COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1762-CR **Cir. Ct. No. 00CF 3968**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILLIE C. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Billie C. Smith appeals from a judgment of conviction after a jury found him guilty of carrying a concealed weapon and possession of a firearm by a felon, both as a habitual criminal. He argues that trial counsel was ineffective, and that the circuit court erred in denying his motion for postconviction relief without an evidentiary hearing. We affirm.

I. BACKGROUND

¶2 At approximately 4:00 p.m. on August 6, 2000, Milwaukee police were dispatched to the 2500 block of North 16th Street on a gambling complaint. On arrival, they observed approximately fifteen people gathered outside a residence. As the officers approached, the group started to disperse. When police ordered everyone to stop, Smith continued to walk away, prompting Officer Jeffrey Timmerman to approach him. As Officer Timmerman approached him, Smith turned and tried to run. A struggle ensued; police took Smith to the ground and subsequently discovered an unloaded handgun in his back pocket. At the time of his arrest, Smith had four adult convictions and three juvenile adjudications.

¶3 At his trial, Smith denied having knowingly possessed the gun. He testified that, as police approached the crowd, an unidentified black male put the gun in his back pocket, and that he did not know he had the gun until police found it. Lakesia Burks, a friend of Smith's, supported his claim, testifying that she saw a man take an item from his waistband or pocket, reach behind Smith's back, and come away from Smith without the item in his hand.

¶4 The State rebutted Smith's defense by introducing Smith's post-arrest statement in which he acknowledged handling and concealing the gun. Officer Melissa Cwiklinski, Timmerman's partner, testified that after his booking, Smith asked to speak with Officer Timmerman. Officer Cwiklinski said she related his request to Officer Timmerman who then went to Smith's holding cell. Officer Timmerman testified that when he arrived at his cell, Smith apologized for trying to run, stating: "I did it because the guy in a white shirt handed me a gun. I then put it in my pocket. I saw you guys approaching and I got scared when you stopped. And I—that's why I tried to run. I'm a felon and I can't have a gun."

Officer Timmerman said that he then reported the statement, verbatim, to Officer Cwiklinski, who included it in her police report.

¶5 Smith moved for a new trial on the grounds that he was denied effective assistance of counsel and in the interests of justice. His request was denied without a ***Machner*** hearing.[1]

II. ANALYSIS

¶6 Smith claims that trial counsel was ineffective for failing to: (1) impeach Officer Timmerman with what Smith alleges was a prior inconsistent statement; (2) investigate and introduce the testimony of two eyewitnesses; and (3) attempt to introduce a defense witness's statement, as a statement against interest, under WIS. STAT. § 908.045(4) (2001-02).[2]

¶7 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

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

[2] All references to the Wisconsin Statutes are to the 2001-02 version.

¶8 Ineffective assistance of counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant present questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687, 697.

¶9 A defendant is not automatically entitled to a hearing on a postconviction motion. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations, which fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the court may deny the motion on its face. ***Id.*** at 309-10. Whether a motion alleges facts warranting relief, thus entitling a defendant to a hearing, is a legal issue we review *de novo*. ***Id.*** at 310. If the motion and affidavits fail to allege sufficient facts, the trial court has discretion to deny the postconviction motion without a hearing, ***id.*** at 310-11, and this court reviews that denial solely to determine whether the court erroneously exercised discretion, ***id.*** at 311.

¶10 Smith first argues that counsel was ineffective for failing to impeach Officer Timmerman's trial testimony with his allegedly inconsistent prior statement from the suppression hearing, which he claims supported his defense that he never knowingly possessed the gun. We reject his argument.

¶11 Prior to trial, the court held a suppression hearing on the admissibility of the post-booking statement Smith made to Officer Timmerman. At that hearing, Officer Timmerman testified that when he went to Smith's cell at Smith's request, "Mr. Smith stated to me, 'I'm sorry I ran,' *something to the effect of*, 'the guy put the gun in my back pocket, and I know I'm a felon, and that's why I panicked and ran.'" (Emphasis added.)

¶12 The prosecutor asked Officer Timmerman whether he informed Officer Cwiklinski of Smith's statement, and Officer Timmerman said he had. The prosecutor then had Officer Timmerman identify Officer Cwiklinski's report and read that portion quoting Smith's statement to him:

> "I'm sorry for trying to run. I did it because you guys were approaching in a squad car, and the guy in the white shirt handed it to me. *I put it in my pocket.* You guys stopped and came up to us. *I panicked because I knew I was a felon and I could not have a gun. That is why I tried to run.*"

(Emphases added.) Officer Timmerman testified that immediately after speaking with Smith, he told Officer Cwiklinski what he (Smith) had said to him, and that Officer Cwiklinski, using quotation marks, attributed the statement to Smith in her police report.

¶13 At trial, the State did not introduce Smith's statement to Officer Timmerman in its case-in-chief, but rather, called Officers Cwiklinski and Timmerman to rebut Smith's testimony denying making any statement to Officer Timmerman and claiming to never having knowingly possessed the gun. Officer Cwiklinski testified that she had brought Officer Timmerman to the booking area at Smith's request. Officer Timmerman testified:

> Mr. Smith looked at me and stated I'm sorry for trying to run. I did it because the guy in a white shirt handed me a gun. I then put it in my pocket. I saw you guys

> approaching and I got scared when you stopped. And I—that's why I tried to run. I'm a felon and I can't have a gun.

Smith claims that Officer Timmerman's suppression hearing account of his (Smith's) statement would have allowed the defense to argue that Officer Timmerman changed his testimony and/or fabricated either or both statements. We are not persuaded.

