COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1281 **Cir. Ct. No. 1990CF904068**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVELLE CHAMBERS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Lavelle Chambers appeals from an order denying his WIS. STAT. § 974.06 (2005-06)[1] postconviction motion without a hearing. He

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

argued to the circuit court that postconviction counsel was ineffective in failing to challenge the effectiveness of trial counsel. On appeal, he also contends that the evidence was insufficient to support his conviction and that a hearing on his claims was improperly denied. We affirm.

Background

¶2 The factual background of this matter is fully described in ***State v. Chambers***, 183 Wis. 2d 316, 318-19, 515 N.W.2d 531 (Ct. App. 1994). In sum, Chambers and a co-actor, Eddie Brooks, robbed a Milwaukee store and then attempted to flee from approaching officers.

> After [running] approximately 100 yards, the pair split up and proceeded in different directions. Chambers ran under a porch where he was eventually found and arrested by the police.
>
> While Chambers was hiding under the porch, Brooks engaged the pursuing police officer in gun fire. A bullet shot by Brooks struck and killed Sergeant Michael Tourmo.
>
> Chambers was charged with felony murder party to a crime, and possession of a firearm by a felon.

Id. at 319.

¶3 The case was tried to a jury. Over defense objection, the circuit court granted the State's request for a jury instruction on felony murder that "a crime is not complete until a successful escape is made."[2]

[2] The instruction, provided in pertinent part: "[t]he second element [of felony murder] requires that the defendant or one he was intentionally aiding and abetting as party to a crime caused the death of Michael Tourmo while committing the crime of Armed Burglary. *In this regard, a crime is not complete until a successful escape is made*" (emphasis added).

¶4 The jury convicted Chambers. The court imposed fifty years' imprisonment for the charge of felony murder and eight years' imprisonment for the charge of felon in possession of a firearm.

¶5 Chambers filed a direct appeal to this court in 1992, then successfully moved for withdrawal of appointed counsel before submission of his reply brief. He proceeded *pro se*, arguing that the evidence was insufficient to support the conviction. We affirmed the judgment. *See* ***Chambers***, 183 Wis. 2d at 318.[3]

¶6 This court subsequently concluded that Chambers's appellate counsel was wrongly permitted to withdraw. ***State v. Chambers***, No. 03-1479-W, unpublished slip op at 6 (WI App Nov. 17, 2003). In 2003, we reinstated Chambers's appeal and directed that appointed counsel submit a reply brief.

¶7 Chambers's appellate counsel argued that the felony murder jury instruction invaded the province of the jury. We disagreed, holding that the phrase "a crime is not complete until a successful escape is made" did not direct the jury to make any particular finding. We summarily affirmed the judgment of conviction. ***State v. Chambers***, No. 92-1111-CR, unpublished slip op. (WI App Nov. 12, 2004).

¶8 Meanwhile, Chambers, acting *pro se*, had petitioned the federal district court in 1997 for a writ of *habeas corpus*, contending that the felony

[3] We do not include the entirety of Chambers's postconviction efforts in our summary here. For a more complete overview of the prior litigation, *see* ***State v. Chambers***, No. 03-1479-W, unpublished slip op. (WI App Nov. 17, 2003) and ***State v. Chambers***, No. 92-1111-CR, unpublished slip op. (WI App Nov. 12, 2004).

murder jury instruction "violated his due process rights because it relieved the [S]tate of its burden of proving all elements" of the crime. ***Chambers v. McCaughtry***, 264 F.3d 732, 736 (7th Cir. 2001). The federal court appointed an attorney for Chambers, and counsel filed briefs with a "'slightly different twist' on the due process claim." ***Id.*** at 737. Counsel contended that the statute had not previously been "construed to include a death that occurs while the accomplices are escaping the scene of an armed burglary." ***Id.*** Therefore, "the jury instruction amounted to an *ex post facto* application of the state felony murder statute." ***Id.***

¶9 The district court denied the writ and the seventh circuit affirmed. ***Id.*** at 744. The United States Supreme Court denied review. ***Chambers v. McCaughtry***, 534 U.S. 1165 (2002).

¶10 Chambers initiated the instant litigation in 2006 by filing a *pro se* motion for postconviction relief pursuant to WIS. STAT. § 974.06. He alleged that his trial attorney was ineffective by failing to find and offer authority supporting an argument that the felony murder jury instruction "violated his right to be free from *ex post facto* judicial decision making." He alleged that his postconviction attorney in the state proceeding was in turn ineffective by failing to claim ineffective assistance of trial counsel. The circuit court rejected the claims without a hearing and this appeal followed.

Discussion

¶11 To establish ineffective assistance of counsel, 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). There is a strong presumption that counsel rendered adequate assistance. ***Id.*** at 690.

¶12 Appellate counsel has the duty to determine those issues that have merit for appeal. ***State v. Evans***, 2004 WI 84, ¶30, 273 Wis. 2d 192, 682 N.W.2d 784, *overruled on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. "'[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of [appellate] counsel be overcome.'" ***Smith v. Robbins***, 528 U.S. 259, 288 (2000) (citation omitted). To determine whether appellate counsel forfeited an issue "clearly stronger" than those pursued, the reviewing court must consider the merits of the forfeited claim. Here, Chambers asserts that appellate counsel forfeited a claim that trial counsel was ineffective; we must therefore first consider whether the claim of ineffective assistance of trial counsel has merit. *See* ***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").[4]

