COURT OF APPEALS DECISION DATED AND FILED

May 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals of Wisconsin

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.

No. 00-1541-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., and JOHN E. McCORMICK, Judges. *Affirmed*.

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

¶1 PER CURIAM. Michael Evans appeals from a judgment of conviction for two counts of second-degree recklessly endangering safety while possessing a dangerous weapon, in violation of WIS. STAT. §§ 941.30(2) and

939.63 (1997-98),[1] and from the order denying his motion for postconviction relief. He argues that trial counsel was ineffective in several ways, and that the State failed to disclose exculpatory evidence. We affirm.

I. BACKGROUND

¶2 On July 1, 1998, as Darryl Carter was working as a security officer at a Kohl's Food Store in Milwaukee, he observed a man removing multiple items from the shelves and concealing them inside his clothing. When the man attempted to leave without paying for the merchandise, Carter blocked his path and confronted him regarding the shoplifting. Peter San Fillippo, the store manager, and Jeremy Walters, the produce manager, whom Carter had previously alerted regarding the man's suspicious behavior, were standing nearby. Carter announced his intention to handcuff the man; as he was in the process of applying the cuffs, the man began to struggle. Although San Fillippo, Walters, and Dave Grabowski, the store's meat cutter, came to Carter's assistance, Carter was able to cuff only one wrist before the man struck Carter in the head with a handcuff, bit Carter and Walters, and cut Carter and Walters with a razor blade he had removed from his clothing. As soon as San Fillippo heard an employee announce that the man had a blade, he instructed the employees to release the man. When the man was released, he ran. Carter pursued him and pepper-sprayed him from a distance of three or four feet, but he was unable to apprehend him.

¶3 A few days later, as Carter was finishing his shift at Kohl's, he observed the shoplifter near the store. Carter flagged down a police car and

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

informed its officers of the shoplifting incident and his recent sighting of the suspect. The officers pursued and apprehended the suspect, placed him in the back seat of their patrol car, and drove him to the Kohl's store for a "showup." At the store, Carter and Walters identified the suspect as the shoplifter; the suspect was Evans.

¶4 Several days later, San Fillippo, Walters, and Grabowski viewed a lineup. Walters identified Evans as the shoplifter. Grabowski was unable to identify any of the lineup participants, and San Fillippo identified someone other than Evans.

¶5 Evans was charged with two counts of second-degree recklessly endangering safety while possessing a dangerous weapon.[2] Following a jury trial, Evans was found guilty on both counts and received an aggregate sentence of six years in prison.

¶6 In a postconviction motion, Evans claimed that his trial counsel had been ineffective for failing "to properly investigate, to move to suppress an identification procedure, to impeach one of the [S]tate's key witnesses on a prior felony conviction, and to present evidence that supported the theory of defense." Following an evidentiary hearing, *see* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), and review of the parties' written arguments, the postconviction court denied Evans' motion.

[2] In an amended information, the State alleged habitual criminality, based upon its belief that Evans had been convicted of a felony during the five-year period immediately preceding the commission of the charged offenses. At the sentencing hearing, however, it was revealed that the habitual criminality penalty enhancer was not applicable.

II. DISCUSSION

A. Ineffective Assistance of Trial Counsel

1. Standard of Review

¶7 Wisconsin applies the two-part test described in ***Strickland v. Washington,*** 466 U.S. 668 (1984), for evaluating claims of ineffective assistance of counsel. ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To prevail on an ineffective-assistance-of-counsel claim, Evans must prove that his counsel's performance was deficient and that the deficiency prejudiced his defense. ***Id.*** at 127. Regarding deficient performance, the ***Strickland*** court explained:

> Judicial scrutiny of counsel's performance must be highly deferential.… [A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.…
>
> ….
>
> … A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function … is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 689-90 (citations omitted). Regarding the prejudice component, the ***Strickland*** court elaborated:

> 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.
>
> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.…
>
> … When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact[]finder would have had a reasonable doubt respecting guilt.…
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

Id. at 694-95.

¶8 Both components of the ineffectiveness test present mixed questions of fact and law. ***Id.*** at 698. We will uphold the postconviction court's factual findings "concerning circumstances of the case and counsel's conduct and strategy" unless they are clearly erroneous. ***State v. DeKeyser***, 221 Wis. 2d 435, 442, 585 N.W.2d 668 (Ct. App. 1998). Whether trial counsel's performance was deficient and prejudicial to the defendant, however, presents questions of law which we review independently of the postconviction court's determination. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

2. Carter's Credibility

¶9 Evans first argues that trial counsel was ineffective for failing to: (1) discover Carter's felony conviction; (2) use Carter's felony conviction to impeach his credibility; and (3) use Carter's statement to the police—that "he has numerous contacts in the area and people will tell him who this suspect is and will be calling [the police]"—to cast doubt on the reliability of Carter's identification.

