COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2005AP605-CR **Cir. Ct. No. 2001CF186**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FRANCIS E. ALTMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Francis Altman, pro se, appeals a judgment, entered upon a jury's verdict, convicting him of three counts of dealer in possession of an untaxed controlled substance and one count each of delivery of THC, possession with intent to deliver schedule IV drugs, possession with intent

to deliver LSD, and possession with intent to deliver THC. Altman also appeals the order denying his motion for postconviction relief. Altman raises numerous challenges to his conviction. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 The charges against Altman arose from the discovery of marijuana during a police search of Silas Langsdorf's residence. Langsdorf told the police he had purchased the marijuana from Altman and subsequently agreed to participate in a controlled buy of marijuana from Altman. During a telephone call to Altman, Langsdorf asked where Altman was, asked if he had "some more" and asked if they could meet, to which Altman agreed. Langsdorf then made another call "to set up the meeting place" with Altman. The two agreed to meet in a retail store parking lot. The two phone conversations were recorded, reduced to audiotape and later played for the jury.

¶3 Altman was ultimately arrested in the parking lot where the sale was to occur. During a search of Altman's car, officers found a large quantity of marijuana, drugs and drug paraphernalia. The officers also found over $9,000 and a padlock key on Altman. After obtaining search warrants for Altman's residence, officers found marijuana and drug paraphernalia in Altman's bedroom. The officers additionally found approximately two pounds of brick marijuana in a safe secured with a padlock fitting the key that was found on Altman.

¶4 Altman's pretrial motion to suppress the audio recordings of his conversations with Langsdorf was denied. After a jury trial, Altman was convicted and sentenced to three years' initial confinement followed by three years' extended supervision on the THC delivery conviction. With respect to two

of his convictions for dealer in possession of an untaxed controlled substance, the court imposed consecutive sentences totaling five years' initial confinement and four years' extended supervision. On the remaining conviction for dealer in possession of an untaxed controlled substance, the court imposed a concurrent sentence consisting of four years' initial confinement and four years' extended supervision. Altman received a consecutive sentence of five years' initial confinement and five years' extended supervision on his conviction for possession with intent to deliver schedule IV drugs. Finally, the court imposed concurrent sentences consisting of four years' initial confinement and four years' extended supervision on each of the remaining convictions for possession with intent to deliver THC and possession with intent to deliver LSD.

¶5 Altman filed a pro se motion for a new trial alleging his trial counsel was ineffective for "allowing him" to testify in his own defense and failing to obtain an audiotape of the conversation in which Altman agreed to sell drugs to Langsdorf. After a hearing, the trial court denied Altman's motion, concluding that Altman had failed to show that he had not testified knowingly, intelligently and voluntarily. The court also concluded Altman had failed to prove that anything was missing from the audiotape. In its decision, the court additionally addressed issues Altman raised for the first time at the hearing. Specifically, Altman claimed that the lesser-included offenses upon which the jury was instructed were improper, that his speedy trial right was violated, and that defense counsel was ineffective for failing to convince the jury that Langsdorf was an incredible witness. The court rejected these additional claims and this appeal follows.

DISCUSSION

¶6 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶7 "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Johnson***, 153 Wis. 2d 121, 126, 449, N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Altman must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Strickland***, 466 U.S. at 694.

¶8 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant

must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶9 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. However, we need not address the prejudice prong if we conclude there is no deficient performance by counsel. *See* ***id.*** at 697.

¶10 Here, as in his postconviction motion, Altman argues trial counsel was ineffective for failing to compel discovery of his recorded conversations with Langsdorf, and for allowing Altman to testify in his own defense.[1] Altman additionally claims counsel should have challenged the improper disclosure of the audiotape's contents. We are not persuaded.

¶11 With respect to the audiotape, Altman argues that a cursory examination of the tape would have revealed an approximately sixty-second gap in the tape, and the gap would have discredited Langsdorf. At the ***Machner***[2] hearing, however, trial counsel testified that although his repeated requests for a copy of the tape were unsuccessful, he had, in fact, listened to the audiotape with the district attorney. Counsel additionally testified that if what he heard on the tape

[1] With respect to the remaining arguments Altman raised at the postconviction motion hearing, Altman presents no argument on these issues in his brief. Issues not briefed are deemed abandoned on appeal. *See* ***Reiman Assocs. Inc., v. R/A Adver., Inc.***, 102 Wis. 2d 306, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

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

prior to trial had differed from what was played at trial, he would have commented on it. To the extent Altman is challenging counsel's failure to have the tape tested for gaps or other flaws, the trial court found that Altman's recollection that the conversation was longer than what was heard on the tape was insufficient to establish that the tape had been altered. Moreover, Altman has failed to identify what he believes took place during the alleged gap on the tape, or how any missing portion of the conversation would have impacted the outcome at trial. Because Altman cannot show that he was prejudiced by his counsel's failure to more thoroughly analyze the tape, we need not address the deficient performance analysis. ***Strickland***, 466 U.S. at 694.

