COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP481-CR **Cir. Ct. No. 2005CF1379**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOBBY D. CLAYTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT A. DeCHAMBEAU and JOHN W. MARKSON, Judges. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Bobby Clayton appeals a judgment convicting him of armed robbery and possessing a firearm as a convicted felon. He also appeals an order denying him postconviction relief. The conviction followed a jury trial.

In his postconviction proceeding, Clayton argued ineffective assistance of trial counsel. We conclude that he failed to meet his burden on the ineffectiveness claim, and therefore affirm.

¶2 The complaint against Clayton alleged that he and two other men stole sports jerseys from Michael Rueger at gunpoint. The evidence against Clayton at trial included testimony that Clayton and his accomplices drove away from the robbery scene with sports jerseys that included a Franco Harris Pittsburgh Steelers jersey. Rueger recorded the license number of the getaway car and called police. Officers quickly located the car and arrested Clayton after discovering him hiding in the bathtub in a nearby apartment. He was wearing a stolen Franco Harris jersey when arrested, and other stolen jerseys and a firearm were also found in the apartment with him. Officers brought Rueger to the arrest scene and he identified Clayton as one of the robbers. He also identified Clayton as one of the robbers at trial. He testified that he had never seen Clayton before the robbery.

¶3 During Rueger's testimony defense counsel attempted to bring out the fact that Rueger had four prior criminal convictions. However, the trial court excluded testimony about those convictions because counsel failed to seek a preliminary ruling from the trial court concerning their admissibility as credibility evidence. *See* WIS. STAT. §§ 906.09(3) and 901.04 (2007-08).[1]

¶4 Clayton denied robbing Rueger. He testified that he had purchased the Franco Harris jersey and another jersey from Rueger a few weeks before his arrest. He said that he was supposed to pay Rueger $20 and some cocaine, but

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

instead paid $20 and some fake cocaine. The defense theory was that Rueger concocted his story of the robbery, presumably to gain revenge against Clayton for cheating him. Clayton's testimony included his admission to eighteen prior convictions.

¶5 In the postconviction proceeding, Clayton alleged that counsel performed ineffectively because counsel failed to challenge Rueger's arrest-scene identification of Clayton, and failed to take the steps necessary to introduce Rueger's prior convictions as impeachment evidence. The trial court denied relief, resulting in this appeal. Clayton renews his arguments concerning counsel's performance.

¶6 A defendant claiming ineffective assistance of counsel must show that counsel's performance was deficient, meaning that counsel made such serious errors that he or she "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citation omitted). We defer to counsel's professional judgment and make every effort to eliminate the distorting effects of hindsight. ***Id.*** Counsel's performance is not deficient unless the defendant shows that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992) (citation omitted). If we conclude that counsel's representation was deficient, the defendant must also show that counsel's performance prejudiced the defense, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Johnson***, 153 Wis. 2d at 129. We may dispose of an ineffective assistance of counsel claim where the defendant fails to

satisfy either element. ***Id.*** at 128. We review the questions of performance and prejudice independently. ***Id.***

¶7 Counsel's decision not to challenge Rueger's arrest-scene identification of Clayton was a reasonable exercise of professional judgment, even if we assume that counsel could have persuaded the court to suppress the identification.[2] Clayton told counsel that he and Rueger knew each other from previous contacts. Clayton presented a defense based on one of those previous contacts, and how it gave Rueger a motive to falsely accuse Clayton. A defense of misidentification would have directly conflicted with the defense actually presented, and a reasonable attorney could have chosen to avoid that conflict.

¶8 Clayton notes that a successful suppression challenge would have occurred outside the jury's presence, such that raising the issue would not have presented a direct conflict between defenses. Instead, in Clayton's view, it would have permitted a choice between defenses. However, a reasonable attorney might have determined that even with suppression of the arrest scene identification, a defense based on misidentification was not a viable option. The fact remained that Clayton was wearing one of the jerseys reported as stolen shortly after the crime. A reasonable defense would have to somehow explain his possession of the jersey, and a misidentification defense would not have provided that explanation. Nor would suppression of the arrest-scene identification have prevented Rueger from identifying Clayton in court as the perpetrator, as Rueger in fact did. In short, a reasonable attorney could have recognized the weakness of a misidentification

[2] We note that while the State argues that counsel reasonably chose not to challenge the identification, it does not dispute Clayton's argument that counsel had strong grounds to challenge the identification as the product of an unconstitutional police show-up.

defense and abandoned it even without pursuing suppression of one part of the identification evidence.

¶9 Even if we assume that counsel's failure to seek admission of Rueger's four prior convictions was deficient, Clayton has failed to demonstrate that counsel's omission prejudiced him. The defense strategy was to directly counter Rueger's testimony with that of Clayton's and attempt to persuade the jury to believe Clayton. In finding Clayton guilty, the jury obviously chose to believe Rueger's version of events. We conclude that there is no reasonable probability of a different credibility determination, and therefore a different verdict, had the jury known of Rueger's four convictions. Very strong evidence from police witnesses corroborated Rueger's version of events, and Clayton admitted eighteen convictions. Whether those convictions were matched against four convictions or no convictions for Rueger was simply not a factor in the result, under any reasonable view of the circumstances.

¶10 Finally, Clayton contends that the admission of the arrest-scene identification and the exclusion of Rueger's criminal record require a new trial in the interests of justice. We disagree because the identification evidence played little or no part in the outcome given the reasonable defense strategy selected by counsel, and there is no reasonable probability that Rueger's prior convictions would have affected the verdict. The real controversy concerning the charges against Clayton was fully and fairly tried.

By the Court.—Judgment and order affirmed.

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