

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 26, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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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. 02-1420-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 01-CF-108**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TONY B. OLIVER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Tony Oliver appeals a judgment entered on a jury verdict convicting him for delivery of cocaine, contrary to WIS. STAT.

§ 961.41(1)(cm)1.<sup>1</sup> He also appeals an order denying his motion for postconviction relief. Oliver argues the trial court violated his right to counsel by not allowing him to change attorneys prior to trial. He also claims he received ineffective assistance of counsel when his attorney failed to cross-examine one of the State's witnesses about the money used in the controlled purchase leading to Oliver's arrest. Oliver also contends his counsel was ineffective by not objecting to several hearsay statements. We determine the trial court did not err when it refused to allow Oliver to substitute counsel. In addition, we conclude Oliver did not receive ineffective assistance from his trial counsel and therefore affirm the trial court's judgment and order.

### **BACKGROUND**

¶2 On March 5, 2001, the State charged Oliver with two counts of delivering cocaine, five grams or less, with repeater enhancers. In the same complaint, the State charged Derick Stewart with one count of delivering cocaine and one count of possession with intent to deliver. At trial, the court granted Oliver's motion for a directed verdict on one of the charges. Consequently, this appeal only addresses the other charge.

¶3 The charge arose out of a controlled crack cocaine purchase by agent Bobbi Jo Becker of the Department of Justice's Division of Narcotics Enforcement on March 2, 2001. Becker, acting undercover, attempted to purchase crack cocaine from Stewart. Stewart agreed to sell her the cocaine. He told Becker his source was coming over and said he would call the source and increase

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

the order. After the telephone call, Stewart told Becker the source would be over in ten minutes and the two went to Becker's automobile to wait. Becker gave Stewart two marked \$100 bills to purchase the cocaine.

¶4 Oliver arrived in his car and parked in front of Becker. Stewart got into Oliver's car and after a short time, returned to Becker and gave her the cocaine. Oliver was arrested later that night after a second controlled buy that served as the basis for the dismissed charge. After the arrest, the police executed a search warrant at Oliver's home and found the marked bills.

¶5 At his preliminary hearing in April, Oliver was represented by attorney John Bachman. At a July status conference, public defender Carl Bahnson represented Oliver. Oliver said he fired Bachman because he had recommended a guilty plea. In addition, Oliver requested a continuance from the planned August trial date so that Bahnson could familiarize himself with the case. The court granted the continuance and rescheduled the trial for September.

¶6 Eleven days before trial, Oliver requested another continuance because he wanted to obtain private counsel. Oliver said he wished to have an attorney with more drug defense experience and said Bahnson also recommended a guilty plea. In addition, Oliver said his family arranged to retain Michael Stanley,<sup>2</sup> an attorney from Milwaukee. Bahnson said Stanley agreed to take the case provided it could be rescheduled. The court denied Oliver's request, noting the case was not complex, Oliver was represented by competent counsel, Bahnson

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<sup>2</sup> The record refers to this attorney both as Michael Stanely and Michael Steinle. We will refer to the attorney as Michael Stanley because Oliver uses that name in his brief.

had not sought to withdraw, Stanley had not appeared or otherwise notified the court of his intentions, and other rescheduling complications.

¶7 At trial, Oliver renewed his motion to substitute counsel, which the court again denied. The court granted Oliver's motion for a directed verdict on one of the charges and the jury convicted Oliver on the other. Oliver filed a motion for postconviction relief, arguing the trial court denied his right to counsel when it denied his substitution motion. In addition, Oliver claimed Bahnson was ineffective at trial because he did not cross-examine one of the State's witnesses regarding the serial numbers of the buy money and failed to object to numerous hearsay statements. After a *Machner* hearing, the trial court denied Oliver's motions. *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

## DISCUSSION

### A. *Substitution of counsel*

¶8 We first address Oliver's claim that the trial court violated his right to counsel when it refused to grant a continuance and allow him to substitute attorneys. The Sixth Amendment to the United States Constitution includes a qualified right to representation by counsel of the accused's choice. *State v. Miller*, 160 Wis. 2d 646, 652, 467 N.W.2d 118 (1991). When deciding whether to grant or deny a request for substitution of counsel with the associated request for a continuance, the circuit court must balance a defendant's constitutional right to counsel of choice against the societal interest in the prompt and efficient administration of justice. *State v. Lomax*, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988).

¶9 Several factors assist the court in balancing the relevant interests: the length of delay requested; whether there is competent counsel presently available to try the case; whether other continuances have been requested and received by the defendant; the convenience or inconvenience to the parties, witnesses and the court; and whether the delay seems to be for legitimate reasons or whether its purpose is dilatory. *Id.* We review the circuit court's decision using the erroneous exercise of discretion standard. *State v. Kazee*, 146 Wis. 2d 366, 371-72, 432 N.W.2d 93 (1988).

¶10 Oliver told the court he wanted a substitution because Bahnson advised him to plead guilty and because he wanted an attorney with more experience in drug cases. The court denied the motion, pointing to Oliver's prior substitution of counsel, the relatively uncomplicated facts of the case, the difficulty in arranging for the testimony of one of the State's witnesses, Stanley's failure to appear or otherwise contact the court, and the court's lack of available trial dates. Oliver argues this rationale amounts to an erroneous exercise of discretion. We disagree.

