

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2003

Cornelia G. Clark
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. 01-3359
STATE OF WISCONSIN**

Cir. Ct. No. 91-CF-485

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRISTOPHER L. BERRY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Affirmed.*

Before Nettlesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Christopher L. Berry appeals from an order denying his motion for postconviction relief under WIS. STAT. § 974.06 (1999-

2000).¹ He argues that he was denied the effective assistance of counsel and that he should be afforded a new trial on the ground of newly discovered evidence. We affirm the order denying his motion.

¶2 On April 29, 1991, Darnell Williford was shot and killed by eleven-year-old Terrance S. Terrance indicated that he shot Williford at the direction and with the assistance of Berry and Terry Jackson. Berry was convicted of party to the crime of first-degree intentional homicide with a dangerous weapon.² Berry's conviction was affirmed on appeal. *State v. Berry*, No. 92-3139-CR, unpublished slip op. (Wis. Ct. App. Sept. 1, 1993).

¶3 In June 2001, Berry moved for postconviction relief under WIS. STAT. § 974.06. His claims focused on the examination of the primary witness at trial, Terrance. Immediately after the shooting Terrance was interviewed by police and gave four different versions of what occurred.³ Terrance was then the subject of a mental health emergency detention proceeding under WIS. STAT. § 51.15, and committed to the Winnebago Mental Health Institution. Berry argued that his trial counsel was constitutionally deficient because upon learning of the emergency detention proceeding, counsel failed to move the trial court for an in

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² As summarized in *State v. Berry*, No. 92-3139-CR, unpublished slip op. at 8-9 (Wis. Ct. App. Sept. 1, 1993), the evidence showed that Berry fought with Williford over stolen drugs and threatened to kill Williford. Berry obtained a gun and enlisted Terrance, a fellow gang member, to shoot Williford. Berry gave Terrance the gun, lifted Terrance to the rooftop from which Williford was shot, and attempted to lure Williford outside where Terrance would have an opportunity to shoot Williford. Bullet casings which matched the bullet that killed Williford were found at Berry's residence.

³ Terrance did not implicate Berry in the shooting until a statement made three months after the shooting.

camera review of Terrance’s mental health treatment records and failed to cross-examine Terrance and a police investigator about the emergency detention.⁴ He claimed that the information would have seriously damaged Terrance’s credibility as a witness. Berry also moved for a new trial based on newly discovered evidence—Terrance’s recantation of his trial testimony.⁵

¶4 The trial court held an evidentiary hearing on the motion. Trial and appellate counsel, Terrance, the police investigator, and the prosecuting assistant district attorney all testified. The trial court reviewed the mental health records. It denied Berry’s motion, concluding that the records did not reveal any psychological diagnosis or a suggestion that Terrance was in fact a mentally ill child. The court found that the records, and the testimony of the participants in the emergency mental health commitment, demonstrated that the mental health commitment was a way to protect Terrance, who was in fear of his own safety. The court explained that it was obvious to all that Terrance’s placement at Winnebago was a ruse to obtain a secure, protected environment for an eleven-year-old boy who could not otherwise be detained. Although the court found statements in the mental health records that were contradictory to Terrance’s trial testimony, it recognized that many contradictory statements were produced at trial. It also found that the records did not contain any psychological-type information that would assist Berry in presenting a defense. The court concluded that trial

⁴ Berry claimed that postconviction and appellate counsel was ineffective for not raising the claim that trial counsel was deficient in this respect.

⁵ Attached to the motion was Terrance’s affidavit stating: “I lied when I testified at the trial of Christopher Berry that Mr. Berry and Terry Jackson pushed me up onto the roof of the Martin Luther King, Jr. Youth Center just prior to the shooting of Darnell Williford. I lied when I testified that Mr. Berry provided me with the gun that I used to shoot Darnell Williford.... Mr. Berry never asked or ordered me to shoot Mr. Williford.”

counsel was not deficient in not pursuing Terrance's mental health as an impeachment tool. Finally, the court found that the recantation, made ten years later and as Terrance was about to be released into the community, was not sufficiently trustworthy to support a new trial.

¶5 “There are two components to a claim of ineffective trial counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components.” *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *Id.* However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *Id.*

¶6 Berry argues that Terrance's mental health records were important because they would have revealed an unstable person unable to perceive and relate the truth. Yet at the same time, Berry argues that evidence suggesting that Terrance's emergency mental health commitment was a “sham” was equally important to impugn the integrity of the investigation and actions of the prosecutor. These two positions are not compatible. Nonetheless, trial counsel testified that he had a strategic reason for not pursuing the mental health records and not raising the issue in the cross-examination of Terrance or the police investigator. Counsel believed that the emergency mental health commitment was not based on Terrance's mental condition but was a method to get Terrance off the streets. By not exploring the “sham” nature of the mental health commitment, counsel avoided having the jury hear that Terrance and others were afraid of the

people behind the shooting and wanted to protect Terrance. Such evidence would have reflected poorly on Berry. By not questioning Terrance about his mental health records, counsel avoided presenting a hollow claim that Terrance was a mentally ill person. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). A strategic or tactical decision must be based upon rationality founded on the facts and law. *Id.* Counsel made a reasonable strategy decision.

