

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 02-2246-CR

Cir. Ct. No. 00-CF-106

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL R. COOPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 PER CURIAM. Michael Cooper appeals from a judgment convicting him, over pleas of not guilty by reason of mental disease or defect (NGI), of a fifth offense of operating a motor vehicle while intoxicated (OWI), a second offense of operating after revocation (OAR), and disorderly conduct.

Cooper also appeals from an order denying his postconviction motion for a new trial, claiming that the trial court failed to adequately consider his competency to stand trial, that he was denied a fair trial due to memory problems, and that he was denied effective assistance of counsel in several respects. We affirm on the competency and fair trial issues and conclude that most of the errors trial counsel is alleged to have committed were nonprejudicial. However, we are persuaded that trial counsel's failure to obtain Cooper's medical records and present them to the court-appointed psychiatrist who evaluated Cooper may have allowed the jury to be misled on the question of whether Cooper suffered from a mental defect. Therefore, we reverse and remand for retrial solely on the NGI issue.

BACKGROUND

¶2 On September 17, 2000, bystanders at the scene of an accident informed the responding police officers that the driver of the car had fled. The officers found Cooper lying in a field nearby, observed several indicia of intoxication and took him into custody. Cooper alternated between yelling obscenities and slumping into a sleeplike state throughout the processing of his arrest. He refused to take a breath or blood alcohol test, and was ultimately charged with OWI-5th, OAR-2nd, being a habitual traffic offender, and disorderly conduct.

¶3 Cooper initially entered guilty pleas to all of the charges, although he maintained that he could not actually remember the night in question. Cooper asked to withdraw his pleas prior to sentencing, however, at which time the court was informed that medical records submitted with Cooper's presentence investigation report showed that Cooper suffered from a number of significant cognitive deficits, particularly in the areas of learning and memory, as well as

syncopal episodes, following what was believed to have been a bout of meningitis or encephalitis in 1999. The trial court permitted Cooper to withdraw his guilty pleas and enter new NGI pleas, and further ordered that Cooper's competence to stand trial be evaluated.

¶4 The court-appointed psychiatrist examined Cooper without having seen Cooper's medical records. He concluded that Cooper had organic brain damage from meningitis or encephalitis and that he suffered serious memory deficits and seizures as a result. He further opined that Cooper had been in a post-seizure state when arrested, and that he had been incompetent to refuse consent to the breath and blood tests. The psychiatrist's report failed to address Cooper's competency to stand trial, and neither the parties or the court noticed the oversight or raised the issue again prior to trial.

¶5 At trial, five officers testified that Cooper had exhibited slurred speech, red eyes, and difficulty walking, and that they had detected a strong odor of alcohol on him. Another witness who had been at the accident scene said that Cooper appeared intoxicated based on his speech and walking difficulties, although that witness had testified at the preliminary hearing that he had not detected an odor of alcohol on Cooper.

¶6 Defense counsel did not ask the bystander about his preliminary hearing testimony, and did not ask the officers why they had failed to obtain an involuntary blood draw from Cooper. He also did not call Cooper's live-in girlfriend to testify that Cooper had not been drinking when they went out to dinner that evening. Cooper himself did not testify because he said he had no recollection of the night. During closing argument, defense counsel told the jury:

I will grant to you that it may even be more likely than not that my client was intoxicated on the evening in question, but because of the organic brain injury that he has and because of the symptoms that come from that and from the medications that he takes, as Dr. Van Dyke told you, we believe there is a reasonable doubt and Dr. Van Dyke's opinion, a substantial probability that was what goes on that night was a post epileptic seizure

The jury returned guilty verdicts on the OWI, OAR and disorderly conduct charges.

¶7 The case then proceeded to the NGI phase, during which the court-appointed psychiatrist again testified as to his conclusions regarding Cooper's mental deficits. On cross-examination, the State brought out the fact that the psychiatrist had not examined Cooper's prior medical records, and that he had relied on information supplied by Cooper himself in reaching some of his conclusions. In closing argument, the State suggested that, since some of the information which Cooper had provided to the doctor about his drinking history was demonstrably false, and his medical history and disability status were undocumented, the jury could not even be sure that Cooper had ever suffered meningitis, much less the memory problems he claimed.

