COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0335-CR **Cir. Ct. No. 97CF972555**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC JASON SMILEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES and JOHN J. DiMOTTO, Judges. *Affirmed.*

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

¶1 PER CURIAM. Eric Jason Smiley appeals from a judgment entered after a jury found him guilty of first-degree intentional homicide, while armed with a dangerous weapon, contrary to WIS. STAT. §§ 940.01(1) and 939.63(1)(a)

(1997-98).[1] He also appeals from an order denying his postconviction motion. Smiley claims: (1) the trial court should have granted his motion to suppress his first statement to police; (2) the trial court erroneously exercised its discretion in admitting evidence of drugs and other guns with one of the guns allegedly used during the homicide; (3) he received ineffective assistance of trial counsel; and (4) the postconviction court made clearly erroneous evidentiary rulings which denied him the right to present evidence and prove his postconviction claims. Because we resolve each issue in favor of upholding the judgment and order, we affirm.

I. BACKGROUND

¶2 On June 6, 1997, Smiley killed his sister's boyfriend, Christopher Garrett. At the time of his death, Garrett was living with Smiley's sister, Monica Walter, in a home at 2178 North 44th Street, Milwaukee, Wisconsin, which was owned by Smiley and Walter's grandmother. Smiley lived in the home as well.

¶3 The police arrested Smiley on a municipal ordinance warrant and questioned him about the homicide. At this time, Smiley was told that he was not a suspect, but simply a witness because he lived in the residence. Smiley gave a statement denying any knowledge of what had happened. After this statement, the detectives questioning him noticed blood on his shoes and jacket. They terminated the interview.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 Smiley was then read his ***Miranda***[2] warnings. Subsequently, he gave a second statement to police indicating that he had shot and killed Garrett in self-defense. Smiley was charged with first-degree intentional homicide. Smiley moved to suppress the first statement on the basis that it was given before he was mirandized. The trial court denied the motion.

¶5 During the trial, the defense presented a theory of self-defense. Smiley did not testify on his own behalf because his trial counsel was concerned that testifying would expose Smiley to questions about his initial cover-up of the crime, his lies to the police, his conduct in confronting Garrett with a weapon, and his criminal record. The State requested that the lesser-included offense of second-degree intentional homicide be submitted. Defense counsel did not argue in support of second-degree intentional homicide, instead pushing for outright acquittal based on the self-defense theory. The jury convicted Smiley of first-degree intentional homicide. Smiley filed a postconviction motion seeking a new trial, which was denied. He now appeals.

II. DISCUSSION

A. Statement.

¶6 Smiley contends the trial court should have suppressed his first statement to the police. He claims the trial court failed to make adequate findings as to when he became a "suspect," therefore triggering the need to give ***Miranda*** warnings. Smiley implies that he became a suspect before he gave the first statement.

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

¶7 A motion to suppress evidence raises a constitutional question, which presents a mixed question of fact and law. To the extent the trial court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous. ***State v. Krier,*** 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991). The application of constitutional and statutory principles to the facts found by the trial court, however, presents a matter for independent appellate review. ***Id.***

¶8 Here, the trial court found that Smiley:

> did proceed to give a statement denying any knowledge of what had occurred, and at the conclusion of that statement the detectives noticed some small amount of blood on his shoes and on the inside of his jacket and as a result of that principally terminated the interview. They had a conversation with a Lieutenant and ultimately mirandized the defendant and identified him as a suspect in the homicide and then questioned him further.

These findings are supported by the detective's testimony that she had no suspicions about Smiley until she noticed spots of blood on his clothing, which he could not explain. At that point, she "stopped speaking with" Smiley and asked no further questions until after police had given him the ***Miranda*** warnings. Under ***State v. Armstrong***, 223 Wis. 2d 331, 588 N.W.2d 606 (1999), questioning without ***Miranda*** warnings is lawful when police have "no reason to know that their questions would likely elicit an incriminating response …." ***Id.*** at 357.

¶9 The trial court's findings are supported by the record. We agree that under these circumstances, the trial court did not err in denying the motion to suppress Smiley's first statement. The initial interview was not an interrogation, but simply an interview of a potential witness who police believed may have had

pertinent background information to the investigation because he was a tenant in the home where the homicide occurred.

