COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2008

David R. Schanker
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. 2006AP2888 **Cir. Ct. No. 2002CF1221**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAMONT E. WALLACE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lamont E. Wallace appeals from a postconviction order summarily denying his motion for a new trial. The issue is whether postconviction counsel was ineffective for failing to challenge the trial court's alleged deprivation of Wallace's confrontation rights by allowing police testimony about the witness who allegedly implicated Wallace beyond the scope of the

parties' court-approved stipulation regarding that witness. We conclude that Wallace was not deprived of his confrontation rights because the police testimony about that witness did not include hearsay, or extend beyond the scope of the stipulation; consequently, counsel was not ineffective for refusing to raise that issue. Therefore, we affirm.

¶2 We set forth the factual background from our order affirming the judgment and postconviction order on direct appeal. *See* ***State v. Wallace***, 2003AP2229-CR, unpublished slip op. at 2 (WI App June 18, 2004).

> On February 24, 2002, Mary Edwards encountered a stranger in the hallway outside her apartment as she went to a basement laundry room. The man was still there when she returned a few minutes later. The man asked Edwards if she knew the tenant of Apartment 1. When Edwards opened the door to her apartment, the man forced his way in and demanded money. The man told Edwards to sit in the dining room. When he went toward her stereo, Edwards ran toward the door. However, the man reached the door first, closed it and stopped Edwards from leaving. The man then took Edwards' wallet, stereo, boom box, cell phone and some compact discs. The man was in Edwards' apartment for five to seven minutes. He was wearing gloves and a hat, but did not disguise or shield his face during the incident. After the man left, Edwards waited about three minutes and then went to the nearby apartment of her cousin. The police were called and arrived within ten minutes. In addition to interviewing Edwards, one of the officers spoke with the resident of Apartment 1 and obtained the name of a possible suspect. One and one-half hours later, an officer presented a photo array to Edwards. Edwards selected Wallace's photo from the array. When Wallace was arrested several days later, none of Edwards' property was in his possession. At all subsequent court proceedings, including trial, Edwards positively identified Wallace as the man who entered her apartment and took her property.
>
> Edwards' identification of Wallace as the perpetrator was the crux of the State's case.

Id.

¶3 Wallace's challenge involves the police interview of the resident of apartment one (Victor Scott), who told the officer that he recognized Wallace's voice as the one he heard in the hallway. This tip prompted the police to construct a photo array that included Wallace's picture, from which Edwards positively identified Wallace.

¶4 Wallace's trial counsel moved in limine to exclude "[a]ny reference to hearsay statements of any witness who does not testify as to identification of Defendant or any other matter … as prejudicial and unreliable." This motion was targeted to exclude hearsay references attributed to Scott, who implicated Wallace from the voice he heard. As trial counsel explained to the trial court:

> [The prosecutor] indicated that he would make a statement to the Court when the detectives – they found out about [Wallace] through a neighbor; that would be the extent of it, otherwise the door will be open to a lot of hearsay testimony. Because Mr. Scott is not going to be testifying I think that reflects our agreement. Is that true?

The prosecutor confirmed:

> Yes. Just to make sure the record's complete, either party could call this man at his home. He has a lot of health problems and has indicated, I guess to be precise, a certain hostility to coming down here. He really doesn't add anything.
>
> The only thing that he did is he expedited the development of Mr. Wallace as a suspect, so I'm not going to be going into any specifics of what he said, only that they went to talk to Mr. Wallace because they got his name from a neighbor, that's all. That was what was discussed at the final pretrial.

The trial court approved the stipulation, reasoning: "[t]hat, again, keeps out the use of any type of hearsay as to what the neighbor said, why the officers were acting as they were acting."

¶5 Wallace contends that the trial court erroneously allowed police "to use Victor Scott's out-of-court statement at trial," depriving him of his right to confront the witness against him. Recognizing that we may evaluate this error as harmless, he alternatively seeks discretionary reversal pursuant to WIS. STAT. § 752.35 (2005-06), to correct what he views as a miscarriage of justice.[1] Preliminarily, we conclude that postconviction counsel's refusal to raise this issue by postconviction motion pursuant to WIS. STAT. RULE 809.30(2)(h) (2003-04), constitutes a sufficient reason for Wallace to belatedly raise this issue pursuant to WIS. STAT. § 974.06, to overcome the procedural hurdle of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994).

