COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1221-CR **Cir. Ct. No. 2003CF324**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW D. OLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Reversed and cause remanded.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Matthew D. Olson has appealed from a judgment convicting him of homicide by intoxicated use of a motor vehicle in violation of

WIS. STAT. § 940.09(1)(a) (2003-04).[1] He has also appealed from an order denying his motion for postconviction relief. Because we conclude that Olson was deprived of effective assistance of counsel at trial, we reverse the judgment and order and remand the matter for a new trial.

¶2 The motor vehicle accident that gave rise to Olson's conviction occurred at approximately 6:30 p.m. on April 4, 2003, on Highway 18 in the town of Delafield. The evidence at trial indicated that Olson's Ford F250 truck crossed the center line, striking a vehicle driven by David Klinger. At trial, the parties stipulated that Klinger died as a result of the accident and that Olson's blood alcohol concentration was .135.

¶3 A person may be found guilty of homicide by intoxicated use of a motor vehicle if he causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant, or while he has a prohibited alcohol concentration as defined in WIS. STAT. § 340.01(46m).[2] *See* WIS. STAT. § 940.09(1)(a) and (b). A defendant has a defense if he proves by a preponderance of the evidence that the death would have occurred even if he had been exercising due care and had not been under the influence of an intoxicant or did not have a prohibited alcohol concentration. Sec. 940.09(2)(a).

¶4 Olson's defense at trial was based upon WIS. STAT. § 940.09(2)(a). He relied on testimony from the State's witnesses and himself indicating that at

[1] Except as otherwise noted, all references to the Wisconsin Statutes are to the 2003-04 version.

[2] At the time of this offense, the prohibited alcohol concentration applicable to Olson was 0.1. *See* WIS. STAT. § 340.01(46m)(a) (2001-02).

the time of the accident, the road was snowy, sleety, and icy. He relied on his own testimony that his truck "washed out" when he was three-fourths of the way through the curve where the accident occurred, causing him to counter-steer and spin, leading to the collision. He contended that he was exercising due care and caution, and that the accident occurred because of the road conditions, not because he was intoxicated.

¶5 Olson was the only witness in his own behalf. At the conclusion of the trial, the jury found him guilty of homicide by intoxicated use of a motor vehicle, and homicide by operation of a motor vehicle with a prohibited alcohol concentration.

¶6 Olson filed a postconviction motion for a new trial, contending that his trial counsel, Attorney Robert D'Arruda, rendered ineffective assistance. To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** at 687-88; ***State v. Thiel***¸ 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Thiel***, 264 Wis. 2d 571 (quoting ***Strickland***, 466 U.S. at 694). The critical focus is not on the outcome of the trial but on "the reliability of the proceedings." ***Thiel***, 264 Wis. 2d 571, ¶20 (citation omitted). We view the case from counsel's perspective at the time of trial. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶7 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500, *cert. denied*, 543 U.S. 938 (2004). We will not disturb the trial court's findings of fact unless they are clearly erroneous. ***Id.*** However, the ultimate determination of whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel presents a question of law. ***Thiel***, 264 Wis. 2d 571, ¶21. This court reviews de novo the legal questions of whether deficient performance has been established and whether the deficient performance led to prejudice rising to a level undermining the reliability of the proceedings. ***Id.***, ¶24.

¶8 The trial court denied Olson's postconviction motion after a ***Machner***[3] hearing at which testimony was received from D'Arruda, Olson's mother, Attorney Daniel Fay, and Robert Wozniak, an expert on accident reconstruction. In denying the motion, the trial court concluded that trial counsel's performance was deficient, but that the deficiencies did not prejudice Olson.

¶9 In reviewing the trial court's decision, we note that it carefully and accurately set forth the test for ineffective assistance of counsel. In particular, we commend it for considering whether confidence in the reliability of the outcome was undermined by counsel's deficiencies, rather than requiring Olson to prove that a new trial would probably result in acquittal. However, as noted above, although this court sustains the trial court's factual findings unless they are clearly erroneous, we review de novo whether deficient performance has been established and whether the deficient performance was prejudicial. Based upon our review of

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

the testimony at trial and the postconviction testimony, we conclude that trial counsel's performance was deficient and undermines our confidence in the reliability of the proceedings. We therefore reverse the judgment of conviction and the trial court's order denying postconviction relief and remand the matter for a new trial.

