COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2708 **Cir. Ct. No. 2000CF253**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID G. HUUSKO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed*.

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

¶1 PER CURIAM. David Huusko appeals an order denying his WIS. STAT. § 974.06[1] postconviction motion alleging ineffective assistance of his previous postconviction counsel, Jay Heit. The motion alleged that Heit was ineffective for failing to raise issues of ineffective assistance of trial counsel, William Schembera. The trial court initially denied the motion without a hearing. This court summarily reversed that order, concluding that, with the exception of Huusko's speedy trial argument, his detailed allegations of ineffective postconviction and trial counsel were adequate to compel a hearing. On remand, Heit and Schembera testified about some issues relating to Schembera's representation of Huusko. Based on their credibility, the trial court again denied Huusko's motion and Huusko appeals.

¶2 A jury convicted Huusko of a May 17, 2000 armed robbery of a Super America store. The jury acquitted him of another armed robbery that occurred one day earlier. The State's witnesses included Shea Mattice, Huusko's accomplice, and Jacob and Lisa Sieg, who identified Huusko from a surveillance tape.

¶3 In his postconviction motion, Huusko argues that Schembera was ineffective for failing to raise seven issues. However, at the hearing on remand, Huusko asked his attorneys no questions regarding three of the issues. To preserve an issue for appeal, a defendant must call his or her allegedly deficient attorney as a witness to establish the attorney's lack of knowledge of salient law or facts in order to show that counsel's actions were the result of incompetence rather

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

than deliberate strategy. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The three issues that Huusko failed to present at the hearing on remand are not properly preserved for appeal.

¶4 Huusko argues that the trial court limited the issues he could raise at the hearing. The record does not support that argument. When Huusko began to present his speedy trial argument, the prosecutor objected, noting this court had characterized that argument as "nonmeritorious." The trial court agreed and indicated that it would not take testimony on that issue. The prosecutor raised no other objections and the trial court did not prohibit inquiry into any other matters. Huusko made no offer of proof regarding these issues as required by WIS. STAT. § 901.03(1)(b). Therefore, we will address only the speedy trial issue and the three issues that Huusko preserved by asking his attorneys to explain their actions.

¶5 Huusko does not establish any right to relief based on his speedy trial rights. His motion confuses his constitutional speedy trial right with the more restrictive statutory rights set out in WIS. STAT. § 971.10. The statutory remedy for failing to bring a felon to trial within ninety days of his written demand for a speedy trial is release on bond pending trial. *See* WIS. STAT. § 971.10(4). After the trial has taken place, that remedy is no longer available and a violation of the statutory speedy trial right is moot.

¶6 Huusko's motion does not establish any violation of his constitutional speedy trial right. He was arrested on May 17, 2000, and first requested a speedy trial on June 27, 2000. At a hearing held September 5, 2000, Huusko personally waived his speedy trial right. The trial commenced January 24, 2001. The primary reason for the delay was that Mattice obtained new counsel who needed additional time to familiarize himself with the case. Huusko's motion

does not show an inordinate delay, an unacceptable reason for the delay, an assertion of his speedy trial right that was not withdrawn or any actual prejudice to his defense. *See* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). Huusko notes that several witnesses changed their testimony from the statements to police or at the preliminary hearing. Changes in witnesses' testimony are not necessarily due to the passage of time and do not, by themselves, constitute proof of prejudice due to delay.

¶7 At the hearing on remand, Huusko asked his attorneys to explain their failure to introduce the negative results of a drug test taken May 8, 2000, by Huusko's federal probation officer. Huusko contends that the negative drug test would have countered the State's contention that the robberies were committed in a "drug frenzy" and would have contradicted Mattice's testimony that he and Huusko consumed cocaine in early and mid-May 2000. Huusko's testimony that he told Schembera about the drug test was contradicted by Schembera's testimony. Schembera testified that the probation agent was very cooperative and provided him information about drug tests. Schembera shared that information with Huusko. Huusko never advised Schembera of the May 8 blood test. The trial court found Schembera's testimony more credible than Huusko's. Huusko asks this court to overrule the trial court's finding of fact. This court has no authority to overturn a finding based on witness credibility unless the finding is contrary to conceded facts or the laws of nature. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶8 Schembera cannot be faulted for failing to present evidence that Huusko knew about but did not share with Schembera. The reasonableness of counsel's actions may be determined by the defendant's own statements or actions. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). Furthermore,

because trial testimony established that cocaine in the bloodstream dissipates after forty-eight hours, the negative test result would only have shown that Huusko had not consumed cocaine between May 6 and May 8. Neither the prosecutor's theory as to motive nor Mattice's testimony that they consumed cocaine in early and mid-May would be contradicted by that evidence.

¶9 Huusko's motion also alleged that blood was drawn for drug testing shortly after his first court appearance. At the hearing on remand, however, he conceded that he had no evidence to support that allegation. Rather, a blood sample was taken May 22, 2000. Because that blood test occurred more than forty-eight hours after Huusko's arrest, negative test results would not have been exculpatory and positive test results would have been inculpatory. Therefore, his attorney reasonably chose not to have the blood tested.

¶10 Huusko faults his attorney for not taking a hair sample that he contends would not be subject to the forty-eight hour dissipation found in blood tests. However, at the postconviction hearing, he did not establish that reliable hair testing was available in May 2000, or that reasonably effective counsel would have been aware of that possibility and would have preserved a hair sample to contradict the district attorney on the tangential question of whether drugs motivated the robberies.

¶11 Huusko argues that Schembera was also ineffective for failing to present evidence that Sieg violated the terms of his probation. He contends that Sieg and his wife had a motive to curry favor with the prosecutor due to the violations. That argument depends on Sieg having reason to believe his probation was in danger. At the postconviction hearing, a probation supervisor reviewed Sieg's probation record and concluded his probation was not in danger. Probation

violations that were not known by the probation officer would not give Sieg or his wife any incentive to curry favor with the prosecutor.

¶12 Finally, Huusko argues that Heit had a conflict of interest that prevented him from calling Sieg as a witness at his initial postconviction hearing. Heit represented Sieg in the proceedings that led to Sieg being placed on probation. At the postconviction hearing, Heit testified that under the terms of the state public defender assignment, his representation of Sieg ended when Sieg was sentenced. Heit testified that he had no obligation to protect Sieg from the consequences of any probation violation. While he had a continuing obligation to maintain confidentiality, he had no privileged or confidential information that might have affected Huusko's case. Heit's failure to inquire about Sieg's alleged probation violations was based on his judgment that the violations were not relevant to Huusko's case rather than out of any continuing duty to Sieg. Huusko has not established any actual conflict of interest.

By the Court.—Order affirmed.

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