COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP79 **Cir. Ct. No. 2000CF81**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FONTAINE L. BAKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

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

¶1 KESSLER, J. Fontaine L. Baker appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion for postconviction relief.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Baker contends that his postconviction counsel provided ineffective assistance by not arguing that trial counsel was ineffective for failing to: (1) argue that the State violated Baker's right to due process when it failed to disclose evidence favorable to him under the guidelines established by the Supreme Court in ***Brady v. Maryland***, 373 U.S. 83 (1967); (2) argue that Baker's constitutional right to "compulsory process" under the Sixth Amendment was violated; and (3) cross-examine an officer. We affirm the order.

BACKGROUND

¶2 Baker was convicted of one count of first-degree reckless homicide with a dangerous weapon after a jury found him guilty for the shooting death of thirteen-year-old Frankie Jenkins. After initially denying any involvement, Baker admitted shooting Jenkins. However, Baker claimed that Jenkins' death was the result of an accidental firing that occurred as Baker attempted to unjam his gun.

¶3 The court sentenced Baker to forty years of initial confinement and ten years of extended supervision. Baker appealed and we affirmed his conviction in ***State v. Baker***, No. 2001AP2059-CR, unpublished slip op. (WI App June 25, 2002). We addressed four arguments in that appeal: (1) whether sufficient evidence existed to support the jury's verdict; (2) whether trial counsel was ineffective for failing to remove an allegedly biased prospective juror; (3) whether the trial court erroneously evaluated Baker's ***Batson***[2] challenge; and (4) whether the trial court erroneously excluded evidence critical to Baker's defense. *See* ***Baker***, 2001AP2059-CR, unpublished slip op. at 1-2. Baker's petition for review

[2] *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986).

was denied. *See* ***State v. Baker***, 2002 WI 121, 257 Wis. 2d 118, 653 N.W.2d 890 (2002).

¶4 On December 4, 2003, Baker filed a WIS. STAT. § 974.06 motion for postconviction relief. Baker alleged that the State violated his constitutional right to due process under the Supreme Court's holding in ***Brady*** when the State failed to turn over favorable impeachment evidence held in the sole possession of the State. Baker also alleged that his right to compulsory process was denied when the trial court denied Baker the time necessary to subpoena a rebuttal witness. Finally, Baker alleged that trial counsel was ineffective for not cross-examining a specific witness. The trial court denied Baker's motion without a hearing. This appeal followed.

DISCUSSION

¶5 On appeal, Baker presents the same three arguments he presented to the trial court. Although these arguments generally would be procedurally barred because Baker failed to raise them in his original postconviction appeal, *see* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 177-78, 517 N.W.2d 157 (1994), Baker attempts to circumvent ***Escalona-Naranjo*** by arguing that his postconviction counsel was ineffective for failing to argue that trial counsel provided ineffective assistance with respect to the three issues. Assuming that Baker is not procedurally barred from raising these issues, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-84, 556 N.W.2d 136 (Ct. App. 1996), we nonetheless conclude that the trial court properly denied Baker's motion because Baker has not proven that trial counsel provided ineffective assistance.

¶6 To establish an ineffective assistance of counsel claim, a defendant must prove both that counsel's performance constituted deficient conduct, and that

such conduct prejudiced the outcome. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶7 Deficient performance requires a showing "that counsel's representation fell below an objective standard of reasonableness." ***Strickland,*** 466 U.S. at 688. The court reviews the attorney's performance with great deference and the burden is placed on the defendant to overcome the strong presumption that counsel acted reasonably within professional norms. ***State v. Johnson,*** 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Generally, when a defendant accepts counsel, the defendant delegates to counsel the tactical decisions an attorney must make during a trial. ***State v. Brunette***, 220 Wis. 2d 431, 443, 583 N.W.2d 174 (Ct. App. 1998) (citation omitted).

¶8 To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶9 Ineffective assistance of counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant present mixed questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634.

¶10 If an appellant's claim of ineffective assistance of counsel relies on conclusory allegations, or if the record conclusively shows the appellant is not

entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on an ineffective assistance of counsel claim, the appellant must allege specific facts that establish both deficient performance and prejudice. ***Id.*** at 313. Whether the motion sufficiently alleges facts, which, if true, would entitle the appellant to relief, is a question of law to be reviewed independently by this court. ***Id.*** at 310.

I. *Brady* violation

¶11 Baker alleges that trial counsel's performance was deficient because he did not object when the State violated Baker's rights under ***Brady*** by not disclosing impeachment evidence. The background facts related to this issue are as follows.

¶12 On January 7, 2000, Detective Wesolowski of the Milwaukee Police Department interviewed Johnny Howard about his knowledge of the events leading up to the death of Jenkins. After the interview, Wesolowski made a written record of the information he obtained from Howard, including that: (1) on January, 1, 2000, Baker went to Howard's house with Jenkins and Alfonso Miller to obtain bullets for Baker's gun; (2) Baker told Howard that if Dontrell LeFlore[3] did not kill Jenkins, he would; and (3) Baker left Howard's house in a car with Jenkins and Miller. At trial, Wesolowski admitted that he never showed a copy of the written record to Howard for verification and that Howard never signed the written record. In addition, Wesolowski testified that he conducted a second interview of Howard a couple of months after the initial interview but decided not

[3] The record contains two variations of Dontrell LeFlore's name; it appears as LaFlore and LeFlore.

to record the second interview because Howard made only "vague" and noncommittal responses to Wesolowski's questions.

