COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 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. 2007AP2432-CR **Cir. Ct. No. 2004CF4624**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE M. HICKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON and DANIEL L. KONKOL, Judges. *Affirmed*.

Before Curley, P.J., Fine, J. and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Andre M. Hicks appeals from a judgment of conviction for armed robbery, first-degree reckless injury, and being a felon in possession of a firearm, and from a postconviction order denying his motion to

vacate the judgment and order a new trial.[1] The issue is whether trial counsel failed to investigate and present Hicks's alibi defense, resulting in the jury finding him guilty. We conclude that trial counsel did not perform deficiently, and thus, did not provide ineffective assistance. Therefore, we affirm.

¶2 On August 21, 2004, Hicks was involved in a dice game; at about 7:30 p.m., several of the participants were shot and robbed. At trial, three of the witnesses testified that they have known Hicks for several years and each identified him as the perpetrator.

¶3 The jury found Hicks guilty of armed robbery, first-degree reckless injury, and possessing a firearm as a felon.[2] The trial court imposed a thirty-two-year aggregate sentence including a twenty-year aggregate period of initial confinement.

¶4 Hicks moved for a new trial on the basis of ineffective assistance of trial counsel for failing to investigate and present his alibi defense. The trial court summarily denied the motion. On appeal, this court reversed the postconviction order and remanded the matter for a ***Machner*** hearing. *See* ***State v. Hicks***, No. 2006AP1907-CR, unpublished slip op. at 5 (WI App May 30, 2007). Following the ***Machner*** hearing, the trial court denied the motion. Hicks appeals.

[1] The Honorable Karen E. Christenson presided over the jury trial, imposed sentence, and entered the judgment of conviction. The Honorable Daniel L. Konkol decided Hicks's postconviction motion after presiding over the ***Machner*** hearing, which is an evidentiary hearing to determine trial counsel's effectiveness. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[2] The jury found Hicks not guilty of attempted first-degree intentional homicide and two counts of first-degree reckless injury.

¶5 Hicks's ineffective assistance claim is that trial counsel failed to investigate and present an alibi defense, namely, that Hicks could not have committed the offenses charged because he was at a family picnic in a different part of the city at the time of the robbery and shootings. He identified the following people as helpful to his alibi defense, his relatives, Sheree, Michael and Tonya Watkins, and Robin Clark.[3]

¶6 At the ***Machner*** hearing, only Clark and Hicks's trial counsel testified. Clark testified that she was with Hicks at a picnic in a different part of the city from where the robbery occurred from about 4:00 to 4:30 in the afternoon until between 7:30 and 8:30 that evening. Hicks's trial counsel then testified about her experience as a criminal defense lawyer. She also explained that as Hicks's third trial lawyer she had conferred with her predecessor and was well aware of the importance of Hicks's alibi defense and agreed with the prosecutor's assessment that an alibi defense "pretty much starts and ends with what the defendant tells you about his whereabouts." Trial counsel described Hicks as a "very active" participant in his defense, and testified that he identified only Tonya as an alibi witness; he may have mentioned Sheree and Michael Watkins, although not as prospective witnesses. Trial counsel also testified that she was given photographs of the family picnic that he allegedly attended, and showed those photographs to Hicks. She testified that Hicks told her "no, he didn't know who took them and there wasn't a witness to help us."

[3] Throughout the remainder of this opinion, we sometimes refer to Sheree, Michael and Tonya Watkins only by their first names, to avoid the confusion or redundancy of referring to them as Watkins, or by both their first and last names.

¶7 To prevail on an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *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. 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. ***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 Hicks alleged that his trial counsel was ineffective for failing to contact these witnesses to support his alibi: Sheree, Michael and Tonya Watkins, and Robin Clark. We consider trial counsel's testimony about each of them.

