COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP610 **Cir. Ct. No. 2004CF1962**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LADERIAN T. MCGHEE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER and TIMOTHY O. DUGAN, Judges. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Curry,[1] JJ.

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[1] Circuit Judge George S. Curry is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 CURRY, J. Laderian T. McGhee, who is incarcerated at the Columbia Correctional Institution, appeals a decision of the trial court that denied his postconviction motion under WIS. STAT. § 974.06 (2007-08)[2] and ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). He alleges ineffective assistance of trial counsel and postconviction counsel. McGhee alleges that his postconviction attorney was ineffective because he did not bring a postconviction motion asserting that trial counsel was ineffective for the following reasons: (1) failing to challenge the "showup" identification evidence under ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582; (2) failing to impeach a witness for the state; (3) failing to present an alibi defense; and (4) failing to object to him being in shackles and prison garb. The trial court denied McGhee's postconviction motion and concluded, without holding a ***Machner***[3] hearing, that trial counsel and postconviction counsel were not ineffective. We affirm.

PROCEDURAL BACKGROUND

¶2 The court of appeals rejected McGhee's direct appeal, and the Wisconsin Supreme Court dismissed his petition for review of that decision. ***State v. McGhee***, No. 2005-0504-CR, unpublished slip op. (WI App Nov. 16, 2005), petition dismissed (WI Dec. 20, 2005). The court of appeals denied McGhee's motion to reinstate his appellate rights on July 14, 2006. When McGhee tried to have his direct appeal rights reinstated under WIS. STAT. § 908.30, the court of

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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

appeals instructed him that he could either file a ***Knight***[4] petition in the court of appeals or a motion to the trial court under WIS. STAT. § 974.06 and ***Rothering***. He then filed in the trial court a ***Knight*** petition and a postconviction motion under § 974.06 and ***Rothering***. The trial court refused to hear the ***Knight*** petition on the grounds that it could only be heard by the court of appeals. The court then proceeded to hear the motion under § 974.06 and ***Rothering***.

¶3 McGhee raised in the trial court claims alleging ineffective assistance of all his attorneys: appellate counsel, postconviction counsel, and trial counsel. However, we will address only the issues McGhee raised in his WIS. STAT. § 974.06 and ***Rothering*** motion. We will not address his claims of ineffective assistance of appellate counsel since he failed to file a ***Knight*** petition in the appellate court,[5] and he fails to advance any developed arguments regarding ineffectiveness of appellate counsel.

STANDARD OF REVIEW

¶4 The test for ineffective assistance of counsel has two prongs representing a mixed question of fact and law: first, a demonstration that counsel's performance was deficient, and second, a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel'

[4] ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992).

[5] Although postconviction counsel and appellate counsel is the same person, we can only evaluate his performance as postconviction counsel in this decision.

guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id.*** at 689. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Id.*** at 687. We need not address both components of the test if the defendant fails to make a sufficient showing as to one of them. ***Id.*** at 697; ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

¶5 To prove deficient performance, the defendant must point out specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Plus, there is a "strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127.

¶6 Under ***Strickland*** and ***Swinson***, McGhee "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." ***Strickland***, 466 U.S. at 694.

¶7 We will not reverse the trial court's findings of fact regarding counsel's actions unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). We review de novo whether the performance of either trial or postconviction counsel was deficient and whether the actions of either counsel prejudiced McGhee's defense. ***Id.***

DISCUSSION

DUBOSE ISSUE

¶8 In July 2005, the Wisconsin Supreme Court adopted a new rule regarding the admissibility of "showup" identification evidence. The court held in ***Dubose*** that

> [e]vidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.

Dubose, 285 Wis. 2d at 165-66.

¶9 McGhee contends that trial counsel and postconviction counsel were ineffective for failing to anticipate the ***Dubose*** ruling regarding "showup" evidence and by not seeking a stay of his appeal pending the Supreme Court's decision in ***Dubose***. The trial court said trial counsel and postconviction counsel have no duty to anticipate the law will change, and we agree for the following reasons.

