COURT OF APPEALS DECISION DATED AND FILED

September 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2005AP2055

Cir. Ct. No. 1996CF962050

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADLEY KENNETH BLOCK,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 WEDEMEYER, P.J. Bradley Kenneth Block appeals from an order denying his WIS. STAT. § 974.06 (2003-04)[1] postconviction motion. He

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

claims the trial court erred in: (1) concluding that he had not met the prerequisites for a new trial based upon newly discovered evidence; (2) not concluding that his postconviction counsel was ineffective; (3) not granting him an evidentiary hearing on his motion; and (4) concluding that a new trial in the interests of justice was not warranted. Because Block has not fulfilled all the prerequisites for obtaining a new trial on the basis of newly discovered evidence, because his trial counsel and thus his postconviction counsel did not perform deficiently, because the trial court did not erroneously exercise its discretion in denying an evidentiary hearing, and because the real controversy has been tried, we affirm.

BACKGROUND

¶2 This is the third time that this court has examined Block's claims of trial court error. On June 11, 1999, we accepted Block's claim that he had sufficiently set forth a factual basis to entitle him to an evidentiary hearing on his claim of ineffective trial counsel and for a new trial based upon newly discovered evidence and remanded the case to the trial court for that purpose. *See* ***State v. Block***, No. 98-0173-CR, unpublished slip op. (Wis. Ct. App. June 11, 1999). The trial court conducted an evidentiary hearing and again denied Block's motion for a new trial. He appealed that order. On March 6, 2001, by a per curiam opinion, this court rejected his claims on the basis that he had failed to establish a reasonable probability that a different result would be reached at a new trial. *See* ***State v. Block***, No. 00-0053-CR, unpublished slip op. (WI App Mar. 6, 2001).

¶3 On February 11, 2004, Block filed a WIS. STAT. § 974.06 motion for collateral relief. The bases for this motion were: (1) the ineffectiveness of both trial and appellate counsel; (2) newly discovered evidence; and (3) the interests of justice. The trial court rejected his claims without a hearing, again concluding that

Block failed to show a reasonable probability of a different outcome to substantiate his newly discovered evidence, ineffective assistance, or interest of justice challenges. Because the earlier reported appeals amply set forth the factual background giving rise to this appeal with which the respective parties are completely familiar, we refrain from engaging in unnecessary repetition. We shall wax evidentiary only if the analysis in which we are engaged reasonably requires it for purposes of clarity.

ANALYSIS

I. NEWLY DISCOVERED EVIDENCE

¶4 Block first claims the trial court erroneously exercised its discretion in denying his motion for a new trial based upon newly discovered evidence.

A. Standard of Review and Applicable Law.

¶5 The test to determine whether newly discovered evidence warrants a new trial has five prerequisites: (1) the evidence must have been discovered after the trial; (2) the moving party must have not been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). A motion for a new trial is addressed to the sound discretion of the trial court and we will not reverse the trial court decision unless it erroneously exercised its discretion. ***State v. Eckert***, 203 Wis. 2d 497,

516, 553 N.W.2d 539 (Ct. App. 1996). The appellant must prove the first four requirements by clear and convincing evidence. *See* ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98.

¶6 With respect to the fifth factor, which is the most difficult one to meet, *see* ***Lock v. State***, 31 Wis. 2d 110, 117, 142 N.W.2d 183 (1966), the appellant must show that there is a reasonable probability of a different result on retrial. ***Armstrong***, 283 Wis. 2d 639, ¶162.

¶7 A new expert witness opinion based on the same facts available to the trial experts is not, as a matter of law, new evidence. ***State v. Fosnow***, 2001 WI App 2, ¶¶25-26, 240 Wis. 2d 699, 624 N.W.2d 883. The new expert witness opinion is not the equivalent of new evidence, but is merely the newly discovered importance of existing evidence. ***Id.*** "Merely recycling and reformulating existing information into a new format does not generate new evidence. Newly discovered evidence does not include a 'new appreciation of the importance of evidence previously known but not used.'" ***State v. Williams***, 2001 WI App 155, ¶16, 246 Wis. 2d 722, 631 N.W.2d 623 (citation omitted).

