COURT OF APPEALS DECISION DATED AND FILED

February 21, 2007

A. JOHN VOELKER
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2006AP1321

Cir. Ct. No. 1994CF940379A

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD PATTERSON,

DEFENDANT-APPELLANT.

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

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

¶1 WEDEMEYER, P.J. Donald Patterson appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion. Patterson claims he

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

should be afforded a new trial or outright reversal of his conviction because postconviction counsel provided ineffective assistance for: (1) failing to raise the issue that Juror Jerome Hanson was not stricken for cause; (2) not objecting on the basis of subject matter jurisdiction when the State failed to identify which specific subsection of the party to a crime statute applied to him; and (3) not raising the issue that he should not have been charged with the weapons penalty enhancer as use of a weapon was an essential element of the predicate offense. Because Patterson failed to establish ineffective assistance of counsel and because there is no legal merit to any of his claims, we affirm.

BACKGROUND

¶2 Patterson was charged with first-degree intentional homicide with the use of a dangerous weapon and armed robbery, both as party to a crime. Patterson pled not guilty and the case was set for a jury trial. During *voir dire*, prospective Juror Hanson indicated that he felt Patterson was probably guilty and that firing a loaded gun during a robbery constituted "intent to kill." Defense counsel moved to strike Juror Hanson for cause. The trial court denied the request, but conducted an in-chambers questioning of Juror Hanson, wherein Juror Hanson stated that he would be able to render a fair and impartial decision. Accordingly, Juror Hanson was not removed for cause, although he ultimately did not serve on the jury in this case. The record does not reflect whether Patterson or the State used a peremptory strike to remove Juror Hanson, but the record does demonstrate that Hanson was not on the jury ultimately selected to hear the case. In May 1994, the jury found Patterson guilty as charged. On June 10, 1994, he was sentenced. A direct appeal was filed asserting that the trial court erred by failing to submit a lesser-included instruction. On April 11, 1996, we affirmed the judgment of conviction.

¶3 On March 24, 2006, Patterson filed a *pro se* postconviction motion pursuant to WIS. STAT. § 974.06 and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). He alleged that postconviction counsel provided ineffective assistance for: (1) failing to raise the issue that Juror Jerome Hanson was not stricken for cause; (2) not objecting on the basis of subject matter jurisdiction when the State failed to identify which specific subsection of the party to a crime statute applied to him; and (3) not raising the issue that he should not have been charged with the weapons penalty enhancer as use of a weapon was an essential element of the predicate offense. The trial court denied the motion. Patterson now appeals.

DISCUSSION

¶4 Patterson asserts that he received ineffective assistance of postconviction counsel, when his postconviction counsel failed to assert that his trial counsel was ineffective in the three instances referenced above. We reject his contentions.

¶5 We note that the issues Patterson raised were not raised during his direct appeal and ordinarily would be procedurally barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Postconviction ineffective assistance of counsel, however, may constitute a "sufficient reason" to avoid the procedural ***Escalona-Naranjo*** bar. ***Rothering***, 205 Wis. 2d at 682. When a defendant claims ineffective assistance of postconviction counsel on the basis of a failure to assert trial counsel's ineffectiveness, however, the defendant must first establish that trial counsel provided ineffective assistance. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369 ("to establish that

postconviction or appellate counsel was ineffective, a defendant bears the burden of proving that trial counsel's performance was deficient and prejudicial").

¶6 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).

¶7 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. ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. ***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.

¶8 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, "[o]ur review of this determination is limited to whether the court erroneously exercised its discretion in making this determination." ***Id.*** at 318.

A. Juror Bias.

¶9 Patterson first claims that error surrounded the failure to strike Juror Hanson for cause. He continues that, as a result, he was forced to use a peremptory strike to remove Hanson from the jury, which constituted a presumptively prejudicial due process violation. The record belies Patterson's contention.

