COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP399-CR **Cir. Ct. No. 2004CF599**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL MARIO MILLER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON and JEFFREY A. CONEN, Judges. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Michael Mario Miller, Jr., appeals from a judgment entered on a jury verdict finding him guilty of first-degree intentional homicide while armed with a dangerous weapon, as a party to a crime. He also appeals from

an order denying his postconviction motion for a new trial.[1] Miller contends that trial counsel was ineffective because she failed to challenge the admissibility of a statement Miller made to police after an allegedly illegal search led to his arrest and because she failed to present Miller's testimony at the pretrial ***Miranda-Goodchild*** hearing.[2] We agree with the trial court that trial counsel was not ineffective and, therefore, we affirm.

BACKGROUND

¶2 A jury found Miller guilty in connection with the June 12, 2003 shooting death of Marques Messling. The State's case was based in part on a statement Miller gave to Detective Gilbert Hernandez when Miller was in custody in February 2004. At issue in this case are the events that led to Miller's inculpatory statement to Hernandez.

¶3 Miller was first questioned about the crime on June 16, 2003. He denied involvement in the shooting. Six months later, on February 2, 2004, the police executed a warrant for Miller's arrest for driving without a valid driver's license. Miller was arrested at about 9 p.m. at the home of Golda Randolph, where Miller was spending the night. There is little testimony in the record

[1] The judgment of conviction was entered by the Hon. Karen E. Christenson, who presided over the trial and sentenced Miller. The Hon. Jeffrey A. Conen entered the order denying Miller's postconviction motion.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). If a defendant moves to suppress his or her statements because of law enforcement's failure to timely warn of the risks and consequences of self-incrimination (***Miranda***), or the voluntariness of the statements (***Goodchild***), the trial court conducts an evidentiary (***Miranda-Goodchild***) hearing to determine the validity of the accused's statements and whether suppression is warranted.

concerning the circumstances of Miller's arrest, but it appears that at some point Randolph consented to a search.

¶4 At the police station, Miller was interviewed twice in two days. During the second interview, he made inculpatory statements to Hernandez. After Miller was charged, trial counsel filed a motion to suppress Miller's statement and a ***Miranda-Goodchild*** hearing was conducted.

¶5 At that hearing, Detective Mark Walton testified that he and his partner interviewed Miller at 11 p.m. on the night he was arrested. Walton said that he advised Miller of his ***Miranda*** rights and that Miller agreed to speak with the detectives. During the three-hour interview, Miller denied any involvement in the homicide.

¶6 At 1 p.m. the day after his arrest, which was about eleven hours after the first interview ended, Miller was interviewed by Hernandez, who testified that he advised Miller of his ***Miranda*** rights. Hernandez said Miller indicated that he wanted to make a statement, even though he already had a lawyer.[3] Hernandez testified: "And I at that point asked him, well, you have the right to have them present. And he indicated no, that he … wanted to tell the truth and he wanted to cooperate." Hernandez testified that he included this information in his written report, which Miller initialed after he was advised of his rights and agreed to speak with the detectives.

[3] Miller said that he privately retained a lawyer about a week before his arrest, after he heard the police were looking for him. Ultimately, that lawyer did not represent Miller in the case.

¶7 Hernandez said the interview ended at 8:30 p.m. During the interview, Miller had four bathroom breaks and two forty-minute breaks and was given food and beverages. Miller admitted his involvement in the homicide about halfway through the interview.

¶8 Miller did not testify at the ***Miranda-Goodchild*** hearing. After the State's witnesses testified, trial counsel told the trial court that she did not intend to call any witnesses, explaining:

> I will just state for the record that I am aware of the information about the lawyer. That I've discussed this with Mr. Miller. That his recollections are sufficiently similar to those of the witnesses that I do not need to—I did not think it's necessary to present additional information.

Trial counsel did not offer any argument in support of the suppression motion. She said: "[T]he defense will allow the court to rule based on the record."