¶10 "Under ***Strickland,*** 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" ***Thiel***, 264 Wis. 2d 571, ¶40 (quoting ***Strickland***, 466 U.S. at 691) (emphasis omitted). In his postconviction motion and on appeal, Olson contends that D'Arruda rendered ineffective assistance by failing to adequately investigate the facts of the case and failing to seek an adjournment of trial. He contends that the cumulative effect of counsel's deficiencies led to an incomplete defense and prejudiced him. Specifically, Olson contends that D'Arruda deficiently performed when he failed to hire an accident reconstruction expert to investigate the accident, and failed to move the trial court to adjourn the trial to permit the hiring of such an expert. Olson also contends that counsel performed deficiently when he failed to view the scene of the accident, failed to obtain official weather reports for the date of the accident, and failed to obtain information regarding other accidents that occurred in Waukesha county on that date.

¶11 At the postconviction hearing, D'Arruda testified that he was retained by Olson two days after the accident and concluded early in his representation that the affirmative defense provided by WIS. STAT. § 940.09(2)(a) should be pursued. Although the defense was to be based upon the bad weather on April 4, 2003, D'Arruda conceded that he never visited the accident scene and that he failed to seek or obtain weather reports or reports concerning other accidents

that occurred in Waukesha county on that date. In addition, while he conceded that he knew Olson wanted him to hire an expert in accident reconstruction by the weekend before the trial and that he should have moved for an adjournment, he failed to move for an adjournment or hire an expert.[4]

¶12 In its decision denying Olson's postconviction motion, the trial court did not decide when the instruction to retain an expert was given to D'Arruda. However, it found that D'Arruda knew that he had authority to hire an expert after the jury status conference held on September 11, 2003, and that he had time to file a motion for an adjournment before trial commenced on September 16, 2003. While acknowledging D'Arruda's testimony that he thought the trial court would deny a motion for an adjournment if he filed it, the trial court determined that counsel's anticipated lack of success was not a reasonable justification for having failed to file the motion. The trial court found that the motion should have been filed and that no reasonable or strategic basis existed for failing to request an adjournment and trying to bring an expert into the case. Furthermore, it considered the criteria set forth in ***State v. Leighton***, 2000 WI App 156, ¶28, 237 Wis. 2d 709, 616 N.W.2d 126, for granting a motion for a continuance, and concluded that, in hindsight, the criteria "tilt[ed] towards the defendant."

[4] The witnesses at the postconviction hearing disputed when D'Arruda was informed that Olson wanted to hire an expert. D'Arruda testified that he discussed hiring an accident reconstructionist with Olson several months before trial, and contacted the Skogen Engineering Group to ask about fees on June 24, 2003. D'Arruda testified that Olson told him that he did not want to retain an expert because it was expensive and did not inform counsel that he had changed his mind until the weekend before trial. In contrast, Olson's mother testified that she heard Olson tell D'Arruda in late July or early August 2003 that he wanted to hire an expert reconstructionist and that she contacted Fay because she was concerned that the matter was not being taken care of by D'Arruda. Fay confirmed that Olson's mother contacted him about one month before the trial, expressing concern that Olson was trying to retain an expert to perform an accident reconstruction, but D'Arruda was not returning her calls. Fay testified that he then called D'Arruda's office to make sure the message was being conveyed.

¶13 We agree with the trial court that the failure to file a motion for an adjournment constituted deficient performance. Based upon the testimony of Wozniak, the Skogen Engineering expert on accident reconstruction who testified at the postconviction hearing, we also conclude that D'Arruda's failure to retain an accident reconstruction expert was deficient and prejudicial to Olson's defense.

¶14 Olson's defense at trial was that the accident and the victim's death occurred because slippery road conditions, not his intoxication, caused his truck to slide into the oncoming lane. The State contends that Wozniak's testimony would have added little support to Olson's defense, and that trial counsel's failure to seek an adjournment to present expert testimony therefore did not constitute ineffective assistance. We disagree.

¶15 At trial, Olson testified that it was sleety, icy, and snowy as he traveled west on Highway 18, and that his truck "washed out" when he was three-fourths of the way through a curve on the highway. He testified that he was going thirty to thirty-five miles per hour as he approached the curve, and was not speeding, weaving, passing, or otherwise driving recklessly. He testified that it was only two seconds from when the back of his truck started to wash out to the collision.

