

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 11, 2003

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 No. 02-2977

Cir. Ct. No. 98-CF-41

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NORBERT W. ELLIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County:
TIM A. DUKET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Norbert Ellis appeals an order denying his WIS. STAT. § 974.06 motion for postconviction relief.¹ Ellis argues his postconviction

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

counsel was ineffective for failing to challenge the effectiveness of his trial counsel or otherwise pursue various issues during his initial postconviction proceedings. Specifically, Ellis claims trial counsel failed to: (1) adequately investigate Ellis's case; (2) call witnesses to aid in his defense and dispute what he claims was perjured trial testimony; and (3) present relevant evidence at the *Miranda/Goodchild* hearing.² Ellis also claims postconviction counsel was ineffective for failing to challenge the trial court's denial of his request to substitute counsel. We reject Ellis's arguments and affirm the order.

BACKGROUND

¶2 Ellis was convicted of first-degree intentional homicide and hiding a corpse, contrary to WIS. STAT. §§ 940.01(1) and 940.11(2). On direct appeal, Ellis's only claim of error was that the trial court improperly exercised its discretion when it admitted evidence of several sexual encounters between Ellis and children other than the victim. This court rejected that argument and affirmed Ellis's conviction. *See State v. Ellis*, No. 00-0034-CR, unpublished slip op. (Wis. Ct. App. June 20, 2000).

² A trial court holds a *Miranda-Goodchild* hearing to determine whether a suspect's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), were honored and also whether any statement the suspect made to the police was voluntary. *See State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

¶3 Ellis subsequently filed a WIS. STAT. § 974.06 motion with the trial court, arguing that he was denied the effective assistance of postconviction counsel.³ The trial court denied Ellis's motion and this appeal follows.

ANALYSIS

¶4 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.* However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. *Id.*

¶5 To determine the validity of an ineffective assistance of counsel claim, Wisconsin employs the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). To succeed on his claim, Ellis must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. *Id.* Further, we may reverse the order of the tests and avoid the deficient performance analysis altogether if the defendant has failed to show prejudice. *Id.* at 697.

³ Although Ellis's underlying claims would otherwise be procedurally barred under both WIS. STAT. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), Ellis avoids the strictures of *Escalona* by arguing that postconviction counsel was ineffective for failing to challenge the effectiveness of his trial counsel or pursue various issues during his initial postconviction proceedings. In *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996), this court acknowledged "that ineffective postconviction counsel could be a sufficient reason for permitting an additional motion for postconviction relief under [§ 974.06], thereby making the remedy under § 974.06 an adequate and effective remedy for the alleged errors."

¶6 In order to establish deficient performance, a defendant must show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. However, “every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In reviewing counsel’s performance, we judge the reasonableness of counsel’s conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. *Strickland*, 466 U.S. at 690. Because “[j]udicial scrutiny of counsel’s performance must be highly deferential ... the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.* at 689. Further, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Id.* at 690.

¶7 The prejudice prong of the *Strickland* test is satisfied where the attorney’s error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. *Id.* at 694.

A. Failure to Call Witnesses

¶8 Ellis claims trial counsel was ineffective for failing to adequately investigate his case and call witnesses derived from an investigation. Ellis testified at trial that he killed twelve-year-old Jennifer Wallace on November 28 or 29, 1997. Ellis nevertheless argues trial counsel should have called various

witnesses to assist in his defense, including witnesses who claimed they saw Jennifer alive after the date on which Ellis claimed he killed her. Ellis claims “no less than eight people [told authorities] they had seen Jennifer in different places on different dates up to December 11, 1997.” As the State argues, Ellis and these witnesses could have been confused about specific dates and the witnesses could likewise have been mistaken about seeing Jennifer. In any event, because Ellis admitted killing Jennifer, the actual date of her death, within a week or two, is irrelevant. Likewise, Ellis fails to establish how it would have aided his defense to call other witnesses who were not present when Jennifer was killed. Ellis was not prejudiced by any claimed deficiency on the part of trial counsel to call these witnesses.