¶8 On a special verdict, the jury determined that Cooper did not suffer from a mental defect, and consequently did not address whether, as a result of the defect, Cooper lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

ANALYSIS

Competence to Stand Trial

¶9 In Wisconsin, “[n]o person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.” WIS. STAT. § 971.13(1) (2001-02).¹ A person is competent to proceed if: (1) he or she possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding; and (2) he or she possesses a rational as well as factual understanding of a proceeding against him or her. *State v. Garfoot*, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997) (citing *Dusky v. United States*, 362 U.S. 402 (1960)).

¶10 Whenever there is a reason to doubt the competence of a defendant to proceed, the trial court must order an examination of the defendant under WIS. STAT. § 971.14(1)(a) and (2). However, before psychiatric examinations or competency proceedings are required, sufficient evidence giving rise to a reason to doubt competency must be presented to the trial court. *State v. Weber*, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1988). Whether reason to doubt competency exists is a factual finding which we review under the clearly erroneous standard. *State v. Haskins*, 139 Wis. 2d 257, 264-65, 407 N.W.2d 309 (Ct. App. 1987).

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶11 Here, although the trial court did order a competency evaluation which was never completed, we can infer from its statements that the court also made a postconviction determination that the record as a whole did not give rise to a reason to doubt competency. The court reached its decision based on its own observations and interactions with Cooper throughout the proceedings, as well as trial counsel's statements.

¶12 Cooper argues that the trial court's finding cannot be reconciled with the conclusion of the only expert witness that Cooper had not been competent to refuse to give a breath or blood sample on the night of the accident. The psychiatrist's evaluation of Cooper's competence on the night of the accident, however, was based, at least in part, on his opinion that Cooper had suffered a seizure that night. It does not automatically follow that the psychiatrist would also consider Cooper to be incompetent in a non-post-seizure state throughout the trial proceedings. Nor did Cooper offer any postconviction testimony or expert opinion that he had, in fact, been incompetent to stand trial. Based on that record, we cannot conclude the trial court's determination that there was no reason to doubt Cooper's competency was clearly erroneous.

Fair Trial

¶13 Even if Cooper was sufficiently competent to understand the proceedings against him, he argues that his memory lapses precluded him from having a fair trial. There is a six-factor test for evaluating, after the fact, whether an amnesiac received a fair trial:

- (1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
- (2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf.

(3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi.

(4) The extent to which the Government assisted the defendant and his counsel in that reconstruction.

(5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.

(6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

State v. King, 187 Wis. 2d 548, 558-59, 523 N.W.2d 159 (Ct. App. 1994) (citation omitted).

¶14 The trial court did not engage in an analysis of these factors because it determined that Cooper's memory lapses were too conveniently tailored to his own self-interest to be credible. That is, the trial court did not believe, as a threshold matter, that Cooper really was an amnesiac. Because the question of a fair trial is a constitutional issue of due process, we review it de novo. *Id.* at 557.

¶15 Assuming for the sake of argument that Cooper's memory was in fact significantly impaired, we still conclude that Cooper has failed to show that he was deprived of a fair trial based on the relevant factors.

¶16 First, trial counsel testified at the postconviction hearing that he thought Cooper had been able to understand the nature of the proceedings and assist with his defense, aside from his lack of memory regarding the incident itself. This factor weighs in favor of concluding the trial was fair.

¶17 Second, Cooper stated that he could not testify in his own defense because he had no memory of the night in question. This factor weighs against concluding that the trial was fair.

¶18 Third and fourth, the events surrounding the accident and arrest could be largely reconstructed based on the testimony of bystanders and the police, and the State turned over the relevant reports and statements to the defense in advance. Given the bystander's testimony that Cooper was the driver and the fact that Cooper had the keys to the car on him when arrested, there is no reasonable possibility that Cooper could have come up with a successful alibi if his memory had not been impaired. In addition, Cooper's girlfriend was able to help him reconstruct his actions earlier in the evening. These factors weigh in favor of concluding that the trial was fair.