¶10 The record reflects the following occurred with respect to Juror Hanson. First, defense counsel asked: "Is there anyone who would presume that Mr. Patterson is probably guilty of the charges against him simply because he had a loaded gun in the instances that we're here for today?" Juror Hanson responded: "if a person fires a gun during a robbery … that the intent is to kill." Defense

counsel subsequently moved to strike Hanson for cause. The trial court denied the request, but recalled Hanson for further examination in the court's chambers. The court asked:

> Knowing the definition of those elements as given to you in the substantive instructions and whatever evidence you hear … that's in the courtroom, and then putting all those facts together and all the -- what you hear as evidence and the instructions by the Court, would you be able to render a fair and impartial decision?

Hanson answered: "Yes." The record reflects that Hanson did not sit on the jury, but it does not reflect how the peremptory strikes were used.

¶11 Patterson argues that he had to use one of his peremptory strikes to remove Hanson, which violated his due process rights resulting in presumption of prejudice. Patterson argues that ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), held that in such circumstances, he need not prove harm, but should be granted a new trial automatically. Patterson's argument based on ***Ramos*** fails because ***Ramos*** was overruled by ***State v. Lindell***, 2001 WI 108, ¶52, 245 Wis. 2d 689, 629 N.W.2d 223. In ***Lindell***, the supreme court held that failure to strike a biased juror for cause is error, but the error is harmless if the defendant received a fair trial by an impartial jury. ***Id.***, ¶¶109-120. Here, Patterson has failed to assert that the jury in his case was biased. The record reflects that Hanson did not sit on the jury, nor is there any suggestion that any of the members of the jury who did serve were biased. Accordingly, any arguable error the circuit court might have made in refusing to strike Hanson for cause is harmless as Patterson has failed to

establish that he was prejudiced.[2] It logically follows then that Patterson's counsel's failure to raise this argument, either as postconviction or appellate counsel, did not constitute ineffective assistance of counsel.

B. Party to a Crime.

¶12 Patterson's next contention is that counsel provided ineffective assistance for failing to make a subject matter jurisdiction objection on the grounds that the State failed to specifically identify what subsection of the party to a crime statute applied to Patterson. We reject this contention.

¶13 First, the record reflects that the State indicated that charging Patterson as a party to a crime was merely technical. The State alleged that Patterson was the direct actor as he was the individual who shot the victim.

¶14 Second, case law dictates that the State does not need to specify which subsection a defendant is being charged with under WIS. STAT. § 939.05. ***State v. Zelenka***, 130 Wis. 2d 34, 47, 387 N.W.2d 55 (1986).

¶15 Because the State is not required to name the specific subsection of WIS. STAT. § 939.05, Patterson's assertion is meritless. Thus, Patterson's claim that counsel provided ineffective assistance for failing to raise this issue fails as well.

[2] Patterson contends that the presumptive prejudice/automatic reversal rule of ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), applies to him because it was the law in existence at the time of his trial. The State points out that Patterson is mistaken. His trial took place between May 2 and May 4, 1994. The ***Ramos*** decision was issued on June 20, 1997. Moreover, in overruling ***Ramos*** in the ***State v. Lindell***, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223 decision, the supreme court made it very clear that it was returning to pre-***Ramos*** law, i.e., the law as it existed when Patterson was convicted.

C. Penalty Enhancer.

¶16 Patterson's last contention is that his counsel provided ineffective assistance for failing to argue that he could not be charged with the "use of a dangerous weapon" penalty enhancer because the use of a weapon was an essential element of the predicate offense. Again, we reject his contention.

¶17 At the time of Patterson's prosecution, WIS. STAT. § 939.63 (1993-94) provided in pertinent part:

> **(1)**(a) If a person commits a crime while possessing, using or threatening to use a dangerous weapon, the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> ….
>
> 2. If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years.

¶18 The predicate offense statute for first-degree intentional homicide provided "whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony." WIS. STAT. § 940.01(1) (1993-94). Clearly, based on the aforereferenced statutes, "use of a weapon" is not an element of the predicate offense. Therefore, Patterson's contention to the contrary is meritless. It logically follows that counsel cannot be found to have provided ineffective assistance for failing to raise a meritless objection.

By the Court.—Order affirmed.

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