

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 18, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2328-CR

Cir. Ct. No. 2002CF4286

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MITCHELL A. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mitchell Johnson appeals from a judgment convicting him of one count of possession of a controlled substance (cocaine) with intent to deliver and one count of bail jumping. He also appeals from a circuit

court order denying his motion for a new trial. Because we conclude that Johnson was not denied effective assistance of counsel at trial, we affirm.

¶2 Johnson was convicted following a jury trial. The circuit court sentenced Johnson to eight years of imprisonment, consisting of four years of initial confinement followed by four years of extended supervision. Johnson moved the court for a new trial, contending that his trial counsel was ineffective for failing to call four citizen witnesses who were present when Johnson was arrested and would have allegedly testified that Johnson was not dealing drugs as the arresting officers testified they had observed. After holding a *Machner*¹ hearing at which Johnson's attorney and the four proposed witnesses testified, the circuit court denied Johnson's motion, concluding that his trial counsel's performance was reasonable under prevailing professional norms. Johnson appeals.

¶3 In order to prove ineffective assistance, Johnson must show that his counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If Johnson fails to satisfy either factor, his claim fails. *See id.* Our standard of review is mixed. *See State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). Findings of historical fact will not be upset unless they are clearly erroneous, but the questions of whether counsel's performance was deficient and prejudicial are legal issues that we resolve independently. *See id.* at 634.

¹ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶4 At trial, Officer Steven Hermann a City of Milwaukee police officer, testified that he personally observed Johnson approach a vehicle, engage in a short conversation with the vehicle's driver, retrieve a small item from a black garbage bag, return to the vehicle and engage in a hand-to-hand transaction involving currency with the driver. A second officer, Officer Brian Biscobing, testified that he took notes as his partner, Officer Hermann, described what he observed by binoculars from their point of surveillance. Johnson did not dispute the seizure by police at the scene of a black plastic bag containing thirty-nine separately wrapped packages of crack cocaine.

¶5 Johnson's defense consisted of denying that he approached the SUV or engaged in a hand-to-hand transaction. He also offered evidence intended to demonstrate to the jury that Officer Hermann could not see what he claimed because a boat blocked the officer's line of vision. Johnson's postconviction motion also alleged that had trial counsel called four citizen witnesses present at the scene during the alleged transaction, their testimony would have raised a reasonable doubt in the jurors' minds.

¶6 The four citizen witnesses, Samuel Sanders, Derriest Boose, Thomas Sanders and Thomas Leverston, testified at the *Machner* hearing. The record developed at the hearing indicated that Samuel Sanders was the driver of the vehicle which was the subject of Officer Biscobing's report and was the person to whom the drugs were allegedly delivered. Thomas Sanders is Samuel Sanders' brother, and Boose is Johnson's son. Furthermore, Boose and Leverston were arrested at the scene on outstanding tickets.

¶7 The four witnesses' recollections of what happened at the scene contradicted each other on key points, including whether or not Johnson

approached Samuel Sanders' vehicle, and whether or not they exchanged words. The four men's testimonies were also in dispute regarding whether a sixth person, a person identified by Thomas Sanders as "Marv," stashed drugs in the area and ran through an adjacent gangway as police approached.

¶8 Trial counsel detailed his strategy of challenging Officer Hermann's credibility. The strategy was founded on the alleged obstruction of Officer Hermann's sight lines by a boat, his change in testimony between the preliminary hearing and trial, and defense counsel's development of photographic evidence showing views of the scene through binoculars taken from different angles tending to demonstrate that the officer was not telling the truth.

¶9 Trial counsel testified in pertinent part as follows:

Based upon my conversations with Mr. Johnson, we have a preliminary hearing transcript, we had the police reports, I went out to the scene with my investigator, and we looked at the scene from the officer's preliminary hearing testimony and believed that the officer could never have seen what he claimed to have seen from those vantage points. That being from where he was located and where he claimed Mr. Johnson was.

And so at that particular time, I made the decision to present the defense that the officer could never have seen what he claimed. And so I never really thought -- gave it a second thought as to calling any other witnesses to present additional testimony other than what we decided to go with with regard to the scene. So those are really the reasons that I didn't pursue -- I didn't even interview these witnesses to be honest with you.

¶10 “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.” *Pitsch*, 124 Wis. 2d at 636 (citation

omitted). The proper measure of attorney performance is whether it was reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 688.

¶11 We conclude that trial counsel's performance was reasonable in view of prevailing professional standards. Counsel pursued a rational, vigorous defense strategy that attacked the core of the State's case. In contrast, the testimony proffered by Johnson came from individuals whose credibility was undermined by their relationship to him or their own unlawful conduct. In addition, they contradicted each other and the key factual position of Johnson's defense that he did not approach the SUV or engage in a transaction with its occupants. We conclude that the evidence offered by Johnson at the *Machner* hearing failed to overcome the presumption that under the circumstances counsel's challenged conduct exhibited sound trial strategy. *Strickland*, 466 U.S. at 689. Accordingly, we hold that the circuit court properly concluded that counsel's performance at trial was not deficient and, therefore, Johnson was not denied effective assistance of counsel at trial.

By the Court.—Judgment and order affirmed.

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

