COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP965 **Cir. Ct. No. 2002CF2660**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW NEWSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOSEPH R. WALL,[1] Judge. *Affirmed in part, reversed in part, and cause remanded.*

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

[1] The Honorable Michael B. Brennan presided over the trial and sentencing. The Honorable Timothy G. Dugan presided over the first postconviction proceeding, resolved by our earlier decision. The Honorable Joseph R. Wall presided over the postconviction proceeding involved in this appeal.

¶1 KESSLER, J. Andrew Newson appeals from the trial court's order denying his *pro se* motion for a new trial based on ineffective assistance of postconviction counsel. Newson claims postconviction counsel was ineffective by failing to raise the issue of ineffective assistance of trial counsel for trial counsel's failure to: (1) call a specific alibi witness; and (2) object to the sentence imposed, which Newson claims is longer than the statutory maximum. Because we conclude that Newson is entitled to an evidentiary hearing and opportunity to show that his trial counsel was ineffective, we reverse and remand for a hearing on that issue. However, because the statute that controls the range of sentence to which Newson is subject is the statute that was in effect at the time he committed the offense, not the one in effect at the time he was sentenced, we affirm that portion of the trial court's order.

¶2 In this case, Newson previously appealed[2] from the judgment of conviction for delivery of cocaine, and from an order denying his motion for postconviction relief in which he argued that his trial counsel provided ineffective assistance when she: (1) failed to effectively cross-examine two police officers; and (2) agreed to a redaction of Newson's written statement that was presented to the jury. We do not repeat here the underlying facts of the charged offense, or the pre-conviction procedural history of this case, as that is set out in our earlier decision. We concluded that trial counsel's representation was constitutionally adequate, therefore, we did not consider whether Newson was prejudiced by the alleged error.

[2] ***State v. Newson***, No. 2004AP2006-CR, unpublished slip op. (WI App July 6, 2005), *rev. denied*, 2005 WI 150, 286 Wis. 2d 99, 705 N.W.2d 660.

¶3 In February 2006, Newson filed a *pro se* motion under WIS. STAT. § 974.06[3] claiming ineffective assistance of postconviction counsel for not raising two additional claims of ineffective assistance by his trial counsel. The first claim involves trial counsel's failure to call a previously disclosed alibi witness. The State agrees that Newson is entitled to a hearing on the first claim under the rules of ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).[4] The second claim is trial counsel's failure to object to the court imposing sentence under the statute that was in effect when the crime was committed, rather than under the statute in effect at the time of sentencing. The trial court denied Newson's motion without a hearing and Newson appealed. We discuss the two claims separately.

Failure to call alibi witness

¶4 Ordinarily, all grounds for relief under WIS. STAT. § 974.06 (including issues involving ineffective assistance of trial counsel) must be raised in the original, supplemental or amended postconviction motion before the trial court in order to be preserved for appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). Issues not raised in the first such motion are waived, "*unless* the court ascertains that a 'sufficient reason' exists" for the failure to raise the issue. ***Escalona-Naranjo***, 185 Wis. 2d at 181-82 (emphasis in original). In some circumstances, ineffective assistance of postconviction counsel

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[4] We are grateful for the State's assistance to the court in clarifying Newson's factual assertions with citations to the record, and for the State's candor in acknowledging Newson's entitlement to a hearing on this claim.

may justify defendant's failure to raise ineffective assistance of trial counsel. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

¶5 The two-pronged test for ineffective assistance of trial counsel requires the defendant to prove deficient performance of counsel and prejudice to the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. ***Pitsch***, 124 Wis. 2d at 636-37. "[T]he representation must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services." ***Machner***, 92 Wis. 2d at 802.

¶6 Before ineffective assistance of postconviction counsel can be based upon ineffective assistance of trial counsel, the record supporting ineffective assistance of trial counsel must include trial counsel's testimony. ***Id.*** at 804 ("We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel."). A defendant who has made factual allegations with sufficient specificity which, if true, would establish both prongs of the ***Strickland*** test, is entitled to the opportunity to make the necessary record in an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996).

¶7 Newson claims trial counsel was ineffective. Grounds for her ineffectiveness are that: after identifying Edward Dunsmore to the court as an alibi witness in a pretrial disclosure; and after telling the court at the start of trial that defense witnesses would be Dunsmore and Newson; and after mentioning

Dunsmore to the jury as a witness who would testify, counsel did not have Dunsmore testify. There is no explanation in the record for Dunsmore's failure to testify. Newson's trial defense was that at the time of the charged drug transaction, he was actually at a barbecue attended by Dunsmore who, Newson asserts, would have corroborated his presence at the barbecue at the time of the alleged drug transaction.

