COURT OF APPEALS DECISION DATED AND FILED

March 20, 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. 2006AP2000-CR

Cir. Ct. No. 2004CF439

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHERI L. DELARUELLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Sheri Delaruelle appeals a judgment of conviction for second-degree reckless homicide and an order denying postconviction relief. Delaruelle argues her trial counsel was ineffective because he did not challenge the admissibility of incriminating statements she made to the police. The State

argues that Delaruelle's counsel's performance was not deficient because he made a strategic decision not to challenge the admissibility of those statements. It also contends Delaruelle has not established she was prejudiced. We agree with the State and affirm.

BACKGROUND

¶2 Delaruelle was charged with one count of homicide by intoxicated use of a motor vehicle, one count of hit-and-run causing death, and one count of first-degree reckless homicide. On April 24, 2004, an intoxicated Delaruelle drove her truck into Marie Laurent, dragged Laurent underneath her truck, and fled the scene before she was apprehended by police nearby. Laurent died as a result of Delaruelle's actions.

¶3 After a jury trial, Delaruelle was found guilty of homicide by intoxicated use of a motor vehicle and hit-and-run causing death. The jury also found Delaruelle guilty of the lesser-included offense of second-degree reckless homicide. Delaruelle was sentenced to fifteen years in prison, followed by ten years of extended supervision, concurrent on each count.

¶4 Delaruelle retained new counsel and filed a motion challenging the effectiveness of her trial counsel, Charles Koehn, for not filing a motion to suppress Delaruelle's statements to police. Koehn testified at the motion hearing that he did not challenge the admissibility of Delaruelle's statements because in his extensive discussions with her, she never gave any indication to suggest her statements to the police were involuntary. He therefore concluded any challenge to those statements would have been without merit. At the close of the hearing, the court denied the motion, holding that Delaruelle failed to prove counsel's performance was either deficient or prejudicial to the defense.

DISCUSSION

¶5 Whether a defendant has been denied the right to effective assistance of counsel presents a mixed question of law and fact. The circuit court's findings of historical fact will not be disturbed unless they are clearly erroneous. The ultimate determinations based upon those findings of whether counsel's performance was constitutionally deficient and prejudicial are questions of law subject to independent review. ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The defendant bears the burden of proving both that counsel's performance was deficient and, if so, that such performance prejudiced her defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶6 To prove ineffective assistance of counsel, the defendant must overcome the strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *See* ***Strickland***, 466 U.S. at 690. Additionally, there is a strong presumption that an attorney's decision is based on sound trial strategy. ***State v. Harris***, 133 Wis. 2d 74, 81, 393 N.W.2d 127 (Ct. App. 1986). A defendant's mere belief that counsel should have conducted a defense differently does not in and of itself establish that counsel's performance was deficient. Even if in hindsight another defense might have been better, counsel's strategic decision will be upheld if it was rationally founded on fact and law. ***State v. Wright***, 2003 WI App 252, ¶35, 268 Wis. 2d 694, 673 N.W.2d 386. The sole issue is whether there is a reasonable basis for counsel's actions. *See* ***State v. Rock***, 92 Wis. 2d 554, 560, 285 N.W.2d 739 (1979).

¶7 Delaruelle argues Koehn performed deficiently by not filing a motion to suppress her incriminating statements on the basis that they were involuntary. Statements are constitutionally involuntary when they are the product of coercive conduct by police. ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986). Police coercion is "physical violence or other deliberate means calculated to break [a suspect's] will." ***Colorado v. Spring***, 479 U.S. 564, 574 (1987). A defendant's statements are not involuntary merely because that person was intoxicated. *See* ***Connelly***, 479 U.S. at 163-67. Thus, the issue is whether the defendant's decision to talk to police was a free and deliberate choice or was the product of police coercion. ***Spring***, 479 U.S. at 573-74.

¶8 At the ***Machner***[1] hearing, Koehn testified Delaruelle never indicated that the police used any coercive tactics to compel her statements. Additionally, Delaruelle did not testify, either at trial or the post-conviction hearing, that police coerced her statements. The evidence at trial shows that police gave ***Miranda***[2] warnings to Delaruelle before the interview at the police station, she voluntarily and intelligently waived her rights in writing, and she provided voluntary statements to police both orally and in writing.

¶9 Furthermore, Koehn chose to use those statements as a part of his defense strategy. The defense strategy was to use Delaruelle's level of intoxication and statements to avoid a first-degree reckless homicide conviction by refuting the assertion that she acted with an utter disregard for human life. As the State points out, Koehn's strategy was successful in that Delaruelle was convicted

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

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

of the lesser included offense of second-degree reckless homicide. We therefore conclude Delaruelle has not overcome the presumption that Koehn made a rational strategic decision based on the facts and law to not challenge the admissibility of Delaruelle's statements.

¶10 Alternatively, even if we were to conclude Koehn performed deficiently, we fail to see how Delaruelle was prejudiced by the failure to object to her statements. Delaruelle's statements merely corroborated the undisputed testimony that she drove her truck while intoxicated into Laurent when Laurent attempted to prevent her from leaving, and that Delaruelle ran over Laurent, dragging her before fleeing the scene, even though her passenger and the others outside yelled for her to stop. Additionally, Delaruelle's various statements did not undermine, and were often consistent with, her defense that she did not act with utter disregard for human life in an attempt to avoid a first-degree reckless homicide conviction. Thus, the circuit court properly concluded that Delaruelle failed to meet her burden of proving prejudice.

By the Court.—Judgment and order affirmed.

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