¶8 Finally, if the new evidence serves only to impeach the credibility of witnesses who testified at trial, it is insufficient to warrant a new trial as a matter of due process because it does not create a reasonable probability of a different result. ***State v. Kimpel***, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989).

¶9 We conclude, for reasons that will be set forth, that Block has failed to fulfill the requirements of part one and part five of the ***Coogan*** criteria.

B. Part One—New Evidence.

¶10 At the jury trial, which took place in 1996, Block's theory of defense was couched in terms of an accidental action. He testified that to avoid apprehension by police officers seeking his arrest for a probation violation, with the assistance of a co-worker, he was locked in a storage room at his place of employment. While attempting to traverse the dark room, he knocked over what he believed to be a container. He was smoking at the time and had his cigarette lighter in his hand. He became concerned about whether the container was filled with gasoline. This prompted him to light his lighter. When he did, there was a flash of fire. In his own words, suddenly there was "fire everywhere." On the shelves of the storage room there were stored cans of various flammable substances. There were also stored in the room tanks of oxygen and acetylene. According to Block, the flames continued to grow. It was Block's claim that the conflagration occurred before police officers congregated near the door of the storage room and attempted to gain entry.

¶11 In Block's motion for a new trial based upon newly discovered evidence, with the assistance of a new counsel and a new expert, he refined his conflagration theory of an accident by emphasizing the heat-induced ignition of gaseous vapors from the acetylene and oxygen tanks after the gasoline vapors had been ignited by his cigarette lighter. His new evidence is the expert opinion of John Agnosti contained in a John M. Gosti & Associates ("JMA") report produced in 2004. The JMA report places emphasis on two factors.

¶12 First, it concentrates primarily on a secondary source of the fire; i.e., the gaseous vapors that escaped from the oxygen and acetylene tanks present in

the storage room generated by heat from the initial ignition of the gasoline vapor, to explain the variant paths of the flames observed by the police officers.

¶13 This new theorized approach is nothing more than an intensified analysis of the same evidence that was present at the time of trial. The difference lies only in emphasizing that the acetylene torch could not be the source of the flames by reasonably implying that some other source existed for igniting the flames which the officers observed. To reverse the analysis, because the ignited vapors from the oxygen and acetylene were the source of the projecting flames, the acetylene torch could not be, a conclusion enforced by the pictures taken by investigators of the burnt torch in its cabby container located to the left of the entrance doors.

¶14 Second, an obvious intent of the JMA report was to impeach the credibility of the State's main expert witness, Detective Angelo Martinez, by criticizing the methodology he utilized to arrive at the conclusion of intentional activity on the part of Block.

¶15 Thus, our examination of the record leads our analysis to the dictates of ***Williams***, 246 Wis. 2d 722, ¶16, that "[n]ewly discovered evidence does not include a 'new appreciation of the importance of evidence previously known but not used,'" and ***Kimpel***, 153 Wis. 2d at 700-01.

¶16 We agree with the view expressed by the State of Washington Court of Appeals that finality in litigation requires the rejection of the *modus operandi* when an accused has had his or her day in court with a reasonable defense and loses; then hires new counsel, who in turn hires a new expert who examines the same evidence and produces a new opinion. *See* ***State v. Harper***, 823 P.2d 1137,

1143 (Wash. App. 1992). Such efforts do not necessitate a new trial. Plainly said, a new tune played from the same notes does not resonate as acceptable music.

C. Part Five—Different Result.

¶17 Part five of the ***Coogan*** criteria requires the defendant to demonstrate that a reasonable probability exists that a new trial will render a different result.