¶10 Moreover, we decline to address his argument that the first statement should have been suppressed because it referenced a possible arrest in Chicago in 1991 for carrying a concealed weapon. Smiley fails to adequately develop this argument, and we are not obligated or inclined to do it for him. ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

B. Admission of Drugs and Gun Evidence.

¶11 Smiley claims the trial court erroneously exercised its discretion when it admitted testimony about drugs and other guns that were found with one of the guns allegedly used during the confrontation between Smiley and Garrett. An appellate court reviews a trial court's evidentiary rulings according to the erroneous exercise of discretion standard. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983); ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982). If a trial court applies the proper law to the established facts, we will not find a misuse of discretion if there is any reasonable basis for the trial court's ruling. ***Id.***

¶12 During his second statement, Smiley described the following to police. He owned a .22 caliber Supermatic handgun, which he suspected Garrett had stolen. Smiley also believed Garrett had stolen other items from him. In addition, Smiley owned a .38 caliber revolver, which he carried with him. On the night of the murder, Smiley said that he found the .22 caliber handgun in Garrett's bedroom. Smiley noticed that the gun was loaded, and then moved it to an end table in the living room. Smiley then confronted Garrett about stealing the gun, and an argument ensued. Smiley shot at Garrett with the .38, after which Garrett grabbed the .22

and turned toward Smiley. Smiley shot Garrett again. Subsequently, Smiley hid both guns in the basement of a friend's house.

¶13 The police found both guns in the friend's house. They found the .38 in a heating duct above a pipe in the basement and the .22 under the basement stairs in a bag that also contained marijuana and other guns. The prosecutor argued for the admission of this evidence because it created an inference that the .22 was not involved in the confrontation between Smiley and Garrett; if it had been, as Smiley described, the .38 and .22 would have been found in the same place.

¶14 The trial court allowed the admission of testimony regarding the location of the .22 in the bag containing the drugs and other guns, but did not allow the drugs and other guns themselves into evidence. The trial court found that the discovery of the two different locations, and the context in which the .22 was found, were relevant to whether the .22 was ever at the homicide scene. The trial court reasoned that a cautionary instruction to the jury would adequately protect Smiley from any prejudice.

¶15 The trial court's decision was reasonable and based on the pertinent facts of record. Thus, we will not disturb it.

C. Ineffective Assistance of Trial Counsel.

¶16 Smiley claims his trial counsel provided ineffective assistance in six ways: (1) trial counsel was deficient in the attempt to suppress his first statement; (2) trial counsel should have attempted to suppress his second statement; (3) trial counsel should have sought gunshot residue testing of the swabs taken from the victim; (4) trial counsel should have presented and argued for second-degree

intentional homicide, instead of relying totally on self-defense; (5) trial counsel should have objected during the prosecutor's opening statement; and (6) trial counsel should have objected during questioning of the detective about whether it was common or uncommon for persons involved in violent crimes to claim that they were scared, and that they acted in self-defense. We reject each in turn.

¶17 In order to prove that he has not received effective assistance, Smiley must show two things: (1) that his lawyer's performance was deficient; and, if so, (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A lawyer's performance is not deficient unless he/she committed errors so serious that he/she was not functioning as the counsel guaranteed by the Sixth Amendment. ***Id.*** In order to show that counsel's performance was prejudicial, Smiley must prove that the errors committed by counsel were so serious that they deprived him of a fair trial, a trial whose result is reliable. ***Id.*** In other words, in order to prove prejudice, Smiley must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶18 In assessing Smiley's claim that his counsel was ineffective, we need not address both the deficient-performance and prejudice components if he cannot make a sufficient showing on one. ***Id.*** at 697. The issues of performance and prejudice present mixed questions of fact and law. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, ***id.***, and the questions of whether counsel's performance was deficient and, if so, whether it was prejudicial, are legal issues we review *de novo*. ***Id.***

1. First Statement.

¶19 Smiley contends that trial counsel provided ineffective assistance by failing to have him testify at the suppression hearing, by failing to inform the trial court that the critical issue was whether Smiley became a suspect during the first interview, by failing to assert that suppression was required because of the unconstitutional seizure of his clothes, and by failing to argue that his first statement was involuntary. In each of these arguments, Smiley failed to provide sufficient facts to establish the claim.

¶20 An offer of proof must contain an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference sought to be drawn. ***Milenkovic v. State***, 86 Wis. 2d 272, 284-86, 272 N.W.2d 320 (Ct. App. 1978). First, in his postconviction motion, Smiley did not even mention his allegation that trial counsel should have presented Smiley's testimony at the suppression hearing. Despite this omission, the trial court allowed Smiley to make an offer of proof. The offer of proof, however, was wholly inadequate. It failed to demonstrate that Smiley had advised trial counsel of the facts and circumstances that he now claims occurred during the first interview.

¶21 Second, during the offer of proof, Smiley failed to present any evidence to suggest that there was a factual or legal basis to challenge the taking of Smiley's blood-stained clothing at the police station. Third, when the trial court asked postconviction counsel whether he was making a voluntariness challenge, counsel said "no." There is nothing in the offer of proof to establish that Smiley's first statement was involuntary. Accordingly, we cannot conclude that trial

counsel provided ineffective assistance with respect to the suppression challenge to Smiley's first statement.