¶9 The trial court denied the motion to suppress after finding that at each of the interviews, ***Miranda*** warnings were read to Miller and there was:

> nothing to suggest that the detectives engaged in each of those interviews in any unlawful or unprofessional conduct. Anything that would constrain or act upon the free will of the defendant. There was no deprivation of sleep, no deprivation of food or beverages, comfort breaks, bathroom breaks, things of that kind....
>
> ….
>
> … [H]e was in fact presented with circumstances during each of those interviews which demonstrated a free, voluntary, consciousness of choice … [and] nothing that the officers did during the course of those interviews interfered with the free and voluntary statements being made by [Miller].

¶10 The case proceeded to trial and Miller was found guilty. He was sentenced to life in prison with an extended supervision eligibility date of

February 2, 2054. Postconviction counsel filed a no-merit report on Miller's behalf. We rejected the no-merit report and referred the case to the public defender's office for the appointment of new counsel. *See* ***State v. Miller***, No. 2007AP665-CRNM, unpublished slip op. at 3 (WI App April 1, 2008).

¶11 Miller's new postconviction counsel filed a postconviction motion on Miller's behalf. In that motion, Miller sought a new trial on grounds that his trial counsel had performed ineffectively. After hearing testimony at a ***Machner*** hearing, which is detailed below, the trial court concluded that trial counsel had not provided ineffective assistance and denied Miller's motion for a new trial.[4] This appeal follows.

LEGAL STANDARDS

¶12 At issue is whether Miller is entitled to a new trial based on trial counsel ineffectiveness. To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. The Sixth Amendment to the United States Constitution "guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8 (2003) (per curiam); *see also* ***Strickland***, 466 U.S. at 689 (court must make "every effort … to eliminate the distorting effects of

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

hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time").

¶13 To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694.

¶14 On appeal, we affirm the trial court's findings of fact concerning ineffective assistance of counsel unless they are clearly erroneous, but we review the trial court's determination of deficient performance and prejudice—both questions of law—without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633–634, 369 N.W.2d 711, 714–715 (1985).

DISCUSSION

¶15 Miller argues that trial counsel provided ineffective assistance that led to the improper admission of Miller's inculpatory statement to police. As in his postconviction motion, he contends that trial counsel was ineffective because she: (1) failed to challenge the admissibility of Miller's statement as the fruit of the illegal search of Randolph's home; and (2) failed to present evidence at the pretrial ***Miranda-Goodchild*** hearing that Miller invoked his right to counsel prior to confessing involvement in the crime. We consider each issue in turn.

I. Ineffective assistance concerning the warrantless entry to the home.

¶16 In his postconviction motion, Miller argued that trial counsel erred when she failed to file a motion asserting that Miller's custodial statements should be suppressed as the fruit of an illegal search that led to Miller's arrest in Randolph's home. At the ***Machner*** hearing, trial counsel testified about her decision not to seek to suppress Miller's statement on grounds that he had been illegally arrested. She said that after Miller expressed "his concern about the circumstances of his arrest," counsel verified that the police had "at least one municipal warrant" for Miller's arrest at the time he was taken into custody. She also reviewed police reports provided in discovery. Counsel testified that she "did not believe there was a good faith basis for bringing" a motion challenging Miller's statement as the fruit of an illegal arrest, for two reasons: (1) the discovery indicated that Randolph had signed a consent to search; and (2) counsel believed, based on her reading of ***Harris v. New York***, 401 U.S. 222 (1971), that if the search was illegal, it was sufficiently attenuated from Miller's inculpatory statement that it could not be successfully challenged.

¶17 The trial court concluded that the arrest may have been improper because Miller was arrested on private property without extenuating circumstances, but it found that the arrest was sufficiently attenuated from Miller's statement to Hernandez so that the taint of illegal activity was removed. The trial court noted that about sixteen hours had elapsed between the arrest and Miller's statement to Hernandez and that Miller had been read his ***Miranda*** rights at the beginning of each police interview.

¶18 On appeal, the State argues that trial counsel's assessment of the case was reasonable with respect to both consent and attenuation. We conclude

that trial counsel considered the facts available to her and rationally exercised her professional judgment in determining not to pursue a motion to suppress based on the search. Therefore, her performance was not deficient. *See* ***Strickland***, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" in the context of an ineffective assistance claim); ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161, 169 (1983) (strategic or tactical decision must be based upon rationality founded on the facts and law).

