COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP15-CR **Cir. Ct. No. 2002CF441**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRET J. CHAPIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Bret J. Chapin appeals from a judgment of conviction for battery to a police officer and from an order denying his motion for postconviction relief. He argues that his trial counsel was ineffective for not investigating potential witnesses, for not advancing self-defense as the theory of

defense, for not letting him testify, for not conveying a plea offer, for not allowing him to read the presentence investigation report (PSI), for not presenting witnesses at sentencing, and for not bringing an appeal. We affirm the judgment and order.

¶2 A police officer found Chapin asleep in a flower garden in front of a television and appliance store. The officer observed that Chapin was very intoxicated and had a bruised and swollen left eye and scrapes on both of his hands. Upon being woken up, Chapin was belligerent and used profanity. Chapin was taken into custody and transported to a hospital. While medical personnel attempted to examine Chapin, he became uncontrollable. While the officer tried to restrain him, Chapin kneed the officer in the head. The officer reported that a pillowcase was placed over Chapin's head because he began to spit blood at the officer. Chapin was charged with battery to a police officer.

¶3 At trial Chapin was represented by Attorney Bridget Boyle. A voluntary intoxication defense was presented. Boyle cross-examined the police officer about the strong odor of alcohol emanating from Chapin, how long it took the officer to rouse Chapin from sleep, Chapin's inability to identify where he was by city or street, and the need to have Chapin medically evaluated to ascertain whether his level of intoxication would prevent the jail from accepting him. Chapin acknowledged understanding his right to testify and waived his right to testify. Following Chapin's waiver of his right to testify, Boyle stated on the record that her advice not to testify stemmed from the fact that Chapin would have to admit seven prior convictions and his testimony could possibly open the door to other acts evidence, including a prior claim of police brutality.

¶4 Chapin filed a motion for postconviction relief alleging that he had been denied the effective assistance of trial counsel. Chapin's position was that he

had been at a bar earlier in the evening but he had not been involved in a fight. He said that the police officer struck him in the eye with a flashlight. He suggested that the bartender and patrons would confirm that there had been no fight in the bar. Chapin testified at the ***Machner***[1] hearing that he tried to discuss with Boyle that he was the victim of police brutality. In addition to the bartender and bar patrons as potential witnesses, he suggested to Boyle that a young woman could testify that the same police officer hit her in the eye with his flashlight, that his probation agent would corroborate that there were not any scrapes on his hands, and that another police officer remarked that the injury to Chapin's eye was so perfectly round that it looked like an officer had beat him. He indicated he wanted to testify at trial but that Boyle had failed to contact witnesses to back him up. He also indicated that he and Boyle only spent a few minutes going over the PSI prior to sentencing. On cross-examination, he explained that he was never asleep in the flower garden at the television store but that the officer came upon him while he was smoking a cigarette at the side of the store. He stated that the officer hit him in the eye with a flashlight and struck him again at the hospital. He indicated that his knee rising to the officer's head was an involuntary action when the officer put a pillow over his head.

¶5 The trial court found that what happened when the officer first encountered Chapin, whether or not he was in the flower garden, was not relevant to what happened twenty minutes later at the hospital when Chapin kneed the

[1] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

officer in the head.[2] The court recognized that if the officer struck Chapin, it might relate to Chapin's state of mind when subjected to physical restraint at the hospital. However, to suggest that Chapin had enough presence of mind to react to something that happened twenty minutes earlier was contrary to the intoxication defense. The court found that the critical issue of whether Chapin's conduct was intentional was tried to the jury. The court concluded that whether or not to investigate potential witnesses was a matter of trial strategy and that Chapin was not prejudiced because whether or not Chapin was involved in a fight before he was found in the flower garden was not relevant to what happened at the hospital. The court found incredible Chapin's testimony that the plea offer was not relayed to him, that Boyle only cursorily reviewed the PSI with him, and that he did not knowingly and voluntarily waive his right to testify. The motion for postconviction relief was denied.

¶6 As our supreme court stated in ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990): "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984). That requires the ultimate determination of 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' ***Id.*** at 686." The ***Strickland*** Court set forth a two-part test: the first part requires the defendant to show that his or her counsel's performance was deficient; the second part requires the defendant to

[2] The record does not include the transcript of the October 1, 2004 hearing at which the trial court heard oral argument on the postconviction motion and rendered its ruling. The respondent has included the transcript in the appendix of its brief. Chapin does not object to the reproduction of the transcript in the respondent's appendix. We consider the transcript even though it is not part of the record.

prove that his or her defense was prejudiced by deficient performance. *See* ***Johnson***, 153 Wis. 2d at 127. These questions present mixed questions of fact and law. ***Id.*** The trial court's findings of fact as to what happened will not be overturned unless clearly erroneous. ***Id.*** The ultimate determinations of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently. ***Id.*** at 128.

¶7 We assess the quality of counsel's performance by the standard of whether such performance was reasonable under the circumstances. ***State v. Hubanks***, 173 Wis. 2d 1, 25, 496 N.W.2d 96 (Ct. App. 1992). There is a strong presumption that counsel acted reasonably within professional norms. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). The defense selected need not be the one that by hindsight looks best to us. *See* ***id.*** However, we will examine counsel's conduct to be sure it is more than just acting upon a whim; there must be deliberateness, caution, and circumspection. *See* ***id.*** A strategic or tactical decision must be based upon rationality founded on the facts and law. ***Id.***