¶9 Ellis also argues trial counsel should have called a pathologist to counter the testimony of the State’s pathologist, Dr. Gregory Schmunk. At trial, Dr. Schmunk opined that Jennifer’s death was the result of “some homicidal violence of undetermined etiology,” and further testified that although he could not conclude whether her death was due to strangulation or suffocation, “it was one of those two.” Ellis testified at trial that although he did not intend to kill Jennifer, he caused her death by choking her. Ellis has failed to establish how he has been prejudiced by trial counsel’s failure to call another pathologist when Ellis’s own testimony substantiated Dr. Schmunk’s testimony regarding the cause of Jennifer’s death.

B. Witness Perjury

¶10 Ellis also claims that trial counsel was ineffective for failing to challenge the veracity of witness testimony. Ellis argues various witnesses perjured themselves and the State failed to correct these falsehoods. The trial

court concluded, however, that nothing in the record indicated the State relied on any perjured testimony. The court noted there will often be inconsistencies in witness testimony. It is the jury's function, however, to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. *State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Inconsistencies in witness testimony notwithstanding, the jury here needed only to believe Ellis's account of his actions and disbelieve his claim that Jennifer's murder was not intentional.

C. Evidence at the *Miranda/Goodchild* hearing

¶11 Ellis argues trial counsel failed to present relevant evidence at the *Miranda/Goodchild* hearing to establish that Ellis's inculpatory statements were obtained in violation of his Fifth and Fourteenth Amendment rights. The trial court noted, however, that at the time of the *Miranda/Goodchild* hearing, the court was "well aware" of the evidence that Ellis claims was not presented. The court ultimately concluded:

I really find nothing in the defendant's [WIS. STAT. § 974.06] motion about unfair police tactics that would have changed the Court's core findings, that his critical admissions were voluntary and deliberate and thought about for a long period of time, and that even if [trial counsel] was deficient in not fully developing the record as to exactly everything that was happening to Mr. Ellis during his stay in the jail ... it certainly wasn't prejudicial.

¶12 As the court further indicated, Ellis failed to demonstrate that the results of the suppression hearing would have been any different, even if he had testified for hours on end as to violations he was subjected to while in jail. Ellis was not prejudiced by his trial counsel's claimed deficiency and postconviction counsel was likewise not ineffective for failing to pursue these issues. *See State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 ("Failure to

raise an issue of law is not deficient performance if the legal issue is later determined to be without merit.”).

D. Request to Substitute Trial Counsel

¶13 Ellis also claims that postconviction counsel was ineffective for failing to challenge the trial court’s denial of his request to substitute counsel. Whether to grant a motion for substitution of counsel is directed to the sound discretion of the trial court. *State v. Johnson*, 50 Wis. 2d 280, 283, 184 N.W.2d 107 (1971). In exercising its discretion, the trial court considers “the amount of preparatory work done at public expense and the avoidance of delay or dilatory tactics.” *Id.*

¶14 Here, Ellis’s trial was scheduled to begin January 10, 1999. Ellis nevertheless submitted a request to substitute counsel on January 5, 1999. After a hearing on Ellis’s request, the trial court denied the motion, stating that a substitution of counsel at that juncture would have delayed the trial by at least five months. The court noted it had to maintain a delicate balance between Ellis’s right to adequate representation and the public interest in the prompt and efficient administration of justice. The court further acknowledged, however, that while it could not insist upon expeditiousness for its own sake, a defendant could not be allowed to insist upon unreasonable delay or inconvenience in the completion of his or her trial. The trial court ultimately concluded that counsel believed he had diligently prepared for trial and had made tactical decisions regarding what witnesses to call at trial. Noting that Ellis had already discharged one attorney, the court stated: “It would appear to me that there may be a pattern here, you are not – just not going to be satisfied with anybody that’s appointed.” Because the trial

court properly exercised its discretion, postconviction counsel was not deficient for failing to raise the issue on direct appeal.

By the Court.—Order affirmed.

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