¶12 Altman additionally argues counsel was ineffective for failing to adequately apprise him of the consequences of testifying at trial. Specifically, Altman contends that counsel should not have allowed him to testify "when he knew that defendant['s] testimony would satisfy the elements of the crimes [for] which he was charged." We are not persuaded. Before he took the stand, the trial court attempted to ascertain that Altman made the decision to testify knowingly, intelligently and voluntarily, specifically explaining that by testifying, Altman would be opening himself up to cross-examination. When Altman indicated he had not fully discussed his decision to testify with defense counsel, Altman was given an opportunity to further discuss the option with counsel. Altman ultimately confirmed that he had a satisfactory discussion with counsel regarding whether to testify and he opted for testifying in his own defense. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***Id.*** at 691.

¶13 To the extent Altman now claims that his testimony "made the State's case," the State's own evidence at trial was sufficient to support Altman's

convictions. Langsdorf testified that he had purchased drugs from Altman and agreed to participate in a controlled buy from Altman. The jury heard the audiotape of Langsdorf's conversations with Altman. Police officers testified about the discovery of drugs in Altman's car, on his person and later, at his residence. The jury also heard that none of the bricks of marijuana or other recovered drugs had tax stamps. In light of the overwhelming evidence introduced at trial, Altman does not establish how his testimony was crucial to proving the charges against him. Altman therefore fails to establish how he was prejudiced by any claimed deficiency on the part of trial counsel for "allowing" Altman to take the stand.

¶14 Altman argues that counsel was nevertheless ineffective for failing to present an entrapment defense. To establish an entrapment defense, a defendant must show by a preponderance of the evidence that he or she was induced to commit the crime. ***State v. Schuman***, 226 Wis. 2d 398, 403, 595 N.W.2d 86 (Ct. App. 1999). "If the defendant meets [that] burden of persuasion, then the burden falls on the State to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." ***Id.*** Here, Altman does not indicate how he was induced to commit a crime. To the extent Altman claims the controlled buy and phone call recordings constitute "entrapment," Altman is mistaken. "[T]he government may use undercover agents to enforce the law, and … artifice and stratagem may be employed to catch those engaged in criminal enterprises." ***Id.*** at 402-03.

¶15 Altman additionally claims counsel should have challenged the improper disclosure of the audiotape's contents. Specifically, Altman argues that disclosure of the tape's contents was improper because no one testified under oath as to the truthfulness or accuracy of the tape. Interception and use of the evidence,

however, was authorized under WIS. STAT. § 968.29(3)(b) (2003-04), which provides, in relevant part:

> Any person who has received … any information concerning a wire, electronic or oral communication or evidence derived therefrom, may disclose the contents of that communication or that derivative evidence while giving testimony under oath or affirmation in any proceeding … in which a person is accused of any act constituting a felony, and only if the party who consented to the interception is available to testify at the proceeding.

Here, Langsdorf, who consented to the recorded interception of the phone calls, testified regarding the tape's accuracy. Langsdorf confirmed that the tape was a word-for-word recording of the two conversations he had with Altman. Counsel is not deficient for failing to raise a meritless claim.

¶16 For the first time on appeal, Altman intimates that trial counsel was ineffective for failing to raise claims of juror bias or otherwise object to the improper admission of other acts evidence. Claims of ineffective assistance must first be raised in the trial court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Although a ***Machner*** hearing was held in this case, Altman did not raise an issue regarding the admission of other acts evidence or jury bias. It is inappropriate for this court to determine competency of trial counsel based on unsupported allegations. ***State v. Simmons***, 57 Wis. 2d 285, 297, 203 N.W.2d 887 (1973).

¶17 Finally, Altman challenges the validity of one of the search warrants for his residence. Although Altman filed a pretrial suppression motion, that motion did not seek to suppress the results of the search warrant or otherwise challenge the validity of the warrant. As a general rule, we will not decide issues that have not first been raised in the trial court. ***Terpstra v. Soiltest, Inc.***, 63

Wis. 2d 585, 593, 218 N.W.2d 129 (1974). Even on the merits, however, Altman's argument fails.

¶18 Altman claims the warrant was invalid because it was not accompanied by a sworn "affidavit." Altman is mistaken. Officer Dale Wisnewski presented a "Complaint for Search Warrant," after being "duly sworn," and averred that "the facts tending to establish the grounds for issuing a search warrant are as set forth in the attached documents prepared by this officer." The officer's narrative report was attached. That the subject document was identified as a "complaint" rather than an "affidavit" is irrelevant. As the State notes, an "affidavit" is merely a "voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *See* BLACK'S LAW DICTIONARY, 58 (7th ed. 1999).

¶19 To the extent Altman intimates that probable cause to search did not support issuance of the search warrant, we are not persuaded. Determining whether probable cause supports a search warrant involves making a "practical, commonsense decision whether, given all the circumstances set forth in the affidavit … there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517. We give great deference to the magistrate's determination that probable cause supported the warrant. ***Id.***, ¶21.

¶20 Here, the warrant application identified Altman's residence in detail, and explained that an informant had given police information against his penal interests, indicating that Altman sold marijuana and had been in possession of marijuana the previous day. The warrant application further described the recorded phone conversations between Altman and the informant, as well as the

discovery of marijuana, cash and other drugs following Altman's arrest in the parking lot. Taken as a whole, the information in the warrant application and the reasonable inferences drawn from that information constitute sufficient grounds to believe there was a fair probability that Altman's residence contained evidence linking him to criminal activity.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).