¶16 Olson was the only witness who testified for the defense at trial. The State presented four witnesses, including James Clayton, a citizen witness who arrived on the scene shortly after the accident occurred, Charles Spielvogel and Chadwick Niles, Waukesha county deputy sheriffs who were dispatched to the scene, and Deputy Allen Sill, who was trained in accident reconstruction and evaluated the accident at the scene on the night of April 4, 2003.

¶17 Clayton, Spielvogel and Niles testified that it was snowy, sleety, and icy on April 4, 2003, and that it was slippery or slick as they traveled to or arrived at the scene of the accident.[5] However, despite testifying that the weather was bad, all of the State's witnesses testified that they were able to safely control their vehicles on the road. In addition, Sill testified that he ruled out snow or ice as a factor in causing Olson's vehicle to leave its lane because when he drove from his residence to the scene, he "did not feel [the conditions] were that bad." He also testified that the victim was able to remain in his lane.

¶18 Because the State's witnesses all testified that they safely navigated the road despite the adverse weather conditions, and because the State's accident reconstruction expert testified that he ruled out weather conditions as causing Olson's inability to navigate the curve, their testimony harmed rather than helped Olson's defense. Olson was left to rely solely on his own testimony to support his defense that he lost control of his truck because of ice and snow, and that the accident would have occurred even if he had not been under the influence of an intoxicant and did not have a prohibited alcohol concentration.

¶19 At the postconviction hearing, D'Arruda testified that although he would have preferred to have an accident reconstructionist as a defense witness and although he knew before trial that the police reports did not attribute the accident to the weather, he had concluded that he could rely on the State's witnesses and its accident reconstruction to present Olson's theory of defense. However, he acknowledged that the State's expert, Sill, did not agree with his

[5] Sill testified that it was merely wet as he drove from his home to the courthouse and then to the accident scene on April 4, 2003, but that snow started to accumulate as he got to the scene at around 7:45 p.m.

theory, and that the prosecution's position was that the only person who had trouble navigating the road was Olson.[6]

¶20 Under these circumstances, proceeding to trial without seeking an adjournment to retain an expert in reconstruction fell below an objective standard of reasonableness and constituted deficient performance. Moreover, a review of Wozniak's expert testimony at the postconviction hearing establishes that his testimony would have provided significant corroboration of Olson's defense. Although Wozniak admitted that he could not testify that Olson's intoxication was not a cause of the accident, Wozniak's postconviction testimony provided significant evidence regarding the effect of the physical forces at play at the time of the collision and undermines our confidence that the proceedings were reliable.

¶21 Wozniak reviewed the police reports, the reconstruction done by the sheriff's department, photographs, and Department of Transportation records regarding other accidents in Waukesha county on April 4, 2003. Like Sill, he calculated that at the time of the accident, Olson was traveling twenty-nine to thirty-five miles per hour, significantly under the posted speed limit of fifty-five miles per hour. He testified that there were eighteen accidents in Waukesha county on April 4, 2003, of which sixteen were reportable, and fifteen listed snow, ice or wetness as a highway factor. Most importantly, Wozniak provided detail

[6] D'Arruda also testified that because the defense did not have an accident reconstruction expert for a witness, the trial court declined to determine whether it would give the affirmative defense instruction until it heard testimony. D'Arruda testified that as a result, he waived his right to an opening statement until after the prosecution had presented its case, thus delaying informing the jury of the defense until after the State's witnesses had all testified. Counsel acknowledged that if an expert witness had been retained by him, he could have made an offer of proof on the affirmative defense. He could thus have avoided the trial court's ruling deferring the issue, and informed the jury of Olson's theory of defense at the beginning of the trial, instead of after most of the testimony had been heard.

concerning the road and Olson's truck which, if accepted by a jury, would have supported Olson's claim that the accident would have occurred regardless of his intoxication.

¶22 Wozniak testified that the curve through which Olson was driving was relatively long, and began approximately 1200 feet, or two-tenths of a mile, before the point of impact. He testified that at the time of impact, the victim's eastbound vehicle was just entering the curve, and Olson was roughly completing it. He concluded from this that Olson had been steering around the curve prior to the impact, noting that if he had not been providing steering input, his truck would have left the road 800 to 900 feet before the area of impact.

