COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3178-CR **Cir. Ct. No. 2004CF3050**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER MURRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Judgment affirmed; order affirmed in part; reversed in part and cause remanded for further proceedings.*

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

¶1 WEDEMEYER, P.J. Alexander Murry appeals from a judgment entered after he pled no contest to one count of homicide by intoxicated use of a

motor vehicle. He also appeals from an order denying his postconviction motion. Murry claims that his trial counsel provided ineffective assistance by failing to challenge the admissibility of a blood alcohol test conducted by the state crime lab. Murry also contends that the trial court erred in denying his motion seeking suppression of a statement he made following the accident. Because Murry has alleged specific facts which, if proven true, would entitle him to relief on the ineffective assistance claim, we reverse and remand that portion of the order for an evidentiary hearing. Because the statement Murry made in the ambulance did not occur in a custodial setting, the trial court did not err in denying the motion to suppress on that issue; therefore, we affirm that part of the order.[1]

BACKGROUND

¶2 On June 4, 2004, at about 12:15 a.m., Murry was driving his car when he collided with a minivan driven by Dennis Sloans at the intersection of West North Avenue and North 27th Street, Milwaukee. Sloans died as a result of injuries sustained in the collision. Murry sustained a head injury and was initially trapped inside his vehicle. Once removed, he was placed in an ambulance, where paramedic Tina Conklin began to render emergency medical assistance. Conklin asked Murry some direct questions while he was in the ambulance and was unable to understand a lot of his audible responses. When Conklin asked Murry if "he had been drinking," she believed his response to be yes, "I drank too much." Conklin indicated later that she asked Murry about his alcohol use because she felt

[1] The judgment is not affected as of yet by our decision. Therefore, we affirm the judgment. If, after the evidentiary hearing Murry is allowed to withdraw his plea, the trial court's judgment shall be vacated.

it was necessary "for medical purposes." During the time Conklin was speaking with Murry, there was a police officer present in the ambulance.

¶3 When the ambulance arrived at the hospital, Murry was placed into police custody. At approximately 3:20 a.m., hospital personnel took a blood sample from Murry and it was transferred to the state crime lab in Milwaukee to test for the presence of drugs and alcohol. The test showed a blood alcohol concentration of 0.106. The police report noted that the reason for the blood draw was "OWI."

¶4 Murry was subsequently charged with one count of homicide by intoxicated use of a motor vehicle and he entered a not guilty plea. He filed a motion to suppress the statement he made to the paramedic that he had too much to drink. A suppression hearing was held on the morning scheduled for trial, December 13, 2004. The trial court denied the motion.

¶5 Murry then changed his plea to no contest, a plea hearing was conducted, and judgment was entered. Postconviction, Murry filed a motion seeking to withdraw his no contest plea on the grounds that he received ineffective assistance of trial counsel. The trial court denied the postconviction motion and Murry now appeals.

DISCUSSION

A. Ineffective Assistance of Counsel.

¶6 Murry contends he received ineffective assistance of trial counsel because his counsel failed to challenge the admissibility of the blood alcohol test conducted by the state crime lab. He asserts that had his trial counsel made a motion to suppress the blood alcohol concentration (BAC), it would have been

successful. He proffers that the trial court would have had to suppress the BAC for several reasons.

¶7 First, the record demonstrates that no effort was made to inform Murry of his rights under the Wisconsin implied consent statute. Citing ***Village of Oregon v. Bryant***, 188 Wis. 2d 680, 693-94, 524 N.W.2d 635 (1994), ***State v. Neitzel***, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980), and ***State v. Wilke***, 152 Wis. 2d 243, 250-51, 448 N.W.2d 13 (Ct. App. 1989), Murry argues that the law requires police officers to advise an accused drunk driver about the driver's implied consent and requires the police officers to inform the person about all the information regarding his or her rights under the implied consent law.

¶8 Second, Murry cites ***State v. Jenkins***, 80 Wis. 2d 426, 259 N.W.2d 109 (1977), in support of his contention that the *purpose* of the blood test weighs on its admissibility. In ***Jenkins***, the blood test, which was ruled admissible, was ordered by the physician "strictly for diagnostic and treatment purposes." ***Id.*** at 433. Moreover, Jenkins was not under arrest at the time of the treatment. ***Id.*** at 428. Murry points out that in his case, the purpose of the blood test was for "OWI" (which we assume stands for the charge of operating a motor vehicle while intoxicated), that there is nothing in the record to suggest that any medical personnel at the hospital ordered the blood draw for any medical purpose, and therefore trial counsel should have moved to suppress the results.