¶13 Assuming for purposes of discussion that Howard's vague and noncommittal answers to Wesolowski's questions during the second interview were favorable impeachment evidence and that the State inadvertently suppressed the evidence, Baker's ***Brady*** argument is still insufficient because Baker fails to allege how non-disclosure of Howard's second statement prejudiced him in such a manner as to "'undermine confidence in the outcome.'" *See* ***State v. Harris***, 2004 WI 64, ¶14, 272 Wis. 2d 80, 680 N.W.2d 737 (citation omitted). In contrast, the record shows that Wesolowski testified at trial about Howard's vague and noncommittal responses at the second interview. Furthermore, Howard himself testified at trial that he had never met Wesolowski, never participated in an interview with Wesolowski, and categorically denied all knowledge of the information contained in Wesolowski's written record.

¶14 Whether the State violated a defendant's right to due process under ***Brady*** is a question of constitutional fact that we review independently. ***State v. Sturgeon***, 231 Wis. 2d 487, 496-97, 605 N.W.2d 589 (Ct. App. 1999). However, we review the underlying historical facts of the case using the clearly erroneous test. ***Id.*** at 496.

¶15 Under the Fourteenth Amendment to the United States Constitution, the prosecution's suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. ***Brady***, 373 U.S at 87. Evidence is favorable to an accused, when, "if disclosed and used effectively, it may make the difference between conviction and acquittal." ***United States v. Bagley***, 473 U.S. 667, 676 (1985). Evidence that is favorable to the

accused encompasses both exculpatory and impeachment evidence. ***Strickler v. Greene,*** 527 U.S. 263, 280 (1999). The "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." ***Kyles v. Whitley***, 514 U.S. 419, 437 (1995).

¶16 There are three prerequisites for a ***Brady*** violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. ***Strickler***, 527 U.S. at 281-82. "'Prejudice' … encompasses the materiality requirement of ***Brady*** so that the defendant is not prejudiced unless 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" ***Harris***, 272 Wis. 2d 80, ¶15 (citation omitted). To determine prejudice:

> "[T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response."

Id., ¶14 (citation omitted).

¶17 In light of Wesolowski's and Howard's testimony at trial, we fail to see how the State's disclosure of Howard's responses at the second interview prior to trial could have assisted Baker to impeach Wesolowski. Both witnesses fully presented their conflicting testimony to the jury and the jury was left to decide the credibility of the witnesses. We are unconvinced that prejudice ensued. *See* ***Strickler***, 527 U.S. at 281-82. Because there was no ***Brady*** violation, trial

counsel's failure to raise the issue was not prejudicial, and Baker was therefore not denied the effective assistance of trial counsel. *See* ***Strickland***, 466 U.S. 668 at 694.

II. Compulsory process

¶18 Baker alleges that trial counsel was ineffective because he did not ask for a continuance to locate Baker's cousin, Geneina Jones, so that she could contradict testimony given by Detective Vail of the Chicago Police Department at Baker's ***Miranda-Goodchild***[4] hearing and at trial. We conclude that Baker's postconviction motion was properly denied without a hearing or relief. *See* ***Bentley***, 201 Wis. 2d at 309-10.

¶19 In his postconviction motion, Baker failed to allege facts demonstrating: (1) a reasonable expectation that the witness could have been located at the time of the trial; or (2) the nature and materiality of the testimony the witness would have provided.[5] Without more, Baker was not entitled to a hearing or relief. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972) (When a defendant in a postconviction motion "fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.").

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[4] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

[5] No affidavit from Jones has been submitted. Moreover, there is evidence in the record that trial counsel himself expressed doubt at the trial that he would be able to find and serve the witness. In light of this statement and the lack of affirmative assertions that the cousin would have testified, Baker was not entitled to a hearing or relief.

III. Denial of right of confrontation

¶20 Baker alleges trial counsel was ineffective for failing to cross-examine Detective Vail. Baker argues that trial counsel should have cross-examined Detective Vail about Vail's testimony attributing a statement to Baker rather than to Jones. Because the State used the controversial statement to demonstrate that Baker lied to police, Baker argues that this failure was prejudicial and affected the outcome of the trial. However, Baker does not allege specific questions trial counsel should have asked Detective Vail or how the answers to the specific questions could have aided Baker or changed the outcome of the trial. Because Baker's argument fails to allege facts sufficient to show that trial counsel acted unreasonably, and instead relies only on conclusory allegations, we affirm the circuit court's decision denying Baker's ineffective assistance of counsel allegation. *See* ***Bentley***, 201 Wis. 2d at 309-10.

CONCLUSION

¶21 We conclude that Baker has failed to show that trial counsel provided ineffective assistance with respect to the three identified issues. Therefore, postconviction counsel was not ineffective for failing to allege trial counsel ineffectiveness. We affirm the order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

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