COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP731 **Cir. Ct. No. 2000CF3635**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO L. SIMMONS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: ROBERT CRAWFORD and DAVID A. HANSHER, Judges.[1] *Affirmed*.

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

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[1] The Honorable Robert Crawford presided over the jury trial and sentencing hearing. The Honorable David A. Hansher heard Simmons's original postconviction motion, his *pro se* WIS. STAT. § 974.06 (2003-04) motion, as well as his motion for reconsideration of the denial of the § 974.06 motion.

¶1 CURLEY, J. Antonio L. Simmons appeals the orders denying his postconviction motions. Simmons claims that he is entitled to a new trial because: (1) of newly-discovered evidence; and (2) his attorneys, both trial and postconviction, were ineffective. Because: (1) Simmons has not presented newly-discovered evidence that warrants a new trial; (2) Simmons is barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), from raising claims of ineffectiveness of his trial attorney; and (3) those additional claims Simmons has made that his postconviction attorney was ineffective for failing to raise alleged acts of ineffectiveness of his trial attorney fall short, we affirm.

I. BACKGROUND.

¶2 On July 8, 2000, Simmons was at a bar when he and another man, James Gray, began arguing. Simmons pushed Gray, and Gray struck Simmons in the forehead with a glass. A fight broke out, which was eventually broken up by the tavern's security force. When urged by a security guard to leave, Gray, his sister, Precious Gray, and a friend, Andrea Crawley, left the bar, got into Precious Gray's black car, and eventually drove off. They told the police that shortly thereafter they saw Simmons drive up to them in a white car, stick a gun out of the window and begin shooting at them. Two of them, James and Precious Gray, were struck by bullets. Crawley escaped injury by ducking down in the car. The police were dispatched and they found a white car similar to the one the victims described abandoned about eleven blocks away. A casing was found in this white car that matched the casings found at the shooting scene.

¶3 Simmons was arrested and charged with two counts of first-degree recklessly endangering safety while armed, and one count of second-degree recklessly endangering safety while armed, as a result of the shooting incident. He

was later convicted by a jury. At trial, Gray and Precious Gray testified, as did Crawley, explaining their version of the night's events. Precious Gray also explained that she and Simmons had had a prior relationship, but they were not speaking on the night of the shooting. Also testifying for the State was Tyrone Ramsey, who was employed as part of tavern security on the night of the incident. Ramsey said he saw someone hand Simmons a handgun shortly before Simmons left the bar. Ramsey told the jury that he witnessed this shooting from the street. John Lindsey, a friend of Simmons's, testified on behalf of Simmons at trial. He described the fight that led to Simmons bleeding from the forehead. He told the jury that Simmons was not the shooter because he and Simmons left in a red Oldsmobile to seek medical care; however, they never arrived at the hospital because Simmons changed his mind due to his having an outstanding warrant. Simmons did not testify.

¶4 After the jury found Simmons guilty of all three counts, he was sentenced to a cumulative sentence of twenty-six years of initial confinement, to be followed by thirteen years of extended supervision, to be served consecutively to any other sentence. In 2003, he brought a postconviction motion seeking a new trial in the interests of justice or sentence modification, which was denied without a hearing. In this earlier postconviction motion, he attached the affidavits of two people who were in the bar on the evening of the shooting who claimed to have witnessed the fight and to have seen Simmons get into a red car and drive off. The trial court denied his motion, stating that the affidavits did not establish a

reasonable probability that a different result would have occurred. He then brought a direct appeal, which was affirmed by this court.[2]

¶5 In 2005, Simmons, acting *pro se*, brought a WIS. STAT. § 974.06 motion claiming newly-discovered evidence; ineffective assistance of trial counsel; and ineffective assistance of postconviction counsel for failing to raise the alleged ineffective assistance of trial counsel. He attached a request for discovery and submitted affidavits from various new witnesses who claimed to have seen Simmons leave in a red car, one of which said he actually witnessed the shooting. Both motions were denied without an evidentiary hearing. Simmons moved for reconsideration and that motion was also denied. He now appeals from those orders.

II. ANALYSIS.

A. No newly-discovered evidence.

¶6 Simmons first argues that he is entitled to a new trial because of newly-discovered evidence consisting of the affidavit of Elijah Brooks, who stated that he was at the bar the evening of the shooting. Brooks claims he saw Simmons leave the bar after the altercation and get into a red car with another man and drive away. Brooks also stated that he witnessed the shooting of the people in the black

[2] *See* ***State v. Simmons***, Nos. 2003AP1455-CR and 2003AP1456-CR, unpublished slip op. (WI App July 30, 2004).

car by someone in a white car. He claimed Simmons was not the shooter, and he thought he could possibly identify the person who did the shooting.[3]

¶7 The five-factor test to determine whether newly-discovered evidence warrants a new trial consists of the following: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). The appellant must prove the first four requirements by clear and convincing evidence. *See* ***State v. Armstrong***, 2005 WI 119, ¶¶161-62, 283 Wis. 2d 639, 700 N.W.2d 98.