2. Second Statement.

¶22 Smiley next contends trial counsel was ineffective for failing to attempt to suppress his second statement as involuntary. The trial court found that trial counsel made a reasonable tactical decision not to challenge the second statement.

¶23 Again, Smiley's offer of proof was insufficient to support this claim. Smiley did not include any assertion that he told trial counsel the facts necessary to support a finding of involuntariness, and Smiley's own factual account on appeal does not demonstrate improper police coercion. Absent police coercion, the involuntariness analysis ends. ***State v. Deets***, 187 Wis. 2d 630, 636-37, 523 N.W.2d 180 (Ct. App. 1994). Therefore, we reject this claim of alleged ineffective assistance of counsel.

3. Gunshot Residue Testing.

¶24 Postconviction, Smiley had the swabs of Garrett's hands tested for the presence of gunshot residue. The testing revealed that both of Garrett's hands contained chemicals characteristic of gunshot residue, which can be deposited on the hands of a person who has recently discharged a firearm or show that hands have been in close proximity to a firearm that has been discharged. During the ***Machner*** hearing, trial counsel testified that he did not seek to have Garrett's swabs tested before trial because the results would not necessarily have assisted the finder of fact. It was not disputed that Smiley and Garrett were very close to each other when Smiley fired his weapon five times. Therefore, the fact that

Garrett had gunshot residue on his hands would not necessarily have indicated that Garrett fired a gun.

¶25 However, there was no evidence presented during the trial that Garrett fired a gun. Smiley claims he told police that he did not know whether Garrett fired a gun, but that the police did not record this in his statement. There is no evidence that Smiley told trial counsel that he believed Garrett fired a gun during the confrontation. Under these circumstances, we cannot fault trial counsel for making the choice not to test the swabs.

4. Lesser-Included Offense.

¶26 Smiley argues that his trial counsel should have investigated, presented and argued in favor of the lesser-included offense, second-degree intentional homicide. The trial court rejected this argument, reasoning that trial counsel's decision and recommendation to pursue an all or nothing strategy of complete self-defense was not constitutionally unreasonable. We agree.

¶27 Trial counsel reasonably concluded that Smiley's self-defense statement to the police provided a sufficient basis for the jury to acquit, and it was not necessary or desirable to subject Smiley to the intense cross-examination that would occur if Smiley testified at trial. We must consider the facts at the time counsel's decisions were made. It is obvious from trial counsel's ***Machner*** hearing testimony that he felt strongly that Smiley could be acquitted on the basis of self-defense. He indicated that Smiley agreed with this strategy, and with the decision that Smiley would not testify because of the potential problems with cross-examination. These decisions were reasonable.

5. Failure to Object.

¶28 Smiley complains that trial counsel should have objected during the prosecutor's opening statement, and should have objected when one of the detectives testified regarding whether it was common or uncommon for persons involved in violent events to claim that they were scared, and to claim self-defense. Smiley failed to raise either objection in his postconviction motion. Accordingly, he has waived his right to review on these claims. ***State v. Schultz***, 148 Wis. 2d 370, 379-80 n.3, 435 N.W.2d 305 (Ct. App. 1988), *aff'd*, 152 Wis. 2d 408, 448 N.W.2d 424 (1989).

¶29 Smiley has failed to prove that he received ineffective assistance of counsel and, therefore, we reject his claim.

D. Challenge to Postconviction Court's Rulings.

¶30 First, Smiley contends the postconviction court limited his right to present testimony. The record belies this assertion. Although the trial court initially inquired as to why postconviction counsel wanted to ask Smiley questions about his arrest and interview, despite the absence of this issue in the written postconviction motion, when the trial court was advised that the ineffective assistance claim would include a challenge to the suppression ruling, the trial court permitted the offer of proof to proceed.

¶31 Second, Smiley challenges the postconviction court's findings of fact. Specifically, he contends the postconviction court: (1) never considered the importance and necessity of his testimony at the suppression hearing; (2) disregarded the evidence that trial counsel failed to engage in a Fourth Amendment evaluation; (3) ignored trial counsel's own opinion at the ***Machner***

hearing regarding the adequacy of his performance; (4) disregarded the fact of trial counsel's misunderstanding of the all-or-nothing self-defense strategy; (5) disregarded the fact that the all-or-nothing strategy was counsel's choice, not Smiley's choice; (6) disregarded the evidence that trial counsel should have engaged in a presentation of second-degree intentional homicide; and (7) disregarded the evidence relative to the choice of whether or not Smiley should testify at trial.

¶32 Although Smiley raises these seven issues, he fails to develop any of them. He offers nothing specific to establish that the postconviction court's findings were clearly erroneous. Accordingly, we decline to address them. ***Pettit***, 171 Wis. 2d at 647.

By the Court.—Judgment and order affirmed.

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