COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2921-CR **Cir. Ct. No. 01-CF-239**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY A. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Randy Davis appeals from a judgment convicting him of a fifth offense of operating a motor vehicle while intoxicated (OWI) and from an order denying his motion for postconviction relief. He claims he is entitled to a new trial in the interest of justice or based upon ineffective assistance of counsel because counsel failed to present evidence that would have compelled

the trial court to grant him an instruction on a necessity defense. We cannot conclude, however, that the trial court's decision that the real controversy had been tried was unreasonable or that counsel's failure to put on the requested evidence constituted deficient performance. Accordingly, we affirm.

BACKGROUND

¶2 It is undisputed that sometime after 2:00 a.m., on a below-freezing March morning, police officers responding to complaints of a vehicle with a loud revving engine, which was starting to smoke, found Davis passed out in the driver's seat of a parked but running vehicle, with his foot on the accelerator. It took the officers about a minute to rouse Davis by shaking and yelling at him. Upon removing Davis from the car, the officers noted that he was disoriented and very unsteady with extremely poor balance, and appeared to have been drinking. The officers administered field sobriety tests and arrested Davis when he failed them.

¶3 Davis testified that he had walked to a couple of bars after getting off work the previous morning, and had spent the day drinking and playing pool. It was his intention to take a cab home, as was his custom when he became really intoxicated. However, while Davis was at the second bar, a man he occasionally worked for came by and asked him to look at his van. Davis advised the man that he thought a wheel bearing had gone out on the van, and that the van should not be driven until repaired.

¶4 The man then asked Davis whether he would like to work for him that night, and Davis agreed. The man advised Davis that he would come back to the bar to pick him up later, and gave him the keys to the van to wait for him.

Davis stayed inside the bar until about 10:30 or 11:00, and then went out to the van, where he fell asleep.

¶5 When Davis awoke, he did not know what time it was. His hands were frozen and his feet were cold, due in part to a metal screw in his neck, a plate in his thumb, and a rod in his leg, which left him feeling numb in below-freezing weather. He had no gloves, scarf or blanket, so he climbed into the front seat and turned on the engine to try to warm the van. The next thing he remembered, one of the officers was waking him up.

¶6 Davis requested a jury instruction on necessity. The trial court denied it, noting that, while Davis had testified that he wanted to warm himself, he had not testified that he thought his life was in danger, or explained why he could not have sought help from a nearby house or a hospital which was only three blocks away.

¶7 After the jury convicted him, Davis moved for a new trial in the interest of justice and on the grounds that he had received ineffective assistance of counsel. The trial court denied the motion without a hearing, and Davis appeals.

DISCUSSION

Interest of Justice

¶8 WISCONSIN STAT. § 805.15(1) (2001-02)[1] permits the trial court to grant a new trial in the interest of justice. The interest of justice may warrant a

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

new trial when the real controversy has not been fully tried. ***State v. Harp***, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991). In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering important testimony that bore on an important issue or that certain evidence, which was improperly received, clouded a crucial issue in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (internal citation omitted). A failure to properly instruct the jury may prevent the real controversy from being tried. ***Harp***, 161 Wis. 2d at 778.

¶9 The trial court's decision whether to grant a new trial under WIS. STAT. § 805.15(1) is discretionary in nature. ***Goff v. Seldera***, 202 Wis. 2d 600, 614, 550 N.W.2d 144 (Ct. App. 1996). We give great deference to the trial court's decision because the trial court is in the best position to observe and evaluate whether such relief is appropriate. ***Id.*** Accordingly, we will look for reasons to sustain the trial court's decision and will set it aside only if the trial court fails to provide a reasonable explanation for its decision or grounds the decision upon a mistaken view of the evidence or an erroneous view of the law. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993).

¶10 Here, Davis claims the trial court erroneously exercised its discretion when considering whether to grant a new trial in the interest of justice because it based its conclusion that the real controversy had been fully tried upon an erroneous view of the proof necessary to obtain an instruction on necessity. We disagree.

¶11 Under ***State v. Anthuber***, 201 Wis. 2d 512, 518, 549 N.W.2d 477 (Ct. App. 1996), the necessity defense is available when: (1) the defendant acted

under pressure from natural physical forces; (2) the defendant's act was necessary to prevent imminent public disaster, or death or great bodily harm; (3) the defendant had no alternative means of preventing the harm; and (4) the defendant's beliefs were reasonable. The existence of a "natural physical force" may depend on what set the force in motion and whether the force could be controlled. ***Id.*** at 519-20.

¶12 Davis contends that the freezing weather was a natural physical force with which he had to contend, and argues that the trial court erred in determining that he did not satisfy this element because he had subjected himself to his exposure to the elements as the result of his own intoxication. We do not address whether Davis had presented sufficient evidence to satisfy the first element, however, because we conclude the trial court also reasonably concluded that the second and third elements had not been met. Specifically, the trial court noted that Davis had not testified that he thought he was going to freeze to death or that he thought turning on the van's heater was the only way he could avoid freezing to death. In light of the absence of testimony on these points, the trial court's determination that the evidence did not support a necessity instruction represented a reasonable application of ***Anthuber***.

Ineffective Assistance of Counsel

¶13 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. ***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.***

> 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. 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." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, ___ Wis. 2d ___, 660 N.W.2d 12 (citations omitted).

¶14 A defendant is entitled to a postconviction evidentiary hearing when he alleges facts which, if true, would entitle him to relief. ***State v. Bentley***, 201 Wis. 303, 309-10, 548 N.W.2d 50 (1996). No hearing is required, though, when the defendant presents only conclusory allegations, or the record conclusively demonstrates that he is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

¶15 Davis claimed in his postconviction motion that counsel was ineffective for failing to present evidence that he was suffering from hypothermia at the time of the incident, such that he was at risk of death or great bodily harm. He alleged that a nurse with expertise in hypothermia cases would testify that hypothermia can occur in below freezing temperatures; that the behavior exhibited by Davis at the time of his arrest was consistent with hypothermia; that

hypothermia can cause great bodily harm or death; and that a person suffering hypothermia needs to get warm as soon as possible to avoid dying or suffering great bodily harm. Davis claimed counsel should also have presented more specific evidence as to the exact temperature of the night in question.

¶16 Addressing the second contention first, we note that there was no dispute in the record that it was below freezing on the night in question. Therefore, we see no reason why counsel would have needed to present cumulative evidence on that point, and cannot conclude that counsel performed deficiently in that regard.

¶17 It may be that presenting evidence about the dangers of hypothermia and whether Davis had in fact been suffering from hypothermia could have bolstered an argument that it was reasonable for Davis to believe that he faced great bodily harm if he did not turn on the van's heater. That presupposes, however, that Davis held such a belief. Davis did not testify that he thought he was going to freeze to death; he simply testified that his "hands were frozen" and his "feet were cold." Calling a nurse to testify about whether Davis may have been suffering from hypothermia would not have remedied the absence of evidence that Davis actually believed his life to have been in danger. Therefore, the trial court reasonably denied the postconviction motion without a hearing.

By the Court.—Judgment and order affirmed.

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