

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 3, 2002

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 Nos. 02-0015-CR &
02-0984-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00 CF 1981

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH E. HOPKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ and WILLIAM SOSNAY, Judges. *Affirmed.*

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

¶1 PER CURIAM. Kenneth E. Hopkins appeals from a judgment entered after he was convicted of being a felon in possession of a firearm, contrary

to WIS. STAT. §§ 941.29(2) and 939.62 (1999-2000).¹ He also appeals from an order denying his postconviction motion. Hopkins claims his trial counsel provided ineffective assistance when he: (1) failed to object to hearsay evidence; (2) failed to provide him with proper footwear during the trial; (3) failed to investigate a witness' prior record; and (4) failed to accurately advise him as to the potential incarceration accompanying the State's plea-bargain offer. Because Hopkins failed to demonstrate he was prejudiced by the first three instances of alleged ineffective assistance of trial counsel and because he failed to show that the fourth constituted deficient performance, we affirm.

BACKGROUND

¶2 On April 18, 2000, the police were called to 9241-G West Allyn Street regarding a complaint of a man with a gun. Jonnie Broady allowed Officer Britt Kohnert to enter her residence where he discovered Hopkins asleep in an upstairs bedroom. Officer Kohnert found a gun in a Green Bay Packer coat that was on a chair in the same bedroom. The officer also recovered a cell phone from the coat, which belonged to Hopkins.

¶3 Hopkins was charged with felon in possession of a handgun as a habitual criminal. Hopkins insisted he was innocent. The case was tried to a jury. Broady, Hopkins's girlfriend, did not testify at trial. Broady's daughter, Vintisha Price, testified on behalf of the State. During her testimony, she recounted a conversation with her mother wherein her mother told Price she was calling the police after discovering a gun in Hopkins's coat pocket. Officer Kohnert also

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

testified for the State and indicated that Broady told police where Hopkins was, that there was a gun in his pocket, and how she discovered the gun. Kohnert also related that Broady had told the police that the Green Bay Packer coat used to be hers, but that Hopkins had started wearing it several years before this incident.

¶4 The jury found Hopkins guilty and he was sentenced to five years' initial confinement and three years' extended supervision. Hopkins filed a postconviction motion alleging ineffective assistance of counsel. After conducting a *Machner*² hearing, the trial court denied the motion. Hopkins now appeals.

DISCUSSION

¶5 Hopkins claims that he received ineffective assistance of trial counsel for the reasons stated above. We are not persuaded.

¶6 Hopkins has a Sixth Amendment right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to prove that he has not received effective assistance, Hopkins must show: (1) that his lawyer's performance was deficient and, if so, (2) that "the deficient performance prejudiced the defense." *Id.* at 687. A lawyer's performance is not deficient unless he or she has committed errors so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* In order to show that counsel's performance was prejudicial, Hopkins must prove that the errors committed by counsel were so serious that they deprived him of a fair trial, i.e., a trial whose result is reliable. See *id.* In other words, in order to prove prejudice, Hopkins must show that "there is a reasonable probability that, but for

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

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.

¶7 In assessing Hopkins's claim that his counsel was ineffective, we need not address both the deficient performance and prejudice components if Hopkins 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.* at 236-37.

A. *Hearsay Statements.*

¶8 Hopkins first argues that his trial counsel failed to object to hearsay statements offered during the testimony of Price and Officer Kohnert. He asserts that the testimony as to the conversations with Broady constituted inadmissible hearsay, which would have been excluded if counsel had objected. We reject Hopkins's claim on this ground on the basis that even if the failure to object constituted deficient performance, he was not prejudiced by it.

¶9 As noted by the State, the evidence against Hopkins, even absent the challenged testimony, was overwhelming. The jury heard evidence from two witnesses who had seen Hopkins possess a firearm on April 16, 2000. Price testified that she saw Hopkins playing with a gun and then put it into the pocket of his Green Bay Packer coat. She positively identified the gun recovered as the one she saw Price place in his coat. Price also testified that she had seen Hopkins wearing the Green Bay Packer coat when he came home on April 18, 2000, and

that she had seen no one else wearing the jacket since Hopkins began living in the residence.

¶10 Further, a neighbor, Ebony Ousley, testified that she had observed Hopkins with the gun and had seen him place it in his Green Bay Packer coat. She also testified that Hopkins was the only one who wore that particular coat. Officer Kohnert testified that when he arrived, he found Hopkins asleep on a bed and that the coat was on a chair next to the bed. Officer Kohnert found the gun and a cell phone in the coat. Hopkins admitted that the cell phone was his.

¶11 Based on the foregoing, even if counsel had objected to the statements recounting Broady's words, and even if trial counsel excluded all of the statements, there is no reasonable probability that the outcome of the trial would have been different. The evidence overwhelmingly indicated that Hopkins was in possession of the gun.

B. Shoes.

¶12 Hopkins next argues that trial counsel was ineffective for failing to procure footwear for him. As a result, Hopkins was forced to wear his "jail" shoes. He argues that this prejudiced the jury against him because the shoes were identifiable prison clothing. We are not persuaded.