¶10 At the ***Machner*** hearing, trial counsel testified that she did not use Carter's felony conviction to impeach him at trial because she was unaware of it. She explained that her normal practice was to verify with the district attorney's office the criminal record of each witness prior to trial and prior to his or her testimony. Additionally, she testified that she was sure the prosecutor had told her that Carter had no criminal record. Although she acknowledged that she could have hired an investigator or utilized the Circuit Court Automation Program (CCAP) to discover Carter's criminal history, she decided to rely upon the information provided by the district attorney's office due to her trust in that office's personnel.

¶11 At the ***Machner*** hearing, trial counsel also testified that she had had an opportunity to review the police reports and discuss them with Evans prior to trial. She denied, however, remembering the statement Carter had made to police—that "he has numerous contacts in the area and people will tell him who this suspect is and will be calling [the police]."[3]

¶12 The postconviction court observed that "[r]ather than relying wholly on district attorney submissions with respect to prior convictions of a State's witness, the more prudent course would have been to consult clerk's office records." The court recognized, however, that because of an erroneous date-of-birth entry on the State's witness subpoena sheet, "neither trial attorney had a correct date of birth for Darryl Carter, and it is questionable whether an independent search would have located Carter's prior conviction." Additionally,

[3] The trial transcript reveals that trial counsel did not question Carter regarding the statement; during her brief cross-examination, she merely asked Carter about the injuries he received during the shoplifting incident and then verified that he had not viewed the police lineup.

the postconviction court found that "both Carter and Walters were strong eyewitnesses for the State and had no doubt as to the defendant's identity." The postconviction court's findings are not clearly erroneous; they are supported by the record.

¶13 Evans has failed to establish that counsel was ineffective. First, he has not established that counsel's reliance on the State's disclosure of witnesses' criminal records was anything other than a "reasonable professional judgment," *see* ***Strickland***, 466 U.S. at 690, even though, in this case, such reliance resulted in the failure to discover Carter's criminal record. Second, although counsel's failure to remember and utilize Carter's statement to the police may have been deficient, Evans has not established that any such deficiency produced prejudice. As the postconviction court observed, Carter's identification of Evans was strong; nothing in his comment to the police would have produced a "reasonable probability" of a different outcome. *See* ***id.*** at 695.

3. Reliability of Walters' Identification of Evans

¶14 Evans argues that trial counsel was ineffective for failing to "investigate the show[]up, file a motion to suppress the identification of Jeremy Walters, or use the suggestiveness of the procedures to attack the reliability of Walters['] identification before the jury." Evans contends that the postconviction court should have accepted his description of the showup as credible and, on that basis, found that the showup and subsequent lineup were impermissibly suggestive. Emphasizing that the jury was unaware of the existence of the showup, he further argues:

> Due to [trial counsel's] failure to highlight the suggestiveness of the identification procedures, the jury was left with no reason to doubt the accuracy of Walter[s'] identification of the defendant. In regard to the line[]up,

> the jurors were further given a false impression of its accuracy, since they were completely unaware that Walters had already seen the defendant at the show[]up.

In light of the totality of the evidence, we conclude that even assuming counsel's performance was deficient for failing to expose and develop evidence of the showup, Evans has failed to establish that counsel's deficient performance produced prejudice.

¶15 At the ***Machner*** hearing, trial counsel testified that the defense theory was misidentification, and that she was "aware of the general constitutional standards regarding the admissibility and suggestiveness of identification procedures." Although she was unable to recall when she first learned of the showup procedure involving Evans, she agreed that, according to police procedure and case law, a lineup in which the participants are similar in height and race would be more reliable than a showup in which an individual is "alone in the back seat of a squad car." She testified: "I don't think you can say, as a matter of law, that lineups are more suggestive than show[]ups or show[]ups are more suggestive than lineups. They both have their pros and cons to them; and depending on how they're handled, a jury can decide."

¶16 Additionally, trial counsel testified that, during the trial, she considered Walters the most damaging witness to the defense, and that she did not believe that further cross-examination of him would have revealed any evidence of bias or prejudice. She explained: "There was not going to be a way to shake that individual. He was consistent, strong, dynamic, sure, and had the jury. He was the one who really got their heads shaking yes in agreement when he said things." She continued:

> My strategy was to minimize the damage to my client by not having … Mr. Walters … again be able to repeat how sure he was and have [the prosecutor] redirect

> and have the jury hear it for a third time. My concentration was to concentrate on the people who couldn't identify him at all.

¶17 The postconviction court found that Walters was "a strong witness" and that his testimony at the ***Machner*** hearing, regarding his showup identification of Evans, was credible. The court noted that Evans had not testified at trial; additionally, it found that, aside from Evans' own testimony at the ***Machner*** hearing, there was no evidence "with which to impeach the reliability of the show[]up identification based on [Evans'] contentions without putting [Evans] on the stand." These findings are not clearly erroneous; the evidence supports them.

¶18 "[S]howups are not *per se* impermissibly suggestive." ***State v. Wolverton***, 193 Wis. 2d 234, 265, 533 N.W.2d 167 (1995). Still, counsel's failure to attempt to undermine the lineup and in-court identifications by linking them to the showup is troubling and may well have constituted deficient performance. Nevertheless, given the witnesses' substantial opportunities to observe the suspect, and given the strength of their identifications, we conclude that Evans has failed to establish "a reasonable probability that, absent [trial counsel's] errors, the fact[]finder would have had a reasonable doubt respecting guilt." *See* ***Strickland***, 466 U.S. at 695.

