, 1998) (the direct appeal). Aguilar had the same counsel on the postconviction motion and the direct appeal, Attorney Lang. Aguilar filed a pro se WIS. STAT. § 974.06 motion in November 1998. After a hearing, the circuit court denied the motion. Aguilar appeals. We will discuss the facts as they relate to the appellate issues.

¶3 Aguilar contends that the circuit court misused its discretion when it refused to appoint counsel for him on his WIS. STAT. § 974.06 motion. After Aguilar had asked several questions of the attorney who had served as his postconviction and appellate counsel, Aguilar asked the circuit court to appoint counsel for him. The court declined, noting that Aguilar had had appointed trial and appellate counsel and it was "not likely you're going to succeed."[2]

¶4 Aguilar did not further pursue his request for counsel or make the argument he now makes on appeal that the circuit court failed to discharge its responsibility under WIS. STAT. § 974.06(3)(b) to refer him to the State Public

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Aguilar states on appeal that the State Public Defender determined that he was indigent. That office held Aguilar's request for counsel in abeyance pending a decision from the circuit court on Aguilar's request for counsel. Aguilar never informed the circuit court of his interaction with the State Public Defender.

Defender for an indigency determination and appointment of counsel if the defendant's § 974.06 motion suggests that counsel is necessary.[3]

¶5 A party must raise and argue an issue with some prominence to allow the circuit court to address the issue and make a ruling. *See* ***State v. Ledger,*** 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). Our role is to correct errors made by the circuit court, not to rule on matters never considered by that court. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 10-11, 456 N.W.2d 797 (1990).[4] Finally, we note that Aguilar was given a full opportunity to raise his WIS. STAT. § 974.06 issues in the circuit court, and the court was able to assess the merits of Aguilar's issues.

¶6 Aguilar argues that the court should have adjourned the hearing on his WIS. STAT. § 974.06 motion when Lang indicated that she had not reviewed her file prior to the hearing. Counsel also stated that she sent Aguilar her file in October 1998, one month before he filed his § 974.06 motion and approximately four months before the hearing.[5] The court admonished Aguilar that he should have subpoenaed counsel's file. Aguilar never asked the court to adjourn the hearing to permit counsel to review the file. We agree with the State that Aguilar waived this issue by not making a prominent request for this relief. *See* ***Ledger***, 175 Wis. 2d at 135.

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[3] We note that there is no constitutional right to counsel in a WIS. STAT. § 974.06 proceeding. *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 647-49, 579 N.W.2d 698 (1998).

[4] We invoke waiver against Aguilar because the statutory right to have counsel appointed under WIS. STAT. § 974.06(3) can be waived. *Cf.* ***State v. Gove***, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989) (constitutional claims will be deemed waived if not timely raised in the circuit court).

[5] It is not clear from counsel's response whether she kept a copy of her file or sent the entire file to Aguilar. Nevertheless, it is clear that counsel did not review the file prior to the hearing.

¶7 We turn to the merits of Aguilar's ineffective assistance of counsel claim. Counsel renders ineffective assistance if counsel's performance was deficient and the deficient performance prejudiced the defendant. *See* ***State v. Oswald***, 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207 (1999). Whether counsel was ineffective is a mixed question of fact and law. *See* ***id.*** at ¶51. We will uphold the circuit court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***id.*** However, the final determinations of deficient performance and prejudice present questions of law which we decide independently of the circuit court. *See* ***id.***

¶8 Aguilar argues that Lang was ineffective because she failed to present for posttrial consideration the October 1994 report of investigator Daly. Aguilar contends that the report substantiates that the State did not attempt to locate Miguel Blas, a witness and one of the victims, prior to the February 1996 trial. Aguilar contends that the State did not make any efforts to locate Blas for trial. Daly's report discusses his attempts in 1994 to locate four witnesses other than Blas. The circuit court declared Blas unavailable for trial and his preliminary examination testimony was read to the jury.[6]

¶9 We need not address the deficient performance prong if we conclude that the defendant was not prejudiced by counsel's conduct. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). A defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

[6] We affirmed this evidentiary ruling in Aguilar's direct appeal. We will not revisit this holding and do not consider Aguilar's arguments regarding Blas's unavailability, the court's decision to permit the jury to hear his preliminary examination testimony or Aguilar's right to confront witnesses.

proceeding would have been different. *See* ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citation omitted). In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. *See* ***id.*** at 129-30.

¶10 We conclude that Aguilar was not prejudiced by Lang's failure to present investigator Daly's report because there was other evidence that the State attempted to locate Blas. Investigator Albro testified as part of the unavailability determination that he had attempted to locate Blas several times since November 1994, but that Blas had apparently returned to Mexico. Therefore, even if Daly's report had been presented to the jury, it is not probable that the trial would have had a different outcome.

¶11 Next, Aguilar argues that Lang was ineffective for failing to raise trial counsel's failure to impeach Javier Patino with what Aguilar characterizes as Patino's prior inconsistent statement to the police. At trial, Patino, one of the robbery victims, testified that when Aguilar's coactor, Tirado, demanded his money, Patino gave his money and keys to the man by the door, i.e., Aguilar. Aguilar contends that Patino should have been impeached by an earlier statement he made to a police officer in which he stated that he gave his money to Tirado, not Aguilar. Aguilar contends that Lang was ineffective for not raising this issue as part of his original postconviction proceedings.