¶18 Most arson trials lack eyewitness testimony. As a result, most jury verdicts are based upon reasonable inferences drawn from circumstantial evidence. Necessarily, the weight of physical evidence and weight and credibility of witness testimony are significant factors in rendering a verdict. These considerations measure heavily in determining whether there is a reasonable probability that a jury looking at the old evidence, and the supposed new evidence, would have a reasonable doubt as to a defendant's guilt.

¶19 In succinct terms, to succeed in a claim for a new trial based upon newly discovered evidence, Block must demonstrate that Agnosti's opinion, as contained in the JMA report, creates a reasonable probability of a different result.

¶20 By and large, the Agnosti opinion discredits the opinion and sequential conclusions of Detective Martinez who served as the main expert witness for the State. The Agnosti report opines that the evidence "more likely indicates that the flammable vapors from spilled gasoline were ignited (accidentally) by Mr. Block[] …." Agnosti concluded: "This ignition, based upon the special circumstances of this chemical storage room, caused … both the noise and torch-like flames [heard and] observed by the police officers, rather than use

of an acetylene torch by Mr. Block to frighten the officers away from the terminal."

¶21 As aptly described by the trial court:

> Agnosti posits that the "spill" and the conflagration in the room *proceeded* (sic) *and caused* the flames observed by the officers, whereas the officers first observe[d] the shooting flame around the door and only later s[aw] the liquid emerge and ignite. According to Agnosti, there was first a spill of a flammable substance, then the ignition of vapors and other combustibles in the room (which presumably includes the spilled substance), then enough heat to cause certain acetylene tanks to vent vapors, which in turn ignited and caused the hissing noises and flames around the door frame that were heard and observed by the officers. According to the officer[s'] testimony, they first banged on the door and shouted for the defendant to come out, then tried to pry off the lock, and then encountered flames coming … from a single source, moving about the doorframe and coming in apparent response to their efforts to open the door. After the flame *paused for a few seconds*, Officer Chicks again tried to open the door and the shooting flames emerged again. *A light was on inside the room. The person in the room shouted that the officers should get away or get back.* After more "screaming" for the defendant to give himself up, a liquid smelling like gasoline came out from under the door and then the liquid burst into flames.

(Italics in original; footnote omitted.)

¶22 Although contrary inferences can be reasonably drawn from the record evidence as to the nature of Block's actions while locked in the storage room, the absence of, and/or the consideration of, other evidence weighs heavily in favor of the State's theory of prosecution.

¶23 A major inconsistency in the Agnosti opinion is its insistence upon a rigid adherence to an accepted scientific method of inquiry for the lack of which it faults the testimony of the State's expert witness, Detective Martinez. What is

absent, however, from the Agnosti opinion, is a demonstrated basis for its proffered conclusion of accidental activity on Block's part or, to the contrary, why an intentional spilling and its ignition by a cigarette lighter could not be reasonably implied. The application of a legitimate scientific method of inquiry is not a one-way path of inductive reasoning.

¶24 There is a deep lacuna in the logic applied by the JMA report. The opinion contained within the report accepts as true, without any stated basis, Block's version of what transpired in the store room. It then jumps to the conclusion that the lack of evidence that the fire had been deliberately set, is tantamount to proof of an accident. This process of reasoning is a nonsequitur. Except for Block's testimony, there is nothing in the report that is inconsistent with an intentional act of spilling and igniting the gasoline vapors. A consistent application of the revered rubrics of the scientific method of inquiry as advanced by Agnosti are quite obviously lacking in the JMA report. The value of the report is greatly diminished because the report violates the very same methodology it holds so dear.

¶25 Next, we note there are other challengeable bases upon which the conclusions of the report are founded. The report suggests that the initial starting point of the fire was located somewhere in the middle of the storage room. Block however, conceded that the fire started near the door. This item of evidence is further corroborated by Detective Martinez's testimony about a pour pattern of acetylene at the doorjambs. He further stated that in his investigation immediately after the fire, he did not find evidence of a splashing pattern in the middle of the room which, if found, would have been consistent with Block's testimony that he knocked over a container of gasoline in the middle of the room.