¶8 We first address Chapin's claim that trial counsel failed to investigate and present a theory of defense that the officer used excessive force against him. Chapin's specific complaints that trial counsel did not spend enough time consulting with him, did not interview potential witnesses, did not review medical records, did not present his booking photograph, and did not present the 911 tape all stem from his assertion that the officer struck him with a flashlight. A person may claim self-defense to a battery charge when an officer employs excessive force in making an arrest and the person counters with the use of

reasonable force to protect himself or herself thereby injuring the officer. ***State v. Reinwand***, 147 Wis. 2d 192, 201, 433 N.W.2d 27 (Ct. App. 1988). However, the self-defense privilege exists only for the physical protection of the defender and ends when the need for that protection disappears—that is, when the use of excessive force has ceased or abated. ***Id.*** at 201-02. Thus, trial counsel's assessment that proof that the officer struck Chapin with a flashlight was not relevant to what occurred at the hospital was sound. Twenty minutes elapsed and the excessive force that Chapin claims compelled his physical response was over. Nothing in the record suggests that such force was used against Chapin at the hospital so as to independently give rise to a privilege of self-defense.[3] He was not prejudiced by trial counsel's failure to investigate or present self-defense.[4]

¶9 We also agree with the trial court's conclusion that as a matter of trial strategy, trial counsel decided not to assert self-defense. None of Chapin's proposed witnesses could give evidence about what happened between the time that Chapin left the bar and his first contact with the officer. Thus, asserting self-defense would have required Chapin's testimony since he was the only person to know that the officer struck him with a flashlight. Chapin would have had to

[3] The officer indicated that because Chapin was thrashing about and medical personnel could not examine him, the officer placed a mandibular angle pressure point hold on Chapin which is designed to gain compliance through a small amount of pain. At the postconviction motion hearing, Chapin testified that the officer put a pillow over his head and the raising of his knees was an involuntary action. Although the officer indicated in his report that he delivered two closed fist blows to Chapin's chest, that occurred after the officer was kneed in the head.

[4] Chapin asserts that the expert testimony that trial counsel was ineffective is uncontroverted. "No factfinder is bound by the opinion of an expert, even if the opinion is uncontroverted." ***Davis v. Psychology Examining Bd.***, 146 Wis. 2d 595, 602, 431 N.W.2d 730 (Ct. App. 1988). *Cf.* ***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752 (court is not required to accept defense counsel's testimony as dispositive of an ineffective assistance claim).

admit seven prior convictions. Trial counsel also determined that Chapin's testimony would have opened the door to other acts evidence consisting of Chapin's prior violent behavior towards his parents and a previous claim of excessive police force.[5] Chapin's testimony could also have been impeached by the 911 tape which indicated that a man, later identified to be Chapin, was observed lying in the flower garden. Chapin's credibility would have been damaged. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***State v. Schultz***, 148 Wis. 2d 370, 380, 435 N.W.2d 305 (Ct. App. 1988) (quoting ***Strickland***, 466 U.S. at 691), *aff'd*, 152 Wis. 2d 408, 448 N.W.2d 424 (1989).

¶10 More importantly, Chapin's testimony that he was coherently standing by the side of the television store would have been contrary to the voluntary intoxication defense. To negate the intentional act element of battery, the defense wanted to show the jury that Chapin was too intoxicated to know what was going on. A trial attorney may select a particular strategy from the available alternatives, and need not undermine the chosen strategy by presenting inconsistent alternatives. *See* ***Hubanks***, 173 Wis. 2d at 28.

¶11 The trial court rejected as incredible Chapin's testimony that a plea offer was not conveyed to him, that he did not freely and voluntarily waive his

[5] Chapin questioned trial counsel about whether the admissibility of such evidence was ever determined by the trial court. The prosecution's motion to admit other acts evidence was filed before Boyle was retained. Although the motion was not ruled on, Chapin does not establish that trial counsel's determination that the evidence would be admissible was error.

right to testify, and that he did not get to read the PSI. These credibility determinations are not clearly erroneous. Trial counsel indicated that she discussed a possible plea with Chapin and, in fact, believed one of the goals was to get the battery reduced to a misdemeanor. In response Chapin was adamant that he was not guilty of the offense and would not accept the plea offer. At trial, an adequate colloquy was conducted demonstrating that Chapin understood his right to testify and waived it. At sentencing, corrections were made to the PSI by the defense. That demonstrates that the PSI was reviewed in detail with Chapin. There was no showing that trial counsel was ineffective with respect to conveyance of the plea offer, Chapin's waiver of the right to testify, or review of the PSI.

¶12 Chapin complains that trial counsel did not call a single witness at sentencing and that counsel only presented "limited argument." He does not establish what evidence was missing. Chapin failed to ask trial counsel about this aspect of her performance and, therefore, the issue is waived. *See* ***State v. Elm***, 201 Wis. 2d 452, 463, 549 N.W.2d 471 (Ct. App. 1996).

¶13 Finally, Chapin argues that Boyle failed to undertake the requested appeal. Boyle filed a timely notice of intent to pursue postconviction relief under WIS. STAT. RULE 809.30(2)(b) (2003-04).[6] She did not, however, proceed further.[7] Chapin cannot establish that he was prejudiced by trial counsel's conduct

[6] All references to the Wisconsin Statutes are to the 2003-04 version.

[7] At the ***Machner*** hearing, Boyle explained that she believed Chapin only wanted to challenge his sentence and she was waiting for the resolution of Chapin's appeal in another criminal case before pursuing a motion for sentence modification.

in this regard since this appeal fulfills his right to seek postconviction relief and an appeal as of right under RULE 809.30.[8]

By the Court.—Judgment and order affirmed.

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

[8] Although certain time limits under WIS. STAT. RULE 809.30(2) expired and were not specifically extended while this matter was pending in the trial court, this court's order of February 10, 2005, extended the time for filing a notice of appeal and cured all expired deadlines. The time for filing a notice of appeal may be extended only in a case under RULE 809.30(2).