¶12 Aguilar's premise is flawed. The alleged statement of Patino is contained in a report prepared by Officer Prudhom. The officer testified that he interviewed several people at the scene with the aid of an interpreter and that the page of his report on which the alleged Patino statement appears is actually a

summary of what he was told by everyone at the scene. The officer did not attribute the statement to Patino.

¶13 Trial counsel noted during closing argument that Prudhom's report did not attribute any specific statement to Patino. Counsel raised the possibility that Patino's trial testimony was inconsistent with the facts of the event. Trial counsel made as much use of the officer's report as possible.

¶14 We conclude that the officer's report did not contain an inconsistent statement which could be attributed to Patino and used to impeach him at trial. Therefore, Lang did not perform deficiently in failing to pursue this issue postconviction.

¶15 Aguilar next argues that Lang was ineffective for failing to challenge trial counsel's failure to introduce photographs which Aguilar contends were important to the identification issue at trial. Two photographs show Aguilar and a coactor, Tirado, standing next to each other and, according to Aguilar, were relevant on the question of their relative heights. Several victim-witnesses referred to Aguilar and Tirado by their relative heights.

¶16 At the original postconviction motion hearing, Lang questioned trial counsel about the photographs.[7] Trial counsel testified that he did not use the

[7] While postconviction counsel pursued this issue in the circuit court, she did not argue this issue on appeal. Because this issue was litigated as part of the WIS. STAT. § 974.06 motion, we will not require Aguilar to commence a separate habeas corpus petition in this court under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), which held that questions of ineffective assistance of counsel in an appellate capacity must be raised via habeas in the court which heard the direct appeal. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 679, 556 N.W.2d 136 (Ct. App. 1996). We will decide this issue because we have a record on the question and can independently decide whether counsel performed deficiently and prejudiced the defendant. *See* ***State v. Oswald***, 2000 WI App 2, ¶51, 232 Wis. 2d 62, 606 N.W.2d 207 (1999).

photographs to address the height difference because they would undermine a defense theory that Tirado and Aguilar did not know each other well enough to commit a robbery together. The photographs showed Tirado and Aguilar at a party the night before the robbery and made Tirado and Aguilar look like good friends. Also, trial counsel expressed his concern that the photographs appeared to depict Tirado and Aguilar giving gang signs. Trial counsel wanted to avoid the issue of gangs at trial.

¶17 The circuit court found that the jury had the opportunity to observe the relative heights of Aguilar and Tirado in court. The court opined that trial counsel would have been ineffective if he had introduced photographs depicting gang signs. At the hearing on the WIS. STAT. § 974.06 motion, Lang stated that she had not reviewed the file and could not explain why she did not raise on appeal trial counsel's failure to use the photographs.

¶18 Regardless of Lang's reasons for failing to raise the photographs on appeal, we conclude that Aguilar was not prejudiced by her conduct. Any challenge to trial counsel's approach to the photographs would have been without merit. A trial attorney may select a particular strategy from the available alternatives and need not undermine the chosen strategy by presenting inconsistent alternatives. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). The court found that trial counsel made a strategic decision not to use the photographs.[8] This strategic decision was based on knowledge of the facts and law. *See* ***State v. Felton,*** 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Therefore, any appellate challenge to this strategic decision would have been

[8] Trial counsel explored the issues regarding height and identification at trial in several other ways.

unsuccessful, and appellate counsel was not deficient for not pursuing it. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). "It is well established that an attorney's failure to pursue a meritless motion does not constitute deficient performance," ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996), and cannot be prejudicial to the defendant.

¶19 Aguilar claims that another photograph would have impeached identification testimony offered by the State. The photograph, taken by the Racine police, shows that the hallway outside of the apartment where the robbery occurred did not have a light above the apartment door. The renter of the apartment testified at trial that there was a light at each end of the hallway and her apartment was at one end of the hall. She testified that sunlight was coming into the hallway and her apartment at the time of the robbery and there was plenty of light for her to see Aguilar and Tirado standing in the doorway. Aguilar argues that the police photograph does not show a working light fixture above the door to the victim's apartment and that it was unlikely sunlight was coming into the hallway because the robbery occurred between 4:30 and 5:00 a.m. on June 19, 1994.

¶20 Trial counsel could not recall why he had not presented the hallway photograph. Lang had not reviewed the file and could not comment on why she had not pursued this issue postconviction. Nevertheless, we see no prejudice to Aguilar. Even if the photographs had been used to challenge the circumstances under which the robbers were identified, we conclude that it is not reasonably probable that the result of the trial would have been different. *See* ***Johnson***, 153 Wis. 2d at 129. There was sufficient other evidence that Aguilar was at the scene and properly identified. Several witnesses identified Aguilar. Aguilar was subdued and injured in

a struggle with the victims as he tried to flee.[9] We conclude that the photograph relating to the light fixture would not have made any difference in Aguilar's trial.

¶21 Finally, Aguilar argues that the evidence was insufficient to convict him of first-degree recklessly endangering safety. This issue could and should have been raised in his direct appeal. Aguilar did not question Lang during the hearing on his WIS. STAT. § 974.06 motion as to why she did not raise this issue. Therefore, this issue is waived on appeal and barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), which requires a defendant to raise all claims in his or her original postconviction and appellate proceedings or offer a sufficient reason why such claims were not raised.[10]

[9] We acknowledge that Aguilar claimed that he arrived after the robbery was completed and was mistakenly attacked by the victims. However, for the jury to have accepted Aguilar's contention, it would have had to reject the testimony of every other witness to the event. This is not plausible.

[10] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Management of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1977) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

By the Court.—Order affirmed.

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