¶26 Next, we note that the JMA report concludes that Block could not have been shooting flames from a torch because it would have left fire burns on the door. In contrast, Block's own expert at trial testified that such a fact is not correct if Block kept rapidly moving the torch head that produced the flame.

¶27 More fundamentally, the JMA report does not state that burn marks did not appear on the door. The reason for this is that the JMA's investigators never saw the immediate aftermath of the fire because, by the time of its investigation, the premises had been repaired and the door had been replaced. Thus, the opinions proferred in the report are not based upon viewed conditions that existed immediately after the fire.

¶28 Based upon the above mentioned internal inconsistencies, coupled with the overlooked evidentiary contradictions by the writer of the report, we are not convinced that the contents of the JMA report, when added to the old evidence already evaluated by the jury, would produce a different result.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

¶29 Next, Block contends his postconviction counsel was ineffective for failing to challenge the effectiveness of his trial counsel on the ground that trial counsel should have produced an expert witness or report in 1998 similar to the JMA report submitted in 2004 to warrant a new trial based upon newly discovered evidence.

A. Standard of Review and Applicable Law.

¶30 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show

both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697.

¶31 An attorney's performance is not deficient unless he or she made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. ***Id.*** at 687. To satisfy the prejudice prong, appellant must demonstrate that counsel's deficient performance was "so serious as to deprive the [appellant] of a fair trial, a trial whose results is reliable." ***Id.*** In other words, there must be a showing 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." ***Id.*** at 694.

¶32 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***Id.*** at 634. "[T]he ultimate conclusion of whether the attorney's conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law [for which] no deference to the trial court's decision is required." ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

B. Application.

¶33 Block essentially faults trial counsel for failing to present scientific evidence challenging the reliability of the police investigation which affected the weight of evidence, making it less probable that he wielded his acetylene torch or that he intentionally set the fire. We reject this contention for several reasons.

¶34 We first note that Block overlooks the fact that trial counsel did produce an expert in the welding profession who testified as to the implausibility of Block's acetylene torch being capable of projecting a flame two to three feet as attested to by the police officers at the scene. For Block to argue that there was no challenge made to the weight of the police investigation is ignoring the trial record. Block's expert, Gerald Dlouhy, was qualified as an expert in the characteristics and capabilities of welding torches. He testified that Block's torch could only produce or project a maximum flame length of four inches because of the nature of the torch head at the time of the fire. Dlouhy's testimony was so effective that it forced the State to recall its expert investigator to the witness stand to rebut the quality of his testimony.

¶35 When the State's expert, Detective Martinez, was recalled for rebuttal, he testified there was a second torch head found in the storage room with Block's torch. He stated these two torch heads were destroyed at the direction of the Milwaukee Fire Department before trial because they contained hazardous material. On cross-examination of this rebuttal testimony, trial counsel caused Detective Martinez to concede he did not mention this evidence in his previous direct testimony and he did not know what type of tip was on the second torch head.

¶36 In closing argument, trial counsel stressed this oversight on the part of Martinez and also that photos of the contents of the storage room taken by police investigators did not show the presence of a second torch head. Trial counsel was adroit at pointing out to the jury that the torch head or heads should not have been disposed of because there would have been no gas remaining in them if they were instrumental in starting the fire. Contrariwise, if gas remained in the heads that was hazardous, the torch, in all likelihood, was not used to start the fire.

¶37 In summary, trial counsel, by the use of Dlouhy's testimony, was able to punch a large hole in the web of implied argumentation that the State sought to weave as evidenced by the inconsistent rebuttal testimony of Detective Martinez. As repeated to the jury in final argument, even a State expert conceded that flames from Block's torch could project no longer than one and one-half to two feet.