¶9 Although Hicks ultimately acknowledged that Sheree and Michael Watkins may not have been appropriate candidates to testify, he contends that they should have been interviewed because they would have provided further information about others at the family picnic who could have provided useful information to support Hicks's alibi. Trial counsel testified that she asked her investigator to interview Sheree, despite her concern that Sheree could not be called as a defense witness because her car had blood in it that may have implicated Hicks in the crimes. Nevertheless, trial counsel testified that she did not recall nor did she receive any notes from her investigator about any contact

with Sheree. Trial counsel also ultimately declined to talk to Michael Watkins because the prosecution's theory was that Michael may have driven the car and waited for Hicks as Hicks committed the crimes; Michael was also currently in jail.

¶10 Hicks has not proven that trial counsel was ineffective for failing to contact Sheree or Michael Watkins. First, neither was a reasonably acceptable risk as an alibi witness because each could also implicate Hicks. *See* ***Strickland***, 466 U.S. at 690-91 (strategy decisions are "virtually unchallengeable"). Second, Hicks never specified what helpful information Sheree or Michael would have provided had they been interviewed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) ("Moreover, '[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the [proceeding].'") (citation omitted; first alteration by ***Flynn***). Consequently, Hicks has not shown with the requisite specificity why failing to interview Sheree or Michael Watkins, individuals Hicks acknowledged should not be called as defense witnesses, constituted deficient performance.

¶11 Tonya Watkins was the next potential alibi witness, and according to trial counsel, the "only" alibi witness Hicks told her about. Trial counsel sent a defense investigator to interview Tonya who told the investigator that "she went to a picnic with Mr. Hicks [and] that they left together sometime around 8:45." Trial counsel testified that she intended to call Tonya as an alibi witness, but was unable to locate her. In response to questioning regarding her attempts to locate Tonya, trial counsel testified, "I made personal calls to Ms. Watkins where I left messages, and my investigator made at least four or five attempts to locate her as

well." The following exchange is trial counsel's testimony in response to the following question by the prosecutor:

> **The prosecutor's question:** You could have … ask[ed] your investigator to personally serve T[o]nya Watkins with a subpoena and warn[] her that if you don't come to court we are going to have the judge order you arrested to come to court; you could have done that?
>
> **Trial counsel's response:** That's what we were trying to do, but we couldn't find her. Every time the investigator would go to her house, nobody would answer the door, so she would leave cards and they wouldn't get back to her.

Trial counsel diligently attempted to compel Tonya to testify; that her attempts failed does not constitute deficient performance. *See* ***McMahon***, 186 Wis. 2d at 80.

¶12 Robin Clark was the only alibi witness who actually testified at the ***Machner*** hearing and, as we previously concluded, provided Hicks with an alibi. At the ***Machner*** hearing, however, trial counsel testified that "[u]ntil [she] read [Hicks's postconviction] motions, [she] had never heard of Robin Clark." That testimony is undisputed.

¶13 It is not objectively reasonable to require trial counsel to interview an arguable alibi witness she "never heard of." Trial counsel testified that she repeatedly discussed and requested information about arguable alibi witnesses with Hicks, whom she described as an active participant in his defense; trial counsel testified that Hicks never identified or referred to Clark. Trial counsel testified that "[Hicks] did specifically tell me there were no other family witnesses that would be able to help me and that Ms. [Tonya] Watkins was the only one." Trial counsel's failure to divine Clark's potential as an alibi witness does not constitute deficient performance. *See* ***McMahon***, 186 Wis. 2d at 80.

¶14 Trial counsel was well aware of the importance of an alibi witness to Hick's defense. She discussed potential alibi witnesses with Hicks repeatedly, and requested that Hicks provide her with names and leads of any potential witnesses. She pursued those leads. Hicks's specific ineffective assistance claims regarding Sheree, Michael and Tonya Watkins, and Robin Clark, each fails. Consequently, Hicks has not shown that his trial counsel was deficient. It is therefore unnecessary to address the prejudice element of his ineffective assistance claim. *See* ***Moats***, 156 Wis. 2d at 101.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).