¶9 Third, Murry asserts that had trial counsel made the motion, the trial court would have granted it and he would not have entered a plea. Accordingly, he argues that his ineffective assistance of counsel resulted in a manifest injustice and he should be allowed to withdraw his no contest plea.

¶10 In order to establish that he or she did not receive effective assistance of counsel, the defendant must prove two things: (1) that his or her lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer'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." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his or her counsel's performance was deficient, he or she is not entitled to relief unless he or she can also prove prejudice; that is, he or she must demonstrate that his or her counsel's errors "were so serious as to deprive [him or her] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] 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.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶11 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he or she cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37.

¶12 Moreover, if an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory

allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶13 Based on the foregoing, we conclude that Murry has alleged sufficient facts on this issue to entitle him to a ***Machner*** hearing.[2] He has alleged with specificity how he believes his trial counsel engaged in deficient performance for failing to challenge the BAC. He has alleged with specificity how he believes this proffered deficient conduct prejudiced him. Accordingly, this case needs to be remanded for an evidentiary hearing. We reverse that portion of the postconviction order and remand for an evidentiary hearing. If, at the conclusion of the hearing, the trial court determines that trial counsel did in fact provide ineffective assistance, Murry may be allowed to withdraw his plea.

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

B. Suppression Motion.

¶14 Murry also contends that the trial court erred in denying his motion seeking to suppress the statement he made to the paramedic in the ambulance that he drank too much. He argues that at the time he made the statement he was in custody, and was not provided proper ***Miranda***[3] warnings prior to the paramedic's questioning. As a result, he contends that his statement must be suppressed. We are not convinced.

¶15 The safeguards of ***Miranda v. Arizona***, 384 U.S. 436 (1966) apply only when a suspect is "in custody." A person is "in custody" for ***Miranda*** purposes when one's "freedom of action is curtailed to a 'degree associated with formal arrest.'" ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984) (citation omitted); ***State v. Pounds***, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993). Because "custody" is determined by an objective standard, the subjective belief of the suspect and the subjective intent of the police are irrelevant. ***Stansbury v. California***, 511 U.S. 318, 323-24 (1994); ***Pounds***, 176 Wis. 2d at 322. We review the historical facts determination of the trial court by the clearly erroneous standard but independently address the legal constitutional question of whether the suspect was in custody. ***Pounds***, 176 Wis. 2d at 320, 323. The same standard of review applies with respect to suppression motions. ***State v. Betterley***, 183 Wis. 2d 165, 172, 515 N.W.2d 911 (Ct. App. 1994), *aff'd*, 191 Wis. 2d 406, 529 N.W.2d 216 (1995).

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶16 Here, the record demonstrates that Conklin was the only person called to testify at the suppression hearing. She testified that she is a paramedic employed by the fire department, not a police officer. She put Murry in the ambulance and attended to his wounds, started an IV, and prepared him for transport. She noted that Murry had slurred speech and smelled of alcohol.[4] She needed to ask him certain questions to determine whether his confused state was due to his head injury or his drinking. During her questioning, she asked if he had been drinking, to which he responded, "I think I drank too much."

¶17 After the suppression hearing, the trial court denied the motion, noting that Conklin's job was to provide medical treatment, that there was no indication that Conklin had communicated with the police officers in any way, there was no indication that Murry was in custody at the time of the questioning, that the purpose of the questioning solely related to medical treatment and was not interrogation. Based on the record before us, we conclude that the trial court's findings are not clearly erroneous. Conklin was not a police officer, nor was she asking Murry about his alcohol intake at the behest of the police. She was asking solely for the purpose of treating his injuries. Further, there is nothing in the record to suggest that Murry was in custody at this time or that a reasonable person would believe he or she was in custody at this time. His confinement at that moment was created by his medical condition, not by the authorities. *See* ***State v. Clappes***, 117 Wis. 2d 277, 285, 344 N.W.2d 141 (1984).

[4] This particular information was testified to at the preliminary hearing. When reviewing a suppression order, we are not limited to the suppression hearing record, but may also review the evidence from the preliminary hearing and trial. ***State v. Gaines***, 197 Wis. 2d 102, 106-07 n.1, 539 N.W.2d 723 (Ct. App. 1995).

¶18 Accordingly, we conclude that the statement Murry made was not the product of a custodial interrogation and therefore was admissible. We also agree with the trial court's assessment that the reliability of the statement due to any decreased level of consciousness was a matter that went to the weight of the evidence and not its admissibility. Therefore, the trial court did not err in denying the motion to dismiss the statement Murry made to the paramedic, and we affirm that portion of the trial court's order.

By the Court.—Judgment affirmed; order affirmed in part; reversed in part and cause remanded for further proceedings.

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