¶23 Wozniak also testified that the curve has a superelevation which tilts the roadway so that a vehicle can go around the curve faster. He testified that this exerts a downward force on the vehicle, causing the vehicle to go to the left or over the center line unless the driver is fighting the force by steering. Wozniak testified that this factor was significant because "[i]f the coefficient is low because of icy or snow or wet roads, then the vehicle will go that way if you lose traction or if the coefficient gets low enough to cause the vehicle to go in the other lane." He opined that, given the road conditions, the location of Olson's vehicle in the curve could have caused the collision. He further stated to a reasonable degree of professional certainty that "if the road conditions were such that the coefficient was low enough for the vehicle to cross over the center line, it could happen to any driver," regardless of the driver's intoxication.

¶24 Wozniak also testified that there were differences in handling between a truck like Olson's and a sedan. He testified that the truck has a stiffer suspension and more body roll in a curve and has a greater chance of losing

control while cornering. He testified to a reasonable degree of professional certainty that Olson's truck would have been more unstable in the road conditions Olson experienced on April 4, 2003.

¶25 In analyzing the accident, Wozniak testified that as Olson drove through the curve, he lost steering input, and moved across the center line. He testified that this could have occurred because Olson lost steering input at the steering wheel, or because the vehicle lost friction and contact with the road surface. He testified that although he could not give an opinion that the accident would have happened even if Olson had been exercising due care and not been intoxicated, he concluded that the weather, the road conditions, and the design of Olson's truck and its susceptibility to spinning out were factors, and could not be ruled out as causes of the accident. He indicated that he disagreed with Sill's opinion that road conditions were not a factor on the night of the accident and that his findings were consistent with Olson's testimony. Although he reiterated that he could not determine why there was a loss of steering input leading to the accident, he stated that based upon the physical evidence he could not discount Olson's statement as to how the accident occurred.

¶26 As instructed by the trial court, Olson had a defense to the homicide charge if the jury was satisfied to a reasonable certainty by the greater weight of the credible evidence that the victim's death would have occurred even if Olson had been exercising due care and had not been under the influence of an intoxicant or had a prohibited alcohol concentration. *See* WIS JI—CRIMINAL 1185 and 1186 (2004). Although Wozniak could not state that intoxication was not a factor in the accident, his testimony would have provided valuable support for Olson's defense. It would have provided scientific and engineering testimony that Olson was in control of his truck far into the curve, and that the weather conditions, combined

with the design of the roadway and truck, could cause Olson's truck to fishtail, or "wash out," as Olson alleged. Combined with the evidence that Olson was driving more than twenty miles below the speed limit when the rear of his truck "washed out" and that the collision occurred within two or three seconds of the washout, it would have permitted a jury to find that the accident would have happened regardless of Olson's intoxication. Absent Wozniak's testimony, Olson had only his own testimony and argument to rebut the State's witnesses' contentions that weather was not a factor in the accident.

¶27 Based upon the value that would have been derived from Wozniak's testimony, we conclude that trial counsel rendered ineffective assistance when he failed to seek an adjournment of trial and failed to retain an expert in accident reconstruction to evaluate the case and testify at trial. Olson also contends that D'Arruda was deficient for failing to view the accident scene, failing to obtain official weather reports for the date of the accident, and failing to obtain information regarding other accidents that occurred in Waukesha county on that date. Although viewed in isolation these deficiencies might not warrant a new trial, the cumulative effect of counsel's deficient acts undermines our confidence in the reliability and outcome of the trial.[7] *See* ***Thiel***, 264 Wis. 2d 571, ¶60. We therefore reverse the judgment of conviction and the order denying postconviction relief and remand the matter for a new trial.

By the Court.— Judgment and order reversed and cause remanded.

[7] In reaching this conclusion, we do not mean to imply that evidence of other accidents that occurred in Waukesha county on April 4, 2003, must be permitted into evidence on retrial. The relevance of evidence regarding the other individual accidents and whether evidence regarding all or some of those accidents is excludable on a basis other than relevancy are issues that may be raised before retrial by motion in limine, if the parties deem it warranted.

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