[4] In a separate argument, Chambers asserts that the reviewing court must first find that postconviction counsel was ineffective in failing to challenge trial counsel's actions before it can consider whether trial counsel's performance was ineffective. In support, he cites a footnote in ***State v. Evans***, 2004 WI 84, ¶56 n.20, 273 Wis. 2d 192, 682 N.W.2d 784, *overruled on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. ***Evans*** does not apply. ***Evans*** bars the court of appeals from extending the time for filing a notice of appeal when the delay is alleged to be caused by ineffective assistance of appellate counsel. Defendants may not be granted extensions based on alleged ineffective assistance because this would circumvent the requirement that defendants prove ineffective assistance before they can proceed to the merits of the issues that they wish to appeal. *See* ***id.***, ¶57. The ***Evans*** rule has no bearing here. In the instant proceeding, Chambers must prove that trial counsel's performance was deficient and prejudicial in order to prove that postconviction counsel was ineffective for failing to make such a claim. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. No attorney is ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶13 Trial counsel objected to the State's request for a jury instruction that "a crime is not complete until a successful escape is made." Chambers asserts that counsel was ineffective in failing to support the objection with a citation to ***Bouie v. City of Columbia***, 378 U.S. 347 (1964). ***Bouie*** bars "an unforeseeable judicial enlargement of a criminal statute" that deprives a defendant of fair warning that his conduct may give rise to criminal liability. *See* ***id.*** at 353, 355**.** Chambers asserts that the instruction here resulted in just such a deprivation.

¶14 Chambers presented this claim of *ex post facto* application of the felony murder statute to the federal courts. *See* ***McCaughtry***, 264 F.3d at 737. The seventh circuit held that Chambers was procedurally barred from pursuing the claim, but also reviewed the issue substantively and concluded that the argument was without merit. *See* ***id.*** at 744. The seventh circuit's decision is, of course, not binding on this court. *See* ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998). Nonetheless, we may rely on a federal court's interpretation of Wisconsin law if it is instructive. *See* ***Baldewein Co. v. Tri-Clover, Inc.***, 2000 WI 20, ¶10, 233 Wis. 2d 57, 606 N.W.2d 145.

¶15 The seventh circuit observed that two Wisconsin Supreme Court decisions had substantially clarified governing principles in this area of the law prior to Chambers's offense and trial. ***McCaughtry***, 264 F.3d at 741-42. In one such decision, the defendant and two co-actors robbed a home and took flight. *See* ***id.***, citing ***State v. Pharr***, 115 Wis. 2d 334, 340 N.W.2d 498 (1983). The ***Pharr*** court rejected the defendant's contention that the robbery was over at the time that a co-actor shot a state trooper who had stopped them on the highway. ***McCaughtry***, 264 F.3d at 742. The court held that the crime of robbery "'was not complete until a successful escape was made.'" ***Id.*** (quoting ***Pharr***, 115 Wis. 2d at 351).

¶16 The facts of Chambers's offense differ from ***Pharr*** principally in that Chambers was hiding and therefore not present when his cohort shot an investigating officer. *See* ***McCaughtry***, 264 F.3d at 742. In a second decision, however, the Wisconsin Supreme Court held that party-to-a-crime liability is sufficiently broad that the defendant need not be present when a co-actor kills a third party. ***Id.*** at 742-43, citing ***State v. Marshall***, 92 Wis. 2d 101, 284 N.W.2d 592 (1979).

¶17 The seventh circuit determined that ***Pharr*** and ***Marshall*** put Chambers on notice that the felony murder and party-to-a-crime statutes encompassed his situation. ***McCaughtry***, 264 F.3d at 743. Therefore, the law was not applied in an unforeseeable manner. *See* ***id.*** The seventh circuit concluded that Chambers was thus "not subjected retroactively to an expanded scope of liability." ***Id.***

¶18 The federal court's analysis is sound and we adopt it here. The challenged instruction did not run afoul of ***Bouie*** because it was not an "unpredictable shift in the law." *See* ***id.*** (noting that ***Bouie*** applies only to such unpredictable shifts). It merely clarified for the jury the law as it existed.

¶19 The jury was properly instructed and a contrary assertion would not have had merit. Trial counsel therefore was not deficient and Chambers was not prejudiced in this regard. "A claim predicated on a failure to challenge a *correct* trial court ruling cannot establish either [deficient performance or prejudice]." ***Ziebart***, 268 Wis. 2d 468, ¶14 (emphasis in original). Because Chambers's trial

counsel was not ineffective, Chambers's postconviction attorney was not ineffective by failing to make such a claim. *See* ***id.***, ¶15.[5]

¶20 Chambers also contends that the circuit court improperly denied his motion without a hearing. When a motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. We consider this question *de novo*. ***Id.*** If the motion fails to allege sufficient facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to deny [the motion without] a hearing." ***Id.*** We consider this question under the deferential erroneous exercise of discretion standard. ***Id.***

¶21 Chambers's motion did not allege facts that would entitle him to relief if proven. Rather, it turned on the legal question of whether the jury instruction violated Chambers's right to due process by subjecting him to an *ex post facto* application of the law. *See* ***Ziebart***, 268 Wis. 2d 468, ¶16 (whether a jury instruction violated a defendant's right to due process is a legal question). The circuit court concluded, and we agree, that the instruction was proper. Its language was a logical application of legal authority, not an unpredictable shift in the law. *See* ***McCaughtry***, 264 F.3d at 743. The record thus conclusively demonstrates that Chambers was not entitled to relief. Accordingly, the circuit court was not required to hold a hearing in this matter. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

[5] Chambers argues that the evidence is insufficient to sustain a conviction under the jury instruction that he claims should have been given. This argument is mooted by our determination that the jury was properly instructed.

By the Court—Order affirmed.

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