¶6 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.*** at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion."

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

> ***Nelson***, 54 Wis. 2d at 498. *See* ***Bentley***, 201 Wis. 2d at 318-19 (quoting the same).

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶7 The basis for Wallace's postconviction motion is the ineffective assistance of postconviction counsel. To maintain an ineffective assistance claim, Wallace must show that counsel's performance was deficient, and that this deficient performance prejudiced the appeal. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "affirmatively prove[n]." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91.

¶8 Wallace claims that the trial court violated his Sixth Amendment right to confront the witnesses against him, by allowing the police to testify about Scott beyond the scope of the sanctioned stipulation, which reconciled the parties' concerns about calling Scott as a witness, but ultimately deprived Wallace of the right to cross-examine Scott. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. Wallace then expounds on the sanctity of the constitutional right of confrontation.

The fatal flaw in Wallace's contention, however, is that no one offered Scott's hearsay to the jury.

¶9 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3) (2001-02). No one testified to what Scott said, only that he was the source of police information that prompted a photo array to facilitate an identification by Edwards.

¶10 The following testimony relates to Scott, and is the subject of Wallace's complaint:

> **Questioning of Police Officer Jodi Kamermeyer**:
>
> Q: Without going into any details of what that person said, did he come back with a name that would assist you in your investigation?
>
> A: Yes, he did.
>
> **Questioning of Police Officer Jered Fliss**:
>
> Q: Which one of you went to see if you could find any leads on who this invader might have been?
>
> A: I did.
>
> Q: And did you get a name from the occupant of apartment number one?
>
> A: Yes, I did.
>
> Q: Why was it important for you right after this happened to be able to come up with a name? What were you able to do with that name, Officer?
>
> A: We were able to get a photo array prepared.
>
> Q: So once you had a name of a possible suspect you prepared something that you call a photo array?
>
> A: Correct.

Questioning of Police Detective Jennifer Sandvick:

> Q: Had Officer Fliss already gotten some information about a possible suspect, and were you aware of that as soon as you got to the scene?
>
> A: Yes.
>
> Q: Explain what you asked him to do and why.
>
> A: When I arrived on the scene I got the basic information of what had happened there. He informed me that he had spoken with a neighbor and obtained a name and a general age of a possible suspect. He had checked our identification division and got a possible name of a suspect and I instructed him to go downtown to compile a photo array so that we could expedite the investigation, that he could do that while I interviewed the –and got a detailed statement from the witness.
>
> Q: What are some of the reasons why you'd want to expedite that part of the investigation to right away go down and get a photo array right after this happened?
>
> A: First of all, you don't want to have the witnesses sitting around and just waiting. It would have taken longer for me to go back downtown and compile it myself, and … the sooner you get somebody identified, it's easier for the person to recall the person who did it.

¶11 This information was not offered for the truth of its contents, as required by WIS. STAT. § 908.01(3) (2001-02). The only incriminating information presented to the jury was that Scott was the source of information that expedited the investigation by identifying Wallace as a potential suspect. There was no hearsay testimony attributed to Scott; consequently, Wallace had no right to confront Scott. Therefore, postconviction counsel's assessment that the testimony about Scott did not include hearsay, and her correlative refusal to raise this nonmeritorious issue was not ineffective assistance. *See* ***Strickland***, 466 U.S. at 687.

¶12 Wallace also seeks discretionary reversal in the interest of justice. *See* WIS. STAT. § 752.35. Section 752.35 allows the appellate court in the extraordinary circumstance, to reverse "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Discretionary reversal is granted "infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). Nothing in this record, or in this appeal, in which Wallace has not shown error by the trial court or ineffective assistance by counsel, persuades us that the real controversy was not fully tried, or that justice miscarried. The extraordinary remedy of discretionary reversal is not warranted.

By the Court.—Order affirmed.

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