¶14 The key difference in Officer Timmerman's suppression hearing and trial testimony is between "[t]he guy put the gun in my pocket" and "I then put it in my pocket." Obviously, one version supports Smith's defense; the other does not. The State argues, however, that the difference is of little consequence given that Officer Timmerman, at the suppression hearing, when provided with the police report containing the exact quotation, corrected his earlier comments, which he had qualified as "something to the effect of." The State is correct. We conclude, therefore, that the circuit court properly determined that Smith was not prejudiced by counsel's failure to impeach Officer Timmerman because the jury's knowledge of his suppression hearing testimony would not have created a reasonable probability of a different result.

¶15 Smith next argues that counsel was ineffective for failing to locate and call his cousins, Jeffrey Jones and Chernette Burks, who, according to the postconviction affidavit from a defense investigator (recounting the investigator's interviews of the cousins), would have testified that they had seen someone place a gun in Smith's pocket. We disagree.

¶16 According to postconviction counsel's affidavit, Smith, before trial, gave trial counsel a list of ten alleged eyewitnesses. Jones' and Burks' names, with Burks' first name misspelled, were included on the list. According to

postconviction counsel's affidavit, trial counsel asked Smith's family and girlfriend to assemble all of those listed at the home of Smith's mother so that counsel and an investigator could interview them. When counsel and the investigator arrived, however, only some of those listed were present. Counsel was subsequently informed that those present were the only people "who wanted to help and be involved." Smith now assails trial counsel for not interviewing Jones and Burks. We conclude, however, that Smith has failed to show that trial counsel's performance was deficient.

¶17 Counsel had a tenable defense theory and a credible defense witness, Lakesia Burks. In light of this, and having been told that the witnesses who failed to show up for the meeting did not want to be involved, counsel was not, as the State argues, required to "track down recalcitrant cousins of Smith for whom she had neither a telephone number nor an address."

¶18 Further, we note that nothing in the postconviction motion or supporting papers indicates that either Jones or Burks was available and willing to testify at Smith's trial. The postconviction submissions simply indicate that in January 2002, a defense investigator was able to locate Burks and Jones and that, at that time, they provided information corroborating the trial testimony of Smith and Lakesia Burks. Even if we were to infer that Jones and Burks would have testified, trial counsel's alleged failure to present their testimony was not prejudicial because no reasonable probability exists that the result would have been different. Apparently, the jury rejected Smith's and Lakesia Burk's testimony about the unidentified male placing the gun in Smith's pocket; nothing suggests that additional, cumulative testimony from Smith's cousins would have altered the verdict. *See* ***Montgomery v. Petersen***, 846 F.2d 407, 413-15 (7th Cir. 1988) (relatives and friends are not deemed disinterested witnesses).

¶19 Finally, Smith argues that counsel was ineffective for failing to attempt to introduce the out-of-court statement of Tyrell Walker to Walker's cousin, Ryan Mason, who was an associate of Smith's brother. Smith contends that the statement could have been introduced through Mason's testimony as a statement against Walker's penal interest, under WIS. STAT. § 908.045(4).[3] We are not persuaded.

¶20 According to postconviction counsel's submissions, Walker told Mason that on or about August 6, 2000, he (Walker) placed a small black handgun on a person whom he did not know when stopped by police in the "hood." Mason testified to that effect at Smith's November 2000 parole revocation hearing. Smith was not revoked, and the decision denying revocation included a summary of Mason's testimony.

¶21 In his brief to this court, Smith states that "at trial, defense counsel moved to introduce Mr. Mason's testimony." He explains:

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[3] WISCONSIN STAT. § 908.045(4) provides:

> **Hearsay exceptions; declarant unavailable.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> ….
>
> (4) STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

> Trial counsel informed the court that Mr. Mason was not present at the time of the incident, but that he knew the gun and the gun owner, because he was present when the gun was purchased. The State objected to this testimony on hearsay grounds. Trial counsel also told the court that Mr. Mason knew how the gun was placed on Mr. Smith, but that this testimony would be hearsay for Mr. Mason. The trial court determined that Mr. Mason's testimony was not relevant and [was] hearsay.

¶22 Smith argues that counsel was ineffective for not knowing that the hearsay exception for statements against interest could have allowed for the introduction of Mason's testimony about Walker's statements. The circuit court denied his claim without a hearing, concluding that Mason's testimony would not have altered the verdict.

¶23 The State echoes the court's reasoning and further contends, "Absent any indication that appellate defense counsel attempted to contact Walker, it would be purely speculative to find that Walker would have been unavailable to testify at Smith's trial [thus allowing Mason to testify in his absence] …. The motion is silent as to any efforts to locate Walker." The State is correct.

¶24 Smith's postconviction submissions are conclusory; they offer nothing to support his claim that trial counsel could have established Walker's unavailability as a prerequisite to the admission of his hearsay statement to Mason. Consequently, the circuit court properly rejected his claim that counsel's performance was deficient.

¶25 Smith also argues for a new trial in the interests of justice. He contends that the real controversy of whether he "knowingly possessed the gun . . . was not fully tried because the jury was erroneously not given the opportunity to hear important evidence that bore on the important issue in this case." We disagree.

¶26 WISCONSIN STAT. § 752.35 provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record[,] and may … remit the case to the trial court … for a new trial ….

Here, we cannot conclude that the interests-of-justice standard has been satisfied. Smith presented his theory of defense through his own testimony and that of Lakesia Burks. The jury weighed the evidence and dismissed Smith's defense. Smith suffered no prejudice from counsel's failure to impeach Officer Timmerman with his prior testimony, or from counsel's failure to present testimony of his cousins, Jones and Burks, or from counsel's failure to argue for the admissibility of Walker's statement to Mason under WIS. STAT. § 908.045(4). Consequently, we conclude that the real controversy was fully tried.

By the Court.—Judgment and order affirmed.

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