¶8 In denying this motion, the trial court concluded that the eyewitness testimony of "multiple police officers" who witnessed the disputed drug transaction could not have been overcome by Dunsmore's proffered testimony if the trial counsel had called him. In his WIS. STAT. § 974.06 motion, Newson describes what Dunsmore would have said if he had testified: "Dunsmore would have testified that Newson was attending a barbecue at the time of the alleged sale of cocaine." The trial court's conclusion is essentially a credibility determination as to who the jury would have believed—Dunsmore and Newson or the police officers. In the context of all of the record, including Newson's theory of defense, *i.e.*, Newson's consistent position throughout the criminal proceedings that Dunsmore would support his presence at the barbecue, and the inconsistent trial testimony of several officers, we do not find facts in the record which support the conclusion that "there is simply not a reasonable probability of a different outcome" had the jurors heard Dunsmore's testimony. Had Dunsmore testified as Newson claims he would, there could be facts in the trial record from which a jury could conclude that Dunsmore was credible, and therefore, Newson was not present at the charged drug transaction. Consequently, Newson is entitled to a hearing with a fair opportunity to present his evidence of ineffective assistance of

trial counsel,[5] and counsel will be given an opportunity to explain her failure to have Dunsmore testify.

Sentencing under the incorrect statute

¶9 We review questions of statutory interpretation *de novo*. ***State v. Stenklyft***, 2005 WI 71, ¶7, 281 Wis. 2d 484, 697 N.W.2d 769. A question involving statutory construction and the application of a statute to a particular set of facts are also questions of law that we decide *de novo*. *See* ***Hanson v. Prudential Prop. & Cas. Ins. Co.***, 224 Wis. 2d 356, 363, 591 N.W.2d 619 (Ct. App. 1999), *rev. denied*, 225 Wis. 2d 490, 594 N.W.2d 384 (1999).

¶10 Between the date Newson was alleged to have committed a crime, and the date of his conviction, the legislature changed the criminal penalty for delivery of "five grams or less" of cocaine or cocaine base. On that basis, Newson argues that he should have been sentenced under the lesser penalty statute which was in effect at the time of his trial[6] and sentence. Newson's legal analysis is incorrect. Penalties applicable to a given offense are those in effect at the time of the offense, not those in effect at the time of trial or sentencing. *See* ***State v. Hermann***, 164 Wis. 2d 269, 286-88, 474 N.W.2d 906 (Ct. App. 1991) (applying WIS. STAT. § 990.04).

¶11 The statute in effect at the time of the alleged offense on May 15, 2002, read:

[5] We ask that the court request the State Public Defender to appoint counsel to represent Newson in this hearing.

[6] Newson actually had two trials. The first trial ended in a mistrial. The second trial concluded after the February 1, 2003 effective date of the new statute.

> (cm) Cocaine or cocaine base, or a controlled substance analog of cocaine or cocaine base, is subject to the following penalties if the amount manufactured, distributed or delivered is:
>
> 1. Five grams or less, the person shall be fined not more than $500,000 and may be imprisoned for not more than 15 years.

WIS. STAT. § 961.41(1)(cm)1. (1999-2000). Effective February 1, 2003, the statute applicable to the offense with which Newson was charged read:

> **961.41 Prohibited acts A—penalties. (1)** … Except as authorized by this chapter, it is unlawful for any person to … deliver a controlled substance or controlled substance analog. Any person who violates this subsection is subject to the following penalties:
>
> ….
>
> (cm) *Cocaine and cocaine base.* If the person violates this subsection … and the amount … delivered is:
>
> 1g. One gram or less, the person is guilty of a Class G felony.

WIS. STAT. § 961.41(1)(cm)1g. (2001-02). At that time, the applicable penalty provisions of WIS. STAT. § 939.50(3) (2001-02) provided: "(g) For a Class G felony, a fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both."

¶12 We reverse and remand for an evidentiary hearing as described above on Newson's claim of ineffective assistance of postconviction counsel based on failure to raise certain claims of ineffective assistance of trial counsel. However, we conclude that Newson was sentenced correctly under the statute with which he was charged, because it was the statute in effect when the offense was committed. Consequently, we affirm the trial court's decision that Newson was charged, and sentenced, under the correct statute.

By the Court.—Order affirmed in part, reversed in part, and cause remanded.

Not recommended for publication in the official reports.