COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0569 **Cir. Ct. No. 99CF000912**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MONTGOMERY P. AVANT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Montgomery Avant, *pro se*, appeals the order denying his WIS. STAT. § 974.06 postconviction motion without a hearing. Avant submits that his postconviction counsel was ineffective for failing to raise the ineffectiveness of his trial attorney in his direct appeal. Specifically, he claims that his trial attorney was ineffective because he failed to: (1) file an interlocutory

appeal after the trial court denied his motion to suppress evidence obtained in a warrantless search of his apartment and car; (2) timely raise a ***Batson*** objection;[1] and (3) call several witnesses to bolster his wrongful identity defense. He also asserts that his postconviction counsel was ineffective for failing to appeal the trial court's ruling that the ***Batson*** challenge was untimely and the trial court's findings of fact made at the suppression hearing that, according to Avant, violated the rule that prohibits a trial court from commenting on a witness's testimony. We affirm.

I. BACKGROUND.

¶2 The Pine Manor Bar was robbed twice within four months by the same man. One of the witnesses caught a glimpse of a license plate on what was believed to be the get-away car. This license plate number did not yield any matches, but when the first three letters were transposed, the license plate number matched that of Avant's red 1986 Pontiac Firebird. Avant's picture was shown to the various witnesses; only one, the bartender, identified Avant as the robber. Based on this identification, Avant was charged with two counts of robbery with use of force.

¶3 The police arrested Avant at his home. They gained entry by lying to Avant's girlfriend, telling her that they were investigating a hit and run accident. After the defendant was arrested, the police asked Avant's girlfriend if they could search his home and his car.[2] She consented. As a result of the search,

[1] ***Batson v. Kentucky***, 476 U.S. 79 (1986).

[2] It appears that Avant also consented to the search of the apartment, but the police did not ask for his consent to search the car.

the police seized a gun, an unusual pair of glasses, which matched the description of the glasses worn by the robber, and clothing matching that worn by the robber.

¶4 Avant brought a motion to suppress the damaging evidence found in the search. Avant claimed that his girlfriend did not live with him and did not own the car, and therefore, she could not legally consent to the search of either location. The trial court found that Avant's girlfriend had apparent authority to consent to the search and denied the motion.

¶5 At trial, shortly after *voir dire* was completed, Avant's counsel made a ***Batson*** objection on the basis that the assistant district attorney struck the only African-American juror on the panel.[3] The trial court ruled that the challenge was untimely. Nevertheless, the trial court later addressed the issue and found the reason given by the prosecutor for the strike to be race-neutral.

¶6 During the trial, Avant's counsel called three witnesses to the robbery to testify, but failed to call two additional witnesses who were also present during the robberies. Neither of the two uncalled witnesses was able to identify the robber. Avant was convicted by a jury of two counts of robbery with use of force. The trial court sentenced him to twenty-five years' imprisonment for each count, to be served consecutively.

¶7 Avant filed a direct appeal raising several claims of error, including a challenge to the trial court's refusal to suppress the evidence found in the search of Avant's apartment and automobile. His convictions were affirmed.

[3] Evidence in the record indicates that Avant is African-American.

¶8 Following his direct appeal, Avant filed a *pro se* postconviction motion. In this motion, Avant claimed that his appellate counsel was ineffective for failing to allege that his trial counsel erred by failing to: (1) file an interlocutory appeal after the trial court denied his suppression motion and admitted the evidence found in his apartment and automobile; (2) timely object to the alleged ***Batson*** error; and (3) call two additional witnesses to bolster his wrongful identity defense. He also claimed that postconviction counsel, acting as appellate counsel, was ineffective for not challenging the trial court's finding that the ***Batson*** motion was untimely, or the trial court's factual findings concerning the motion to suppress. The motion was denied without a hearing.

II. ANALYSIS.

¶9 Avant appeals the trial court's denial of his WIS. STAT. § 974.06 postconviction motion. WISCONSIN STAT. § 974.06(4) requires a defendant to raise all issues in his or her original postconviction motion or appeal. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 177-78, 517 N.W.2d 157 (1994). However, the ineffectiveness of postconviction counsel may be sufficient cause to escape the § 974.06(4) bar per ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1995).

¶10 In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove both that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-90 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 687. To

show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume" counsel has rendered adequate assistance. ***Id.*** at 690.

¶11 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. However, the ultimate question of whether the defendant was denied effective assistance is a question of law subject to independent review. ***Id.*** at 325.

A. Avant's trial attorney was not ineffective for failing to file an interlocutory appeal.

¶12 Avant first argues that his trial attorney rendered ineffective assistance because he did not file an interlocutory appeal challenging the trial court's decision denying his motion to suppress the evidence obtained in a search of his apartment and car. On a related issue, Avant also submits that his appellate attorney's failure to raise and appeal the alleged illegality of the police officers' tactics in gaining entry into his apartment constitutes ineffectiveness. We disagree.

