COURT OF APPEALS DECISION DATED AND FILED

May 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.**

No. 00-1285-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NORMAN D. STAPLETON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Norman Stapleton, *pro se*, appeals from an order denying his motion for postconviction relief, following his convictions for robbery and burglary. He argues that his trial counsel and appellate counsel were ineffective. We affirm.

I. BACKGROUND

¶2 On the evening of August 26, 1994, Beryl Bent returned to her apartment building on North 27th Street. As she entered the lobby, she was accosted by a man. Fearing that the man might follow her to her residence, she asked a security guard to escort her to her apartment. When the security guard did so, the suspect from the lobby rode with them on the elevator to Bent's floor. The security guard ensured that Bent entered her apartment safely, and then returned to his post. Shortly thereafter, a man claiming to be the security guard knocked on Bent's apartment door. When she would not open the door, the man kicked it in and robbed her.

¶3 Bent was unable to identify the perpetrator in a photographic array, but the security guard and Bent's neighbor, Brenda James, identified Stapleton. Later, in an in-person lineup, Bent identified Stapleton as her attacker. Stapleton appealed, arguing that the lineup identifications should have been suppressed as impermissibly suggestive. We rejected his argument and affirmed his convictions. *See* ***State v. Stapleton***, No. 99-1988-CR, unpublished slip op. (Wis. Ct. App. April 2, 1999). Following his direct appeal, Stapleton filed a *pro se* postconviction motion seeking a new trial based on ineffective assistance of trial and appellate counsel. The circuit court denied his motion.

II. DISCUSSION

¶4 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). 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." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶5 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 are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687, 697.

¶6 Stapleton first argues that trial counsel was ineffective for failing to challenge the legality of his arrest. He disclaims his prior argument that his arrest followed an impermissibly suggestive photographic lineup and, instead, claims that "the subsequent [in-person lineup] identification procedures were the fruit of an illegal arrest, hence an illegal search; thereby, such identification procedures should have been suppressed as the fruit of the poisonous tree resulting from the unlawful arrest." Essentially, he maintains that because the victim was unable to identify him prior to the arrest, the police did not have probable cause to arrest him. He is incorrect.

¶7 Two other witnesses linked Stapleton to the crime. Thus, even without Bent's identification, the police had probable cause to arrest him. Consequently, counsel's alleged failure to challenge the arrest was not ineffective;

any challenge would have been unsuccessful. Moreover, this court previously concluded that the pretrial identification procedures were not impermissibly suggestive, *see* ***Stapleton***, No. 97-1988-CR, unpublished slip op. at 4-5 (Wis. Ct. App. April 2, 1999), and, even if they were, that "[b]ased on the in-court identifications and the other trial …evidence … no reasonable possibility [exists] that any error in the line-up or photo array affected the outcome of the trial," ***id.*** Consequently, neither trial counsel nor appellate counsel was ineffective for not pursuing these issues.[1]

¶8 Stapleton next argues that trial counsel was ineffective for failing to object when the prosecutor cross-examined him about statements he made to the police. He claims that the prosecutor had stipulated that he would not question him about such statements. Once again, Stapleton is incorrect.

¶9 The State's cross-examination of Stapleton never entered into any area precluded by the stipulation. In fact, the stipulation did not address the State's use of the statement, but rather, addressed Stapleton's use of the statement during the defense cross-examination of the police. As the State explains:

> [T]he stipulation concerned Stapleton's use of the statement when cross-examining Milwaukee police officers, not other uses to which Stapleton or the prosecutor might put the statement. Moreover, Stapleton's trial lawyer advised the trial court and the prosecutor that Stapleton did not have any problem with the use of the statement except in relation to Stapleton's prior convictions.

[1] Stapleton also argues that the trial court improperly placed on him, not the State, the burden of "show[ing] that the Identification was not Impermissibly suggestive and unreliable." We reject his argument for two reasons. First, the record establishes that the trial court correctly allocated and applied the burden of proof. Second, as we previously concluded, any alleged error was harmless. ***State v. Stapleton***, No. 97-1988-CR, unpublished slip op. at 4-5(Wis. Ct. App. April 2, 1999).

> As the trial court noted, the prosecutor referred to the statement when he "questioned the defendant about the address he had given to police upon his arrest….No other references were made to his statements to the police" Consequently, the prosecutor's cross-examination did not violate the stipulation.

¶10 We agree. Moreover, even if the prosecutor's questioning somehow violated the stipulation, and even if, therefore, trial counsel performed deficiently by failing to object, Stapleton has failed to show how the testimony undermines confidence in the outcome of the trial.

¶11 On direct examination, Stapleton said he lived at "2835 West Kilbourn." On cross-examination, the prosecutor, referring to the police statement, which contained a different address, asked Stapleton if he had given the 2835 West Kilbourn address to police when they questioned him. Stapleton said, "No." Consequently, even assuming that Stapleton's testimony conflicted with his statement to the police, and even assuming that the jury drew an adverse inference from the conflicting responses, Stapleton still has failed to establish that this adverse inference undermines the confidence in the outcome of the trial. After all, two other witnesses testified that they saw Stapleton near Beryl Bent's apartment within minutes of the crime. Bent's neighbor, Brenda James, testified that moments before the crime she saw Stapleton heading in the direction of Bent's apartment. She even heard Bent say, "'Who is it?'" "right after [Stapleton] went around the corner toward Bent's apartment." Additionally, Darnell Wallace, the security guard who escorted Bent to her apartment, testified that when he and Bent entered the elevator, Stapleton, whom Wallace had seen in the hallway, joined them and rode to Bent's floor.