¶10 Case law on this subject is found in ***Lilly v. Gilmore***, 988 F.2d 783, 786 (7th Cir. 1993) (citations omitted), which said, "[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law …." The ***Lilly*** court in its decision quoted ***Strickland***, which said, "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Lilly***, 988 F.2d at 786 (quoting ***Strickland***, 466 U.S. at 668).

¶11 At the time McGhee's postconviction counsel filed his appeal on February 18, 2005, no attorney or court had the benefit of the ***Dubose*** decision regarding its new law on "showup" evidence. ***Dubose*** was released on July 14, 2005, reversing the court of appeals' decision. There is no case law to support the contention that trial or postconviction counsel should have a crystal ball to predict the future. The correct standards were used by the trial court in McGhee's case, and there was no reason for either counsel to suspect a departure from precedent might take place or benefit McGhee by the ***Dubose*** case pending at that time. Here, McGhee's trial counsel's and postconviction counsel's performances were not defective, as they proceeded with reasonable professional evaluations basing their actions on the existing law, not what the law might be.

ALIBI ISSUE

¶12 McGhee argues postconviction counsel was ineffective because he failed to bring a motion asserting that trial counsel was ineffective for failing to file a timely notice of an alibi defense. However, the trial transcript shows that McGhee did not tell his attorney about his alibi defense until two days before the trial when his defense attorney was completely focused on the misidentification issue. Further, trial counsel did raise the alibi defense once McGhee told him about it, but the trial court denied the use of the alibi defense because it was not timely disclosed.

¶13 Even if we assume that trial counsel was deficient for not asking McGhee if he had an alibi, McGhee's argument fails the prejudice test, since he completely failed to tell the court what the alibi witnesses would have said. He presented no affidavits from them, and he failed to provide any facts to prove that

he was prejudiced. Thus, the circuit court properly denied McGhee's motion without holding a ***Machner*** hearing.

IMPEACHMENT ISSUE

¶14 McGhee next contends that his postconviction counsel was ineffective because he did not assert that trial counsel was ineffective for failing to impeach a key witness for the State. However, trial counsel did in fact impeach the witness. The trial court's rationale for denying this claim of ineffective counsel without a ***Machner*** hearing was:

> The defendant argues that trial counsel was ineffective for failing to impeach Officer Lewandowski with regard to the description of the alleged suspect in this case. Trial counsel effectively elicited testimony showing that the victims had given varying descriptions of the perpetrator. Trial counsel also cross-examined Officer Lewandowski about her inability to see the person she saw exit the vehicle and flee on foot. The court finds that there is not a reasonable probability that additional impeachment evidence regarding variations in the defendant's physical description would have affected the outcome, especially given Officer Lewandowski's testimony that the subject she saw fleeing the car was wearing an orange jacket and that person she found in the garage was also wearing the orange jacket. The defendant maintained that the officers placed an orange jacket on him after he was arrested; however, the jury chose to believe Officer Lewandowski. Under the circumstances, the court finds no ineffective assistance in this regard on the part of trial or postconviction counsel.

We agree with the trial court. There was no need for a ***Machner*** hearing since the record clearly showed that trial counsel attempted to impeach the witness and provided constitutionally effective assistance of counsel by his cross-examination of Officer Lewandowski and introducing evidence about discrepant descriptions before the jury.

CONCLUSION

¶15 McGhee's appeallate issues were previously raised and addressed in prior appeals, which is why the court of appeals limited him to filing a ***Knight*** petition or a motion under WIS. STAT. § 974.06 and ***Rothering***. McGhee chose to file in the trial court, so we have considered only the § 974.06 and ***Rothering*** issues. The trial court correctly concluded that McGhee's trial counsel and postconviction counsel were not ineffective. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.