¶19 Fifth, the prosecution's case was very strong. We see little probability that any testimony Cooper might have offered had his memory allowed would have overcome the fact that five officers detected a strong odor of intoxicants coming from Cooper. This factor weighs the most heavily in favor of concluding that the trial was fair.

¶20 Cooper has not offered any other factors under the catch-all provisions. We therefore conclude that the trial did not violate Cooper's due process right to a fair trial, notwithstanding Cooper's memory problems.

Assistance of Counsel

¶21 Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the trial court's findings about counsel's actions and the reasons for

them, unless they are clearly erroneous. WIS. STAT. § 805.17(2); *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. *Id.*

¶22 The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant usually must show that counsel's errors were serious enough to render the resulting conviction unreliable. *Strickland*, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *Id.* at 697.

¶23 Cooper claims that counsel performed ineffectively by: (1) failing to press for a competency evaluation prior to trial; (2) failing to call Cooper's girlfriend during the initial phase of the trial; (3) failing to impeach a witness with more favorable preliminary hearing testimony; (4) arguably conceding during closing argument that Cooper had been intoxicated; and (5) failing to provide the court-appointed psychiatrist or the jury with Cooper's medical records.

¶24 Given the trial court's finding, discussed above, that the record did not raise a doubt as to Cooper's competency to stand trial, we cannot conclude that counsel performed deficiently by failing to press for a competency evaluation.

¶25 The trial court found that counsel had a strategic reason for not calling Cooper's girlfriend during the initial phase of the trial—namely that her story was so implausible as to likely do more harm than good. Indeed, her testimony during the NGI phase was clearly not believed by the jury. We agree that counsel's decision not to call the girlfriend fell within reasonable professional norms.

¶26 With regard to the potential impeachment evidence, it is true that one of the witnesses who testified at trial that he believed Cooper was intoxicated had said at the preliminary hearing that he did not notice any odor of alcohol on Cooper. The preliminary hearing statement was qualified, however, by the witness's explanation that he was never closer than a car length from Cooper. Taken in context, the witness's trial testimony that Cooper appeared drunk based on his movements and speech was not inherently inconsistent with his preliminary hearing testimony. Counsel's failure to bring this point out was not prejudicial.

¶27 Counsel's statement to the jury that his client might "more likely than not [have been] intoxicated," though clearly an attempt to focus the jury's attention on the high burden of proof in criminal cases, was not artfully phrased. However, even if the statement could be construed as deficient performance, we are satisfied that it was not prejudicial, given the overwhelming evidence that Cooper had, in fact, been drinking.

¶28 That brings us to counsel's failure to obtain and present Cooper's medical records to the evaluating psychiatrist. We find counsel's suggestion, that the psychiatrist could have asked for the records if he had wanted them, to be unpersuasive. From his conversations with his client, counsel had reason to know that many of Cooper's complaints had been well documented, and Cooper had

signed a medical release. Given that Cooper was raising an NGI defense, on which he bore the burden of proof, counsel's failure to obtain and present Cooper's medical records constituted deficient performance.

¶29 While the medical records would not have undermined the evidence that Cooper had in fact been driving while intoxicated, driving after revocation, and behaving in an disorderly fashion, they went directly to the question of whether he could appreciate the wrongfulness of his conduct or conform his behavior to the requirements of law. For instance, was Cooper capable of remembering that his license had been revoked prior to driving or moderating the tone or volume of his voice if he had suffered a seizure? The jury concluded that Cooper did not have a mental disease or defect. We cannot be confident that the jury would have reached that conclusion if it had been aware that Cooper's problems had been documented before the present charges arose. We therefore conclude that Cooper was prejudiced by counsel's failure to present the medical records to the examining psychiatrist.

¶30 Accordingly, we reverse the judgment of conviction and postconviction order and remand for retrial of the NGI phase. Nothing in this opinion should be construed to preclude the trial court from ordering another competency evaluation, if additional information is presented to it which raises a concern in that regard.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

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