¶12 Stapleton also testified but, at least in this regard, did not help his cause. Notably, he testified that he visited Bent's building because he had friends

who lived on the first and third floors of the building. When asked to identify these friends, however, he said he could not because he did not know their last names. Although Stapleton said he might have been on the fourth floor that day, he denied having ridden to that floor in the elevator with the security guard.

¶13 Therefore, in light of the testimony of both Stapleton and the State witnesses, the prosecutor's brief cross-examination of Stapleton about his residence could not have affected the outcome of the trial and, thus, defense counsel's failure to object did not prejudice Stapleton. As a result, Stapleton has failed to establish that counsel was ineffective.

¶14 Stapleton next argues that the court erred in dismissing a potential juror due to the juror's conviction for reckless homicide. Citing ***State v. Mendoza***, 227 Wis. 2d 838, 596 N.W.2d 736 (1999), and ***State v. Ferron***, 219 Wis. 2d 481, 579 N.W.2d 654 (1998), he argues that the court had no authority to dismiss a juror based on the stipulation of the parties and, further, that defense counsel really did not stipulate to the juror's dismissal.

¶15 Stapleton correctly observes that the parties did not enter into a formal stipulation. He also observes that the trial court interrupted defense counsel when counsel, commenting on the prospective juror, had only said: "I'm pretty uncomfortable with him. Yea. I don't know if I …." Still, given that defense counsel did not object to the removal of the juror, we view defense counsel's acquiescence as a stipulation to the juror's removal, and we reject Stapleton's arguments.

¶16 First, the cases Stapleton cites do not support his proposition; neither involved a stipulation to dismiss a juror. Second, Stapleton has not presented any authority for the proposition that parties cannot stipulate to the removal of a

potential juror. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments); *see also* ***State v. Brunette***, 220 Wis. 2d 431, 445, 583 N.W.2d 174 (Ct. App. 1998) ("the ultimate decision whether to move to strike a potential juror for cause is for counsel to make"). Finally, Stapleton has not shown any way in which the dismissal of the juror harmed him. In fact, he never claims that the jury selection in his case yielded a biased jury. Absent such a showing, his argument fails. Moreover, as the State notes:

> [T]he stipulated dismissal preserved rather than diminished the number of peremptory challenges [Stapleton] could exercise. The State remains perplexed as to how a trial court granting a defense counsel's request to remove or exclude a potential juror in a way that does not diminish the number of peremptory strikes and does not produce a biased jury can add up to *any* error adverse to the defendant, mush less reversible error.

We agree. The trial court did not err in dismissing of the juror.

¶17 Stapleton also claimed that counsel was ineffective for failing to impeach Darnell Wallace because Wallace failed to testify consistent with his statement to police that he had seen two black females outside of Bent's apartment at the same time he saw Stapleton. The record reveals, however, that trial counsel did expose this discrepancy in cross-examining Wallace. Consequently, trial counsel was not ineffective.

¶18 Stapleton argues that the trial court erred in denying his postconviction motion without a ***Machner*** hearing.[2] Again, we reject his argument.

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

¶19 We review a trial court's decision on whether to hold a ***Machner*** hearing under the two-part test enunciated in ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996):

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing ....

Id. at 310-11 (citations omitted). Further, "'if the defendant 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.'" ***Id.*** at 309-10 (citations omitted). Based on the trial record, the postconviction motion, and the brief in support of the motion, we conclude that the circuit court correctly determined that Stapleton not only failed to establish deficient performance or prejudice, but also that he was not entitled to an evidentiary hearing.

¶20 As previously noted, Stapleton's claim that trial counsel was ineffective for failing to challenge his arrest is without merit. The record clearly established that the police had probable cause to arrest Stapleton based on statements and identifications obtained from witnesses who saw him near the victim's apartment. The record also refutes Stapleton's claim that trial counsel was deficient for failing to object to the trial court's allocation of the burden of proof regarding his challenges to the identifications. In fact, the trial court concluded that, irrespective of whether Stapleton had met his burden of proof, the State had satisfied its burden on the second identification prong and, therefore, had

refuted Stapleton's challenge. And, as we noted, the record refutes Stapleton's claim that counsel rendered ineffective assistance of counsel by failing to object "when the [trial] [c]ourt struck a [j]uror for [c]ause solely on the bas[i]s that the [j]uror had been convicted of a [c]rime." The record establishes that the trial court accepted counsel's agreement to dismiss the juror.

¶21 Similarly, Stapleton's claim that trial counsel was ineffective for failing to object to the State's cross-examination of him about the address he gave police, based on the alleged stipulation not to do so, did not merit a hearing. The record shows that Stapleton did not accurately summarize the stipulation and, further, that the stipulation did not restrict the prosecutor in the way in which Stapleton suggests. Accordingly, the trial court properly denied Stapleton's motion without holding an evidentiary hearing.

¶22 Finally, Stapleton argues that appellate counsel was ineffective for failing to challenge trial counsel's performance. The argument is moot given that this appeal has allowed for Stapleton's presentation of such claims. Moreover, even if Stapleton's claims regarding appellate counsel were not moot, we would have to reject them because Stapleton failed to petition for a writ of habeas corpus in the appellate court that heard his appeal. *See generally* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

By the Court.—Order affirmed.

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