4. Cross-Examination of Detective Fischer

¶19 Evans argues that trial counsel was ineffective for failing to "cross-examine Detective Fischer regarding the undocumented show[]up and the lack of fingerprint and videotape evidence." He contends: "The reliability of an investigation, where a crucial show[]up was not documented or disclosed to the defense, could have been further tarnished by the 'disappearance' of four latent

fingerprints from the toiletry items as well as a videotape that was 'of no value at this time.'"

¶20 The State called Detective Fischer as a trial witness but did not elicit any testimony regarding the showup or the fingerprint or videotape evidence. Trial counsel declined to cross-examine Detective Fischer. At the ***Machner*** hearing, trial counsel testified that she chose not to question the detective about fingerprint or videotape evidence because she "didn't think [she] needed to open up any box about whether there was a possibility that it could have been [Evans]." She said she was unaware of any evidence suggesting that someone other than Evans committed the charged offenses. She further explained that she thought her trial strategy to "keep the focus on the fact that [her] client said they had the wrong man" would work in Evans' favor.

¶21 The postconviction court found that the eyewitness testimony of Carter and Walters was crucial and damning, and that "even if counsel would have pressed the issue that no fingerprints of the defendant's were discovered on the health and beauty items which were dropped prior to his flight from Kohl's … and that no videotape showed him as the shoplifter … the fact of Carter's testimony and Walters' testimony remains." Once again, the postconviction court's findings are supported by the record. Accordingly, although we are troubled by counsel's failure to cross-examine Detective Fischer, Evans has failed to establish that any deficient performance in this respect resulted in prejudice.

5. Totality of Trial Counsel's Errors

¶22 Evans argues that he was prejudiced by the totality of trial counsel's errors. He asserts that the reliability of the eyewitness identification was the central issue at trial, and that trial counsel's failure to challenge the credibility of

Carter and Walters and the reliability of their identification of him as the shoplifter "would certainly result in a conviction." Evans then claims:

> This court must conclude that when counsel chooses a strategy that is certain to result in defeat over a strategy that has a chance to succeed, such a performance falls below an objective standard of reasonableness. To do otherwise renders any ineffective[-assistance-of-counsel] claim meaningless, since even the most egregious mistake could then be characterized as strategy decision.

Evans further claims that "[w]hen [trial counsel]'s so-called 'strategy' is carefully examined, it is revealed as nothing more than an inconsistent and inaccurate 'excuse' for her trial mistakes."

¶23 Evans has not shown that any of the postconviction court's factual findings "concerning circumstances of the case and counsel's conduct and strategy" are clearly erroneous; consequently, we will not overturn them. ***DeKeyser***, 221 Wis. 2d at 442. Nor has Evans established a "reasonable probability that, absent [trial counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." ***Strickland***, 466 U.S. at 695. Accordingly, we conclude that Evans has failed to meet his burden of proof regarding any of his ineffective-assistance-of-counsel claims.

B. State's Failure to Disclose Exculpatory Evidence

¶24 Finally, Evans contends that his defense was prejudiced by the State's failure to disclose Carter's felony conviction and the existence of the showup, and he argues that he

> should be entitled to a new trial based upon the denial of his constitutional right to due process and pursuant to [WIS. STAT.] §§ 971.23, 971.24, and 971.25[4] …; the 5th, 6th, and

[4] We call appellate counsel's attention to the fact that there are no sections labeled 971.24 or 971.25 in the Wisconsin Statutes.

> 14th Amendments to the United States Constitution; and article I, sections 1, 7, and 8 of the Wisconsin Constitution; and ***Brady v. Maryland***, 373 U.S. 83 (1963).

¶25 Evans acknowledges that he first raised this claim in his brief in support of his motion for a new trial, submitted after the ***Machner*** hearing, and he notes that the postconviction court declined to address the issue. Additionally, we note that Evans raised this issue in the last paragraph of the "conclusion" section of that brief and failed to develop any argument on the issue. We also observe that, with respect to "the undisclosed show[]up and felony conviction," rather than developing any specific argument for a new trial on this basis, Evans' brief to this court asks us to rely on his arguments in support of his claims of ineffective assistance of trial counsel. Those arguments, however, have not prevailed.

¶26 "Simply to label a claimed error as constitutional does not make it so, and we need not decide the validity of constitutional claims broadly stated but never specifically argued." ***State v. Scherreiks***, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989) (citation omitted). Also, as we explained in ***State v. Rohl***, 104 Wis. 2d 77, 89, 310 N.W.2d 631 (Ct. App. 1981), "[a] defendant's right to due process is not violated by the prosecution's failure to disclose evidence unless the evidence is within the prosecution's exclusive possession." Neither Carter's conviction (which, according to testimony at the ***Machner*** hearing, would have been available to the defense through the CCAP system) nor the showup (which, of course, Evans knew about) was evidence within the exclusive possession of the prosecution. Accordingly, we conclude that Evans' right to due process was not violated by the State's failure to disclose this evidence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).