¶38 Because of the nature of Block's own testimony, the cross-examination of the State's witnesses and Dlouhy's testimony, trial counsel was able to forcibly reason that the police officers on the scene were mistaken in the conclusions they formed which, in turn, mistakenly formed a substantial basis for Detective Martinez's conclusion that Block deliberately started the fire.

¶39 Finally, trial counsel presented a well-reasoned response to the State's proposed motive for Block's alleged actions. The State argued that Block was overcome by fear he would be reincarcerated for a probation violation. On the contrary argued trial counsel, Block had more at stake, including his tools, his job and his life—the combination of which far exceeded the risk of short term incarceration.

¶40 Block was not entitled, as a matter of right, to a perfect defense or even the best defense. Due process requires only a defense based upon a reasonable strategy developed from a reasonable analysis of the circumstances at play at the time of trial. *See* ***State v. Williquette***, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993).

¶41 It is sheer speculation that at the time of trial in 1996 that a presumed competent trial counsel could have or should have searched for and found an expert proffering a rationale for the defense as provided by the JMA report of 2004.

¶42 As set forth in the preceding paragraphs, trial counsel's efforts to challenge the reliability of the police investigation and affect the weight of that evidence to make it less probable that Block used the acetylene torch or otherwise intentionally set the fire were well grounded in reason and common sense. We see no basis to conclude that trial counsel's strategy was irrational or a product of caprice rather than upon judgment. ***State v. Felton***, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983). Trial counsel's efforts did not constitute deficient performance.

III. DENIAL OF EVIDENTIARY HEARING

¶43 Block claims the trial court erroneously exercise its discretion in denying him a hearing to present the basis for his WIS. STAT. § 974.06 motion. We reject his contention.

¶44 A trial court has the discretion to deny conducting an evidentiary hearing if the motion to obtain the same fails to: (1) allege sufficient facts on its face; (2) presents only conclusory allegations; or (3) the record conclusively

shows the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). If the motion was deficient for any of those reasons, the trial court has the discretion to deny the motion without a hearing. This discretionary decision is subject to deferential appellate review. ***Bentley***, 201 Wis. 2d at 310-11.

¶45 From our review of the record, it is quite clear that the trial court relied on the third basis to deny Block an evidentiary hearing. As the trial court, we have carefully reviewed the affidavits of Block, the JMA report, the letter of counsel, the transcripts of the trial and earlier hearings, two decisions from this court and the postconviction record. We have already determined that Block is not entitled to the relief he has asked for because such relief probably would not effectuate a different result. For these very same reasons, we deny his request for an evidentiary hearing.

IV. NEW TRIAL IN INTERESTS OF JUSTICE

¶46 Lastly, Block claims he should be granted a new trial in the interests of justice because the fire science evidence proffered established that in both the trial and the postconviction proceeding, the "real controversy" had not been tried.

¶47 As an appellate court, we have the authority under WIS. STAT. § 752.35 to grant a discretionary reversal of a conviction in the interests of justice if the real controversy was not fully tried. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11-20, 456 N.W.2d 797 (1990). We are to exercise this discretionary power of reversal only in exceptional cases. Under the "real controversy not tried" standard, discretionary reversal arises in two circumstances:

> (1) [W]hen the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

State v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

¶48 In ***State v. Hubanks***, 173 Wis. 2d 1, 496 N.W.2d 96 (Ct. App. 1992), we declared that WIS. STAT. § 752.35 was not intended:

> [T]o vest this court with power of discretionary reversal to enable a defendant to present an alternative defense at a new trial merely because the defense presented at the first trial proved ineffective. [The] (statute was not designed to allow discretionary reversal to enable plaintiff to sue under a different theory).

Hubanks, 173 Wis. 2d at 29 (citation omitted; parentheses by ***Hubanks***).

¶49 We have earlier examined and rejected the newly discovered evidence claim because the JMA report was nothing more than a new interpretation of the same evidence that was before the jury and for reasons of inconsistencies would not have produced a different result. For these reasons, we decline to grant discretionary reversal.

By the Court:—Order affirmed.

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