COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1458 **Cir. Ct. No. 2000CF155**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAAMAL D. BELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jaamal D. Bell has appealed from an order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2003-04).[1] He

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

sought relief from a judgment entered in December 2000, convicting him after a jury trial of second-degree sexual assault as a repeat offender. This court affirmed Bell's judgment of conviction and an order denying postconviction relief in ***State v. Bell***, No. 2002AP377-CR, unpublished slip op. (WI App Feb. 5, 2003).

¶2 In the postconviction motion which gives rise to the present appeal, Bell contended that both his trial counsel and his prior appellate counsel rendered ineffective assistance. The trial court denied the motion after a ***Machner***[2] hearing at which Bell, his trial counsel, and his prior appellate counsel testified. We affirm the trial court's order denying postconviction relief.

¶3 At trial, the victim, Linea M., testified that Bell sexually assaulted her on the morning of January 12, 2000. The victim and Bell had previously lived together and had a child.

¶4 In his postconviction motion and on appeal, Bell contends that his trial counsel rendered ineffective assistance because he failed to obtain telephone records which would have shown that the victim contacted Bell after the assault, because he did not attempt to obtain hotel records verifying that Bell stayed at a hotel with his girlfriend on the night after the assault, and because he did not adequately attempt to locate a witness named Tara. Bell contends that his appellate counsel rendered ineffective assistance when he failed to investigate the claim of ineffective assistance of trial counsel.

¶5 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense.

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

Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show that his counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** "Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The test for prejudice is whether our confidence in the outcome is sufficiently undermined. ***Strickland***, 466 U.S. at 694.

¶6 Determining whether there has been ineffective assistance of counsel presents a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). A trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. ***Id.***

¶7 In analyzing an ineffective assistance claim, we may choose to address either the deficient performance prong or the prejudice prong. ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11. If we conclude that the defendant has made an inadequate showing with respect to one prong, we need not address the other. ***Id.***

¶8 Because Bell has failed to establish that he was prejudiced by the alleged deficiencies in his trial counsel's performance, no basis exists for relief on appeal. At the postconviction hearing, Bell argued that the telephone and hotel records would have enhanced his credibility and reduced the credibility of the

victim. However, his arguments regarding the telephone and hotel records are controlled by our prior decision in his direct appeal.

¶9 In his direct appeal, Bell argued that he was entitled to a new trial in the interest of justice because, after trial, he learned that records of telephone calls made to him from the victim's apartment after the assault were available. Trial counsel had subpoenaed these records before trial, but had been told they were unavailable. After trial, it was learned that the records had been produced before trial, but had mistakenly been filed with the trial court rather than being served on trial counsel. Bell argued that because the jury was deprived of the telephone records indicating that the victim made numerous calls to him after the assault, the issue of credibility was not fully tried.

¶10 In his direct appeal, Bell also argued that he was entitled to a new trial in the interest of justice because after trial he remembered the name of the hotel that he and his girlfriend stayed at the night after the assault and obtained a hotel receipt verifying his stay.[3] He argued that this evidence corroborated his trial testimony and the testimony of his girlfriend, and undermined the prosecutor's argument that they were lying.

¶11 In our decision, we discussed the standard for ordering a new trial on the ground that the real controversy was not fully tried. ***Bell***, No. 2002AP377-CR, unpublished slip op., ¶9. We stated that we did not need to find a substantial likelihood of a different result on retrial. ***Id.*** However, the evidence which the

[3] At trial, Bell and his girlfriend both testified that they could not remember the name of the hotel. Bell subsequently asserted that he remembered the name of the hotel during the jury deliberations.

jury was deprived of hearing had to be important testimony that bore on an important issue in the case. ***Id.***

¶12 We concluded that neither the telephone records nor the hotel receipt constituted important evidence bearing on an important issue in this case. ***Id.***, ¶¶10-11. Based on that determination, we also rejected Bell's claim that he was entitled to a new trial based on newly discovered evidence presented by the telephone records. ***Id.***, ¶12. We held that a new trial may be ordered based on newly discovered evidence only when it is reasonably probable that a different result would be reached at a new trial. ***Id.*** Based upon our determination that the telephone records were not important evidence on an important issue, we concluded that this standard was not met.

¶13 Our decision on an issue in a defendant's prior appeal is the law of the case. ***State v. Casteel***, 2001 WI App 188, ¶15, 247 Wis. 2d 451, 634 N.W.2d 338. Once decided on appeal, we do not revisit an issue merely because it is raised under a new label. *See* ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶14 As noted by the trial court, we have already decided that neither the telephone records nor the hotel receipt is an important piece of evidence bearing on an important issue in this case. This is the law of the case. It follows that Bell has not met his burden of showing that he was prejudiced by his trial counsel's failure to obtain and present the telephone records and hotel receipt.

¶15 Bell also claims that his trial counsel rendered ineffective assistance when he failed to make adequate attempts to locate and interview a woman named Tara. At the postconviction hearing, Bell testified that Tara was the victim's best friend and could have testified that the victim had, in fact, had contact with Bell

after the assault. As with the telephone and hotel records, Bell contended that testimony from Tara would have enhanced his credibility and damaged the credibility of the victim.

¶16 A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of his case. ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). The defendant must base a challenge to his representation on more than speculation. *See* ***id.*** A defendant fails to prove prejudice from his trial attorney's failure to question a witness when he fails to demonstrate what questioning the witness would have revealed and how it would have altered the outcome of the trial. *See* ***State v. Provo***, 2004 WI App 97, ¶15, 272 Wis. 2d 837, 681 N.W.2d 272, *review denied*, 2004 WI 123, 275 Wis. 2d 296, 687 N.W.2d 523.

¶17 Tara did not testify at the postconviction hearing, nor is there anything else in the record to establish what her testimony would have been. Bell's testimony that Tara would have presented evidence indicating that the victim contacted him after the assault is speculation. Absent evidence establishing that Tara's testimony would have assisted Bell's defense, no basis exists to conclude that Bell was prejudiced by his trial counsel's failure to make greater attempts to locate her prior to trial.[4]

[4] We further note that even if Tara had testified that she was aware of contact between Bell and the victim after the assault, trial counsel's failure to present her testimony was not prejudicial. In our prior decision, we concluded that evidence regarding postassault contact between the victim and Bell was not important evidence in the case. ***State v. Bell***, No. 2002AP377-CR, unpublished slip op., ¶10 (WI App Feb. 5, 2003). Consequently, no basis exists to hold that trial counsel's failure to present testimony from Tara on the subject undermines confidence in the outcome of the trial.

¶18 Bell has thus failed to establish that his trial counsel rendered ineffective assistance. His claim that his appellate counsel was ineffective for failing to argue ineffective assistance of trial counsel therefore must also fail. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369, *review denied,* 2004 WI 20, 269 Wis. 2d 201, 675 N.W.2d 807.

By the Court.—Order affirmed.

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