¶19 At issue is trial counsel's decision not to pursue a motion to suppress based on the warrantless entry of Randolph's home. At the ***Machner*** hearing, postconviction counsel questioned trial counsel about the basis for her belief that Randolph had consented to the search of her home, noting that one police report stated that Randolph had signed a consent form agreeing that the police could search for weapons.[5] Trial counsel testified: "My recollection is … that according to the police … they had had a conversation with [Randolph] before and that they had the statement [agreeing to the search for weapons] signed after the search."

¶20 Postconviction counsel asked trial counsel about another police report that indicated Miller was arrested in one part of the house while a detective spoke with Randolph at the front door. Trial counsel responded:

> The report, as is typical, does not present a chronological series of events, and as I read it, Detective

[5] The police reports and other documents that were received in evidence at the ***Machner*** hearing are not part of the appellate record. Appellants have the burden to provide an appellate record sufficient to review the issues they raise on appeal. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986). If the record is incomplete, this court may assume it supports the trial court's ruling. ***Galatowitsch v. Wanat***, 2000 WI App 236, ¶23 n.8, 239 Wis. 2d 558, 573 n.8, 620 N.W.2d 618, 625 n.8.

> Smith who wrote the report said that in the presence of Detective Walter that he requested Golda Randolph['s] permission to search the residence.
>
> He also says that he was met at the front door by the tenant, Golda Randolph, and there isn't any specificity as to if the request to search was prior to or after Mr. Miller was taken into custody.
>
> ….
>
> … My interpretation of the report is that they talked to Golda Randolph, they asked her permission to search and then they arrested Mr. Miller.

When postconviction counsel suggested that the report was unclear, trial counsel acknowledged that "[t]he report is not time specific," and then stated: "Arguably at this point perhaps somebody would have interpreted it differently. At the time I interpreted it as I've testified."

¶21 No police officers who conducted the search were called as witnesses at the ***Machner*** hearing, and the trial court did not make specific findings concerning what occurred at the Randolph home the day Miller was arrested. Despite this lack of evidence and findings, Miller argues that "Randolph's 'consent' to search the home was limited to weapons, and it was not given until Miller was already under arrest." This assertion is not clearly established in the record—we have before us only trial counsel's testimony concerning the police reports and other documents, not the documents themselves, and the trial court did not make findings concerning the consent given. In any event, determination of the sequence of events that occurred at the Randolph home is not required to resolve the issue before us: whether trial counsel rationally exercised her professional judgment.

¶22 Trial counsel—whose testimony the trial court generally accepted as credible—testified that she believed the discovery materials indicated that

Randolph had consented to the search. As noted, she explained: "My interpretation of the report is that they talked to Golda Randolph, they asked her permission to search and then they arrested Mr. Miller." Trial counsel's interpretation of the discovery materials is not contradicted by the record and her testimony demonstrates that trial counsel considered the facts and rationally exercised her professional judgment. This court will not second-guess trial counsel's exercise of professional judgment because it is not "based upon caprice rather than upon judgment." *See* ***Felton***, 110 Wis. 2d at 503, 329 N.W.2d at 169. We conclude that trial counsel did not perform deficiently and, therefore, Miller was not deprived of the effective assistance of counsel.

II. Ineffective assistance concerning the *Miranda-Goodchild* hearing.

¶23 At the ***Machner*** hearing, Miller testified that after he was arrested, he told both sets of detectives who interviewed him that he had a lawyer and did not want to talk with them. Miller said that just before he was interviewed by Hernandez, he saw him in the lobby of the police station and told Hernandez that he did not want to talk with him and that he had a lawyer. Miller said Hernandez replied, "I know that you didn't do what they sayin' you did. We got to take your statement before we can release you."