¶8 Brooks's affidavit does not meet the test for newly-discovered evidence for several reasons. First, Brooks's affidavit is similar to the two affidavits advanced in his direct appeal that were found insufficient to order a new trial. *See* ***Coogan***, 154 Wis. 2d at 394. However, unlike the earlier affidavits, Brooks claims to have actually witnessed the shooting. Brooks, however, never told the police about his observations. Given Brooks's friendship with Simmons, he certainly could have located him before trial, and certainly before his first postconviction motion. Consequently, Simmons was negligent in not discovering this evidence. *See* ***id.*** Finally, had the jury heard Brooks's testimony, given the

[3] In his brief, Simmons notes that the trial court treated all of the affidavits he submitted as newly-discovered evidence. He disagrees with the trial court's characterization that all of his affidavits were newly-discovered evidence. He states that the other affidavits were submitted to support his ineffective assistance of trial counsel claim, and only Brooks's affidavit constitutes newly-discovered evidence.

strength of the State's witnesses and Brooks's inability to identify who he alleges was the actual shooter, it is unlikely that a different result would have occurred had another trial been held. *See* ***id.*** at 394-95.

B. No ineffective assistance of counsel.

¶9 Simmons argues that the trial court erred in its determination that many of his claims of ineffective assistance of trial counsel were barred because he failed to raise them in his direct appeal. Generally, appellants must raise all of their grounds for relief in their initial postconviction motion or direct appeal, unless they offer a sufficient reason for not having raised it previously. ***Escalona***, 185 Wis. 2d at 185. With respect to these arguments, Simmons is not claiming his postconviction counsel was ineffective for not raising these issues, and he has given us no legitimate reason why he failed to raise these issues earlier. Therefore, the trial court correctly concluded that they are barred by ***Escalona***.

¶10 Simmons next makes several other arguments claiming, unlike his earlier contentions, that his postconviction counsel was ineffective for failing to raise his trial counsel's ineffectiveness. He submits that his postconviction counsel was ineffective because he failed to raise the following alleged acts of ineffectiveness of his trial attorney: (1) he failed "to investigate and call exculpatory witnesses"; (2) he failed to investigate and file a notice of alibi; (3) he failed to consult with Simmons about trial strategy concerning his alibi defense and constitutional right to testify; (4) he failed to "pursue areas of potential impeachment and present impeachment evidence of acrimony between Simmons and Precious Gray"; and (5) he "failed to introduce prior inconsistent statements of key State witnesses for impeachment purposes."

¶11 A claim of ineffective assistance of postconviction or appellate counsel may overcome the ***Escalona*** bar. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). Because the defendant is alleging ineffective assistance of postconviction counsel, we will address the merits of these arguments.

¶12 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** To demonstrate prejudice, "[t]he 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." ***Id.*** at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." ***Id.*** Counsel is not ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

1. The new affidavits are insufficient.

¶13 Besides the Brooks affidavit, Simmons attached three additional affidavits of people who claimed to be at the bar on the night of the shooting.[4] It is Simmons's contention that he was not the shooter, and these affidavits place

[4] Simmons also submitted an affidavit of another person who claimed to have heard Elijah Brooks's version of the shooting incident. This person was not present the night of the incident.

him in a different colored car than the one identified as containing the shooter. As a result, he claims that these affidavits show that his trial attorney was ineffective for failing to investigate the case as these witnesses would have "corroborate[d] the defendant's alibi."

¶14 The three individuals who signed the affidavits are: Toronto Wooten, Clebern Peel, and Tawanda Jones.[5] Wooten stated that he was at the bar on the night in question, "saw a guy smack a glass over Antonio[']s] head" and saw him leave the bar "with [a] guy name[d] John and enter a [r]ed [t]wo door Cutlass that was [p]ark[ed] east of the parking lot, John was driving and [A]ntonio was on the passagener [sic] side …." Peel's affidavit is almost identical to Wooten's. Jones's affidavit placed her at the bar and she, too, witnessed the fight. She claims that she "saw Antonio leave the bar with Toronto and two unknown males and enter a red car. Antonio enter[ed] the passager [sic] side and one of the males where [sic] driving." All of these affidavits are similar to the two submitted in Simmons's 2003 postconviction motion.

¶15 The trial court found that the new affidavits did not establish a substantial degree of probability that a new trial would produce a different result. We agree.

¶16 First, it is apparent that all the people submitting affidavits for Simmons are friends of his. Some of the affidavits actually mention that they are Simmons's friend, and others merely suggest it. While this fact does not negate

[5] It is interesting to note that Simmons claimed in his affidavit that Wooten assisted him in locating the two witnesses who previously submitted affidavits. If true, then surely Simmons would have known then that Wooten was an eyewitness. With respect to Peel, Ramsey told police that a "Clee" handed Simmons the gun and that Clee was Simmons's brother.

their accounts, it does give them a reason to embellish or fabricate their observations in Simmons's favor. Despite their alleged knowledge of the evening's events, none of these people volunteered their observations to the police. More importantly, none of these people witnessed the shooting. The best that can be said for their observations is that they saw Simmons leave in a red car with "a guy named John," or possibly, as stated in Jones's affidavit, with three males. Based on their affidavits, it is entirely possible that Simmons could have exited the red car, entered into the white one found abandoned later, and shot the victims. Like the two affidavits submitted in Simmons's earlier postconviction motion, this is simply not enough to counter the testimony of the victims and Ramsey.