¶13 Neither Hopkins nor his family could provide any clothes; therefore, counsel obtained clothing from the public defender's office. However, the public defender's office did not have any shoes for him. As a result, Hopkins wore his jail shoes during the trial. The trial court rejected this claim on the basis that Hopkins failed to demonstrate that wearing the jail shoes prejudiced him. The trial court noted that it could not see what type of shoes Hopkins was wearing, and

found that it would be speculative to conclude that the jury saw the shoes he was wearing. The trial court reasoned that even if the jury saw the shoes Hopkins was wearing, it would be unreasonable to conclude that he was prejudiced as a result. We agree with the trial court.

¶14 Hopkins has failed to show that the jury even saw the shoes he was wearing. Further, even if the jurors saw the shoes, we cannot conclude that prejudice resulted. The shoes he was wearing with the civilian clothes could not be easily identified as prison garb. Moreover, trial counsel made reasonable efforts to obtain civilian clothes for Hopkins. Under these circumstances, failure to obtain regular shoes did not prejudice Hopkins because there is no reasonable probability that the result of this trial would have been different if he had worn different shoes.

C. Price's Record.

¶15 Hopkins next contends that trial counsel's failure to investigate Price's prior record constituted ineffective assistance. He argues that if counsel had conducted an investigation, he would have discovered that at the time Price was brought to court to testify, there was an outstanding warrant in juvenile court for her failure to appear on a delinquency petition for battery. Hopkins suggests that knowing this, counsel could have further established Price's bias against him. We reject this claim.

¶16 As the trial court noted:

[T]he fact that there may have been a warrant for Ms. Price from juvenile court would not have been admissible at the trial level nor would a reasonable trial judge ... have allowed Ms. Price to be questioned regarding that. That does not amount to a conviction and under what normally

would have been followed, that even if that was raised, it would not have been admissible.

The court finds nothing in the record from the testimony this afternoon that would allow the court to come to any other conclusion. There is nothing in the record here that substantiates that Ms. Price had a juvenile record of prior juvenile adjudications. Had the court been presented with some there would have been more credence or more strength to that argument. But merely asserting that there was an outstanding warrant at the time the court finds does not support any finding that Mr. Daniel was ineffective in his representation of Mr. Hopkins at trial.

The trial court's decision was correct. WISCONSIN STAT. § 906.09 permits use of juvenile adjudications for the purpose of attacking credibility of a witness. The statute does not allow the admission of outstanding warrants for the same purpose. Accordingly, the failure of trial counsel to investigate Price's prior record, which may have led to the discovery of the outstanding juvenile warrant, was not prejudicial. Even if counsel had discovered this fact, the evidence was inadmissible. As such, there is no reasonable probability that the outcome of the trial would have been different.

D. Advice on Incarceration Time.

¶17 Hopkins argues that trial counsel failed to accurately inform him of the potential time for incarceration associated with a plea bargain offered by the State. On the day of trial, the State offered to recommend a two-year period of incarceration if Hopkins pled guilty to felon in possession of a firearm without the enhancer for habitual criminality. Hopkins claims trial counsel did not advise him that under the plea bargain, the trial court could only sentence him to a maximum of two years of initial confinement. Rather, Hopkins believed the trial court could sentence him to five years in prison. As a result, he claims he turned down the plea offer. We are not persuaded.

¶18 The trial court rejected Hopkins’s claim of ineffective assistance based on this ground, in part, because of the credible account of trial counsel and the incredible account offered by Hopkins. During the *Machner* hearing, trial counsel testified that he was familiar with the new “Truth in Sentencing” guidelines and that he never would have misled a client as to potential prison exposure. Counsel testified that he knew the plea bargain would involve a maximum of two years’ incarceration and that he discussed this thoroughly with Hopkins. He stated that he also discussed the ramifications of accepting the plea bargain as opposed to going to trial with Hopkins. Counsel stated that Hopkins chose to proceed to trial on the theory that he was innocent. The trial court found that trial counsel’s version of what happened was more credible than Hopkins’s claim that he was told the court could sentence him to five years’ incarceration under the plea bargain.

¶19 The trial court’s findings, based on credibility, are not clearly erroneous. Accordingly, we cannot conclude that trial counsel provided deficient performance. Further, even if we concluded that Hopkins was misled or confused, we cannot conclude that he was prejudiced. In order to prove prejudice in these circumstances, Hopkins must show that he would have accepted the plea bargain rather than going to trial, but for counsel’s deficient performance. *State v. Fritz*, 212 Wis. 2d 284, 296-97, 569 N.W.2d 48 (Ct. App. 1997). Hopkins fails to make such a showing.

¶20 Hopkins testified during the *Machner* hearing that he wanted to go to trial because he was innocent, and that he wanted to fight the charge. Hopkins failed to state that he definitely would have taken the plea bargain if he had properly understood it. He said only that it was “more than likely” that he would have pled guilty. This falls short of demonstrating that he would have accepted

the plea bargain, but for the failure of counsel to properly explain the sentencing possibilities.

¶21 Based on the foregoing, we conclude that Hopkins failed to make a sufficient showing in support of his claim that he received ineffective assistance.

By the Court.—Judgment and order affirmed.

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