¶24 Miller said that when he was read his ***Miranda*** rights in the interview room, he did not repeat his earlier request to remain silent "[b]ecause I had already told him and he had told me that … I had to make a statement in order to get released." On cross-examination, Miller acknowledged that he initialed as accurate the following statement in the written police report: "States he knows his rights. Miller relates that he wants to make a statement without his attorney." Miller explained that on a previous occasion in high school, he was released from

custody after talking to police officers, so when he met with Hernandez, he "figured it was the same situation so … I talked to the detectives and I signed what they wanted me to sign then because in my past dealing with detectives I got released."

¶25 Miller testified that after he was charged, he told his trial counsel that he had invoked his right to counsel, but on cross-examination, he admitted that he had "[n]ot quite" done so. Miller explained that when he started to raise the issue with trial counsel and tell her what occurred when he was arrested, "she had pretty much brushed [him] off," telling him, "[D]on't make a big deal, that the statement was helpful in my defense."[6] Miller said that he wanted to testify at the ***Miranda-Goodchild*** hearing, but his trial counsel "said something to the Court that … I would agree with everything that they say."

¶26 Trial counsel testified that Miller never told her that he told Hernandez he wanted to invoke his right to counsel and was unwilling to give a statement. Trial counsel said that during the ***Miranda-Goodchild*** hearing, Miller did not contradict Hernandez's testimony and, in fact, told trial counsel that Hernandez's testimony was accurate. Trial counsel testified: "I recall Mr. Miller and I having an exchange at counsel table, him verifying that what Detective Hernandez said was correct, that he had told him that even though he had a lawyer, he would make a statement." Trial counsel said that was the reason why, at the end of the ***Miranda-Goodchild*** hearing, she made a statement to the trial court about the fact that Miller did not dispute Hernandez's testimony.

[6] Miller told Hernandez that he did not fire any gunshots that hit the victim and that he fired his gun in self-defense.

¶27 The trial court implicitly found trial counsel more credible and accepted her version of events. The trial court believed trial counsel's testimony that Miller had not told her that he had invoked his right to counsel when he was interviewed by Hernandez. The trial court found that when the decision not to have Miller testify at the ***Miranda-Goodchild*** hearing was made, "there was discussion and there was a meeting of the minds … between [trial counsel] and Mr. Miller of a strategy to use that statement [to Hernandez] to proceed with a self-defense argument."

¶28 On appeal, Miller asserts that trial counsel was ineffective for failing to present Miller's testimony at the ***Miranda-Goodchild*** hearing. Miller acknowledges that the trial court accepted trial counsel's testimony at the ***Machner*** hearing as accurate. Nonetheless, in making his argument on appeal, Miller cites his own ***Machner*** hearing testimony to the contrary. Miller also asks a series of what he terms "rhetorical questions" about trial counsel's decision not to present Miller's testimony.[7] We are not persuaded by Miller's argument.

¶29 We must accept the facts found by the trial court unless they are clearly erroneous, *see* ***Pitsch***, 124 Wis. 2d at 633–634, 369 N.W.2d at 714–715, and we defer to the trial court's credibility determinations, *see* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60, 62 (1987) ("The credibility of witnesses and weight to be given their testimony are matters for the trial court to decide."). Here, the trial court assessed the credibility of both Miller and trial counsel and chose to accept trial counsel's testimony as true. This finding is not clearly

[7] We decline to attempt to answer these rhetorical questions or to develop arguments on Miller's behalf. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987) (appellate court will not develop arguments for a party).

erroneous and is, in fact, consistent with other evidence presented at the hearing. For instance, Miller admitted that he did not specifically tell his trial counsel that he had invoked his right to counsel during questioning. Further, at the ***Miranda-Goodchild*** hearing, trial counsel told the trial court that Miller did not dispute Hernandez's testimony.

¶30 Applying the trial court's findings of fact to the law of ineffective assistance of counsel, we conclude that it was not deficient performance for trial counsel to decline to have Miller testify where Miller never told trial counsel that he had invoked his right to counsel and told trial counsel that Hernandez's testimony was accurate. Because Miller was not denied the effective assistance of trial counsel, we affirm the order denying his postconviction motion, as well as the judgment of conviction.

By the Court.—Judgment and order affirmed.

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