¶11 The court considered many of the appropriate factors in its decision. Oliver did not request a specific length for the continuance, but the court noted that any delay would be substantial because of its full trial calendar. The court also said the case was fairly straightforward and there was no suggestion Bahnson was not competent to try the case. In addition, the court noted Oliver's previous substitution of counsel and continuance, the inconvenience to one of the State's witnesses and the court. Finally, the court's consideration of Stanley's failure to appear was also appropriate given the nature of Oliver's request. The court properly exercised its discretion by denying Oliver's substitution request.

¶12 Oliver argues we should reverse the circuit court because it failed to determine the extent to which Oliver and Bahnson's attorney/client relationship had disintegrated. *See Lomax*, 146 Wis. 2d at 359. He contends their relationship broke down because Bahnson recommended a guilty plea and he therefore could not properly represent Oliver's interests at trial. We determine this does not require reversal. Nothing in the record reflects this conflict was so irreconcilable that it led to an unjust verdict because the court failed to allow the substitution. *See State v. Robinson*, 145 Wis. 2d 273, 279, 426 N.W.2d 606 (Ct. App. 1988). As the trial court noted, Bahnson did not seek to withdraw his representation or otherwise inform the court that a conflict had developed. We cannot say Bahnson's guilty plea recommendation negatively affected his representation of Oliver at trial.

*B. Ineffective assistance of counsel*

¶13 Oliver next argues he received ineffective assistance of counsel because Bahnson failed to cross-examine one of the State's witnesses about the serial numbers of the marked bills and because he failed to object to numerous hearsay statements. There are two parts to an ineffective assistance of counsel claim: a demonstration that counsel's performance was deficient and a showing that this deficiency prejudiced the defendant. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). The defendant has the burden to prove both elements. *Id.* Strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). On review, we examine a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy under the clearly erroneous standard. *State v. Tulley*, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635

N.W.2d 807. Whether counsel's performance was deficient and prejudiced the defendant are questions of law we review de novo. *State v. Sanchez*, 201 Wis. 2d 219, 236-37, 548 N.W.2d 69 (1996).

¶14 A trial counsel's performance is deficient when counsel fails to exercise reasonable professional judgment and fails to demonstrate reasonable professional conduct under the facts of the particular case. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 620, 516 N.W.2d 362 (1994). The standard for the prejudice prong of the test is whether the alleged deficiency so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686. We may address either prong of the test and an inadequate showing on either dooms the defendant's claim. See *State v. Williams*, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11.

¶15 Oliver first claims he received ineffective assistance of counsel because Bahnson failed to cross-examine investigator Jeffery Wilson regarding whether the \$100 bills he testified he had found while searching Oliver's apartment were the same ones used in the controlled buy. Oliver argues Bahnson should have challenged Wilson on this point, perhaps by asking him to offer proof of the bills' serial numbers, after the district attorney failed to establish the connection beyond Wilson's assertion they were the same.

¶16 At the *Machner* hearing, Bahnson testified he did not pursue this claim because he thought by forcing Wilson and the district attorney to produce the proof, it would remove all doubt about Oliver's innocence. Instead, Bahnson said he waited until closing arguments to note that the State had failed to actually

introduce the buy money. Oliver argues this amounts to a deficient performance. We disagree.

¶17 The trial court accepted Bahnson's explanation of his strategy and noted the State would likely have been able to prove the bills found in Oliver's apartment were the same ones used in the buy. This finding is not clearly erroneous. Further, we determine Oliver has not proved Bahnson's choice of strategy was in any way deficient or prejudicial. On the contrary, as the trial court noted, Oliver would have been in "worse shape" had Bahnson proceeded in the way Oliver now suggests.

¶18 Oliver also argues he received ineffective assistance of counsel because Bahnson failed to object to four hearsay statements. Three of the challenged statements came during Becker's testimony. Two of these concerned the second delivery charge on which the court directed a verdict in Oliver's favor. Assuming without deciding that these statements were hearsay, we determine these two did not prejudice Oliver because of the court's directed verdict.

¶19 The third statement concerns Becker's conversation with Stewart arranging the crack purchase. Specifically, Oliver objects to Becker's testimony that Stewart said "his crack source was already on the way to our location to bring Derick Stewart some crack cocaine and that, if we wanted to call his crack source, he would call his crack source and order up the two rocks of cocaine that I wanted." Again, assuming without deciding this statement constituted hearsay, we cannot say Bahnson's failure to object to it constituted prejudice to Oliver.



¶20 Stewart testified that he did not receive any crack from Oliver and instead said he had the crack he sold to Becker the whole time. Nonetheless, Stewart testified he made it appear he was obtaining it from someone else by telling Becker his source was on his way and making the telephone call. Stewart's testimony supports Oliver's claim of innocence and the hearsay at issue is consistent with Stewart's version of the events. We conclude Bahnson's failure to object to it did not prejudice Oliver.

¶21 The final statement Oliver claims Bahnson should have objected to was Wilson's testimony that after Stewart was arrested, Stewart said he was not going to talk about anybody else and that Wilson "seemed to have the facts from explaining them involving Mr. Oliver pretty well figured out." During his testimony however, Stewart denied making this statement. Wilson's testimony was not hearsay because it revealed a prior inconsistent statement by Stewart. A hearsay objection to this statement would likely have been unsuccessful under WIS. STAT. § 908.01(4)(a)1, and we cannot say Bahnson's failure to object constitutes deficient performance.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