¶17 Further, it would appear from the limited communications between Simmons and his postconviction attorney that have been divulged by Simmons, that Simmons's postconviction attorney discovered that while Simmons claims to have given one of the names of these new witnesses to his trial attorney and supplied him with a cell phone number for one witness, given the fact that years passed before Simmons submitted these affidavits, it would appear he had difficulty locating them. Thus, his attorney cannot be faulted for failing to discover witnesses when only one name and a cell phone number were provided. Moreover, Simmons's postconviction attorney did investigate some of these witnesses and found them unhelpful. Consequently, Simmons's postconviction attorney was not ineffective for failing to raise Simmons's trial attorney's alleged shortcomings in investigating these witnesses to support his alibi defense. *See* ***Strickland***, 466 U.S. at 687; ***Rothering***, 205 Wis. 2d at 682. Moreover, these affidavits are cumulative to those filed in the 2003 postconviction motion that were found insufficient.

2. Notice of Alibi

¶18 Next, Simmons argues that his postconviction attorney was ineffective for failing to raise his trial attorney's failure "to investigate and file a notice of alibi."

¶19 Simmons argues that his trial attorney's failure to file a notice of alibi, as directed by WIS. STAT. § 971.23(8), "waived Simmons'[s] right to testify to the fact that he was in a red car on his way to the hospital when the shooting occurred"; that it "had an adverse effect on Simmons'[s] lone defensive witness"; and his failure "effectively prevented the dropping of all charges against Simmons." We disagree.

¶20 First, as the State points out and the record supports, Simmons elected not to testify, knowing full well that it was solely his decision. Further, the State never argued that he should be prevented from testifying because of the lack of a notice of alibi. In addition, the matters that Simmons now says he would have testified to, had he elected to take the stand, were all presented to the jury. The jury was aware of Simmons's contention that he was not guilty. Lindsey told the jury that Simmons was in the red car on his way to the hospital when the shooting occurred. The jury also heard of the "bad blood" between Simmons and Precious Gray.[6] Thus, the lack of a notice of alibi had no effect on Lindsey's testimony, and did not, as Simmons argues, have "an adverse effect" on Lindsey's testimony. Finally, Simmons's explanation that the lack of a notice of an alibi prevented the

[6] Further, Simmons argues that he could have explained that Precious Gray had a motive because he believed she stole from him. As noted, the jury was aware of their hostility toward one another.

dropping of all charges against him, because the alibi witnesses would have been so strong as to require dismissal, is based entirely upon wishful thinking. With the exception of Brooks's affidavit, Simmons has pointed to no alibi evidence that, had it been known, would have required dismissal of the charges. Thus, we can find no fault for his postconviction attorney's failure to raise this issue in the direct appeal. *See* ***Strickland***, 466 U.S. at 687; ***Rothering***, 205 Wis. 2d at 682.

3. Trial strategy.

¶21 Next, Simmons submits that his postconviction counsel was ineffective for failing to argue that his trial counsel was ineffective because his trial counsel "failed to consult with [him] about trial strategy"; never discussed his alibi or any defense with him; failed to discuss with Simmons the constitutional rights that attended his right to testify; and even counseled him not to testify. We disagree.

¶22 The trial court engaged in a careful colloquy with Simmons concerning his right to testify, and the trial court advised him that it was his decision alone. The record reveals that Simmons knew this when he chose not to testify. The fact that he now laments that decision does not transform his decision into a viable claim of ineffective assistance of counsel. Further, it is clear that his trial attorney was aware of Simmons's defense—that he was not the shooter—and the case was fairly presented in that fashion. While Simmons perceives his defense as having been one of alibi, and his attorney addressed it as one of misidentification, the fact is that the jury was told that Simmons claimed not to be the shooter and that he claimed to be in a red car on the way to the hospital when the shooting occurred. Simmons contends that his trial attorney should have called the lab technician to testify that neither his prints nor blood stains were

found in the white car. To be sure, conflicting evidence was introduced by the State and no physical evidence tied Simmons to the scene. The jury was told of these deficiencies and they chose to accept the version of the events detailed by the State's witnesses. His postconviction attorney was not ineffective for failing to challenge his trial counsel's performance in this regard. *See* ***Strickland***, 466 U.S. at 687; ***Rothering***, 205 Wis. 2d at 682.

¶23 In sum, none of Simmons's allegations has merit; consequently, we affirm the trial court's determination.

By the Court.—Orders affirmed.

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