

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2007

A. John Voelker
Acting 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. 2006AP1520-CR

Cir. Ct. No. 2004CF1355

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRYANT LAMONTE JORDAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Bryant Jordan appeals a judgment convicting him of first-degree reckless injury, and an order denying postconviction relief. The issue is whether he received effective assistance of counsel. We affirm.

¶2 The State charged Jordan in connection with the severe beating of an individual outside a nightclub. At his jury trial, defense witnesses testified that Jordan was present at the scene but did not participate in the beating. The State's principal evidence came from two police officers who testified they saw Jordan repeatedly kicking the victim. The trial was, in effect, a credibility contest between the two sets of witnesses.

¶3 Some time before trial Jordan told his attorney, Martin Kohler, that one of the witnessing officers, Thomas Hines, had previously threatened Jordan after the two quarreled at an after-hours nightclub after Jordan told Hines to leave. Meanwhile, counsel had retained a private detective firm to help prepare the defense. The investigating detective, Katherine Brennan, independently heard an allegation that Hines and Jordan had quarreled. Brennan then withdrew from the investigation because of her friendship with Hines, and none of the investigative reports her firm provided Kohler contained any reference to the alleged quarrel. Kohler could not recall if he arranged for further investigation of Jordan's encounter with Hines, but apparently did not because there was no documentation in his files of any further investigation.

¶4 Kohler initially regarded evidence of the altercation as potentially helpful to the defense in undermining the credibility of Hines and his partner, and shortly before trial the court gave him tentative permission to present testimony about it. In court, Kohler identified the two eyewitnesses to the incident as Dave Paul and Sammy Harris.

¶5 Kohler testified at the postconviction hearing that he was unable to locate Paul or Harris, and came to trial with no potential witnesses to the altercation other than Jordan. However, Jordan brought a man named Charles

Anderson with him to the courthouse on the first day of trial, and presented him to Kohler as another eyewitness to the altercation. Kohler heard Anderson's account but did not subsequently call him as a witness. Jordan did not testify. On cross-examination, Hines denied any prior contact with Jordan. Kohler did not pursue the matter further.

¶6 Jordan moved for postconviction relief, alleging that Kohler provided ineffective representation by failing to continue investigating Jordan's allegation about Hines, and Anderson's information about it, after Brennan withdrew. Testimony at the postconviction hearing revealed that Kohler told the court at sentencing that he would have called Anderson as a witness to the altercation, but Anderson did not show up in time. In the postconviction proceeding, Kohler testified that he decided not to call Anderson because he believed proving the Hines/Jordan altercation would have required Jordan's testimony, as the only person Kohler believed heard Hines threaten Jordan, and Kohler did not want Jordan to testify because doing so would have revealed Jordan's criminal record and his employment at an illegal nightclub. Kohler also believed that calling Jordan would have opened the door to some damaging information that otherwise did not come out during the trial. A point of dispute was whether Jordan told Kohler before trial that Anderson was available to testify as an eyewitness. Kohler could not remember hearing Anderson's name, but said that he would have surely contacted Anderson had Jordan mentioned him, because he and Anderson were long-time acquaintances.

¶7 The trial court did not believe Jordan's testimony that he told Kohler before the trial date that Anderson was a potential witness to the Hines/Jordan altercation. Consequently, the trial court concluded that Jordan failed to show an ineffective investigation. The trial court also determined that Kohler reasonably

chose not to call Anderson as a witness once Kohler learned he was available. The court considered Kohler's reasons valid, and observed that Anderson would have been a poor witness. The court also concluded that testimony about the altercation, even if believed, provided very weak impeachment evidence. The court noted that the incident happened a year before, there was no intervening contact between Jordan and Hines, and even if this brief encounter might have motivated Hines to frame Jordan, it did not implicate his fellow police officer, who also testified as an eyewitness to Jordan's assault on the victim.

¶8 Counsel for a criminal defendant has a duty to conduct a reasonable investigation of the facts, or reasonably decide that a particular investigation is unnecessary. *State v. Thiel*, 2003 WI 111, ¶40, 264 Wis. 2d 571, 665 N.W.2d 305. A claim of ineffective performance of counsel's duty to the defendant requires proof that counsel performed ineffectively, and proof that counsel's errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by an objective standard of reasonably competent professional judgment. *Id.* at 636-37. Prejudice results when counsel's errors deprive the defendant of a fair trial with a reliable result. *Id.* at 640-41. Whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law. *Id.* at 634.

¶9 Even if we accept Jordan's contention that Kohler unreasonably dropped his investigation once Brennan withdrew, Jordan failed to demonstrate prejudice from the discontinued investigation. Jordan's argument for prejudice depends on the presumption that had Kohler continued to investigate, he would have discovered and interviewed Anderson, which in turn would have led to Anderson testifying because Kohler would have had more time to assess the

usefulness of his testimony. However, Jordan failed to show that continued investigation would have led Kohler to Anderson. The trial court made the unchallenged credibility finding that Jordan never told Kohler that Anderson was a potential witness until the day of trial, and Jordan failed to demonstrate any other means by which Kohler might have discovered Anderson's potential usefulness. While Jordan gave Kohler the names of two other witnesses to the incident, neither appeared and testified in the postconviction proceeding that they would have identified Anderson as a witness if asked. Nor did Jordan dispute Kohler's testimony that these other witnesses could not be located before trial, even if they did have information about Anderson. Additionally, Jordan offers nothing more than speculation that Kohler's decision not to call Anderson as a witness would have differed had he interviewed Anderson sooner. A presumption or speculation of prejudice is insufficient; the defendant must make a showing of actual prejudice. See *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

By the Court.—Judgment and order affirmed.

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