¶7 Additionally, Berry has not satisfied the prejudice prong of the ineffective assistance of counsel analysis. Our independent review of the mental health records confirms the trial court's finding that the records do not reveal any psychiatric diagnosis or information that would assist Berry's defense. We disagree with Berry's contention that the excerpts of the records repeated for the benefit of the parties at the postconviction motion hearing constituted "hard evidence of mental illness." Nor do the records suggest, as Berry does, that Terrance's statement about Berry's involvement was the "coerced product of a stay at a mental institution."⁶ The records do not contain any version of the shooting which contradicts the different stories Terrance had already told police. Indeed, when Terrance admitted his involvement, he consistently maintained that he had been forced by another to shoot Williford. One time Terrance told a staff psychologist that Berry and Jackson did not do it. However, that single statement and even vague suggestions in the mental health records that Terrance was lying about his behavior do not stand out as significant when compared to the evidence

⁶ The records suggest that Terrance was making a good adjustment to the institutional environment and preferred to stay there in lieu of alternative placements being considered.

presented at trial that Terrance had given several different versions of the shooting and his involvement. In short, the mental health records would not have added any new information regarding Terrance's veracity. The jury was made aware of the competing versions he professed. Berry was not prejudiced by trial counsel's failure to obtain and review the mental health records. Berry was not denied the effective assistance of trial counsel.⁷

¶8 A motion for a new trial on the ground of newly discovered evidence is submitted to the sound discretion of the trial court. *State v. Terrance J.W.*, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). "We will affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record." *Id.* A new trial may be granted on the basis of newly discovered evidence when: (1) the evidence came to the moving party's knowledge after trial; (2) the moving party was not negligent in seeking to discover the evidence; (3) the evidence is material to the issue; (4) the evidence is not merely cumulative to evidence or testimony introduced at trial; and (5) it is reasonably probable that a different result would be reached on a new trial. *Id.* A recantation will generally meet the first four criteria and the determinative issue is generally whether it is reasonably probable that a different result would be reached on a new trial. *Id.* at 501. However, because a recantation is inherently unreliable, it must be sufficiently corroborated by other

⁷ It follows that if trial counsel was not ineffective, postconviction and appellate counsel was not ineffective for not raising the claim that trial counsel was ineffective with respect to the mental health records or cross-examination about the mental health commitment. "It is well established that an attorney's failure to pursue a meritless motion does not constitute deficient performance." *State v. Cummings*, 199 Wis. 2d 721, 748 n.10, 546 N.W.2d 406 (1996).

newly discovered evidence before a new trial is warranted. *State v. McCallum*, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997).

¶9 Here there is no newly discovered evidence that corroborates Terrance's recantation.⁸ Berry argues that his conviction is dependent solely on Terrance's uncorroborated testimony and, as in *McCallum*, the corroboration requirement is satisfied if he demonstrates a feasible motive for the initial false statement and circumstantial guarantees of the trustworthiness of the recantation. *Id.* at 477-78. First, we do not agree with Berry's assessment that his conviction rested on uncorroborated testimony. Evidence at trial corroborated Terrance's testimony that Berry was seeking revenge on Williford for stealing drugs. There was evidence that Berry had acquired a gun, that Berry had fostered Terrance's eagerness to please, and that Berry went looking for Williford and attempted to lure him out of the building. This is not a case like *McCallum* where the conviction rested only on the victim's testimony.

¶10 Second, absent is a plausible explanation for Terrance giving false testimony in the first place. At the postconviction motion hearing, Terrance testified that he had testified falsely at trial because he felt betrayed by Berry on the streets and pressured by the prosecutor's threats that he would be sent far away from home if he did not testify correctly. On further examination, Terrance indicated that once when being driven to trial by the police investigator, he got the impression that he would be sent away if he did not testify correctly. The

⁸ We reject Berry's suggestion that a single reference in the mental health records that Terrance had denied Berry's involvement is newly discovered corroborating evidence. As the jury was made aware, Terrance gave many different versions of who was involved in the shooting. Terrance admitted at the postconviction hearing that he had told the police investigator that Berry did not do it. The reference in the mental health records is not anything new.

prosecutor and investigator testified that no threats were made. The trial court found Terrance to be an incredible witness at the postconviction hearing. The court noted that at the postconviction hearing Terrance's demeanor was different from that demonstrated at trial. Terrance had been "somewhat spirited" at trial but the court found his affect at the postconviction hearing to be "completely flat." "The credibility of a witness is for the trial court to determine, and we will not upset such a finding unless clearly erroneous." *State v. Lukensmeyer*, 140 Wis. 2d 92, 105, 409 N.W.2d 395 (Ct. App. 1987). Thus, Terrance's explanation for his false testimony was rejected. Further, the claim of betrayal conflicts with evidence that Terrance was afraid of the people behind the shooting.

¶11 In contrast to the lack of a plausible explanation for the original false testimony, the court found Terrance's anticipated release from incarceration a compelling motivation for the recantation. The court explained how Terrance's release back into the community could be less fearful if he helped out his former and fellow gang member by recanting his testimony. The court also rejected Terrance's explanation for why ten years passed before he was willing to reveal the falsity of his trial testimony. The court found that the recantation lacked sufficient guarantees of trustworthiness. Ultimately the trial court concluded that there was no reasonable probability that a jury looking at both the original trial testimony and the recantation would have a reasonable doubt as to Berry's guilt. The court was in the best position to evaluate Terrance's testimony and determine whether any other indicia of reliability were present. *See State v. Carnemolla*, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). We conclude that the trial court properly exercised its discretion in denying Berry's motion for a new trial.

By the Court.—Order affirmed.

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