¶13 An interlocutory appeal of the denial of his motion to suppress would not have been successful, as we affirmed the trial court on direct appeal. Consequently, Avant's counsel's failure to bring an interlocutory appeal does not constitute ineffective assistance. Moreover, it is a "longstanding rule that a

decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989). Thus, Avant is foreclosed from relitigating the circumstances surrounding the search and the trial court's decision because this issue was raised and addressed in his direct appeal.

*B. Avant's attorney was deficient for failing to timely raise a **Batson** challenge, but no prejudice resulted.*

¶14 Next, Avant claims that his attorney was ineffective for raising an untimely ***Batson*** challenge, claiming that the assistant district attorney's strike of the only African-American juror was racially motivated. The trial court ruled that the challenge was untimely pursuant to ***State v. Jones***, 218 Wis. 2d 599, 601, 581 N.W.2d 561 (Ct. App. 1998). ***Jones*** requires a ***Batson*** objection to be made before the jury is sworn. ***Id.*** Avant's attorney did not raise the motion until after the jury was sworn. Despite its initial ruling, however, the trial court later ruled that no ***Batson*** violation occurred.

¶15 In evaluating ***Batson*** challenges, a court follows a three-step process. ***State v. King***, 215 Wis. 2d 295, 300, 572 N.W.2d 530 (Ct. App. 1997). First, the defendant must make a *prima facie* showing of discriminatory intent. *See* ***id.*** at 300-01. If shown, the burden then shifts to the State to provide a neutral explanation for striking the juror. ***Id.*** at 301. The third step of the ***Batson*** test requires the trial court to "weigh the credibility of the testimony and determine whether purposeful discrimination has been established." ***State v. Lamon***, 2003 WI 78, ¶32, 262 Wis. 2d 747, 664 N.W.2d 607. But, once a neutral explanation has been offered, "and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether defendant has made a

prima facie showing becomes moot." ***Hernandez v. New York***, 500 U.S. 352, 359 (1991) (plurality opinion); ***King***, 215 Wis. 2d at 303. Finally, discriminatory intent is a question of historical fact. ***Lamon***, 262 Wis. 2d 747, ¶45.

¶16 Here, the trial court noted that Avant's attorney was challenging the State's use of one of its peremptory strikes to remove the lone African-American venireman. The State then offered a reason for the strike—the fact that he was unsuitable for jury service because he had an armed robbery conviction and because the trial court judge prosecuted the federal case convicting him. As a result, the trial court determined that there was no purposeful discrimination and appropriately ruled that the reason for the strike was race neutral. That finding was not clearly erroneous. Consequently, while Avant's trial attorney may have been deficient for not timely raising the issue, no prejudice occurred because the ***Batson*** challenge was addressed and properly denied.

C. Avant's attorney was not ineffective for failing to call two witnesses whose testimony would have been cumulative.

¶17 Avant next claims that his trial attorney was deficient for failing to call two additional witnesses to the robbery. Avant submits that "[c]ounsel should have called all pertinent witnesses that could have presented to the jury the strong possibility that Mr. Avant could have been wrongfully identified by [the bartender] as the perpetrator." We disagree.

¶18 While the two witnesses who did not testify were unable to identify Avant, Avant's trial attorney did call three other witnesses to the robberies, all of whom were also unable to identify Avant as the robber. The three testifying witnesses gave vastly different descriptions of the robber. Thus, the wrongful identity defense was presented to the jury. Avant's trial counsel established that

only one witness could actually identify Avant, and that none of the descriptions of the robber given by other witnesses matched. Consequently, the other witnesses' testimony would have been cumulative. It is not ineffective assistance of counsel to fail to provide cumulative evidence. *See* ***United States v. Jackson***, 935 F.2d 832, 845-46 (7th Cir. 1991) (not ineffective assistance for defense counsel not to pursue a course of investigation that would produce evidence counsel is already aware of or would add little to what is otherwise available).

¶19 Additionally, the cases Avant cited are distinguishable. For example, in ***Lyons v. Johnson***, 99 F.3d 499, 502-03 (2d Cir. 1996), the trial court erroneously refused to permit counsel to display a witness and co-actor who clearly matched the description of the perpetrator of the crime, wearing the "gold fronts" on his teeth that both co-actors were wearing during the incident. In ***Montgomery v. Petersen***, 846 F.2d 407, 413-15 (7th Cir. 1988), an attorney was found ineffective for failing to investigate and call an unbiased alibi witness. Here, however, no uncalled witnesses would have offered unique testimony. It had already been established that only one witness could identify the robber. Thus, trial counsel was not ineffective for failing to call these two other witnesses.[4]

D. Appellate counsel was not ineffective for failing to appeal two of the trial court's rulings.

¶20 Avant's final argument seems to be that his postconviction appellate counsel was ineffective because in the direct appeal she failed to raise a challenge to: (1) the trial court's decision that a ***Batson*** motion must be made before the

[4] Additionally, the record indicates that Avant's attorney attempted to locate these witnesses, but could not find them.

jury is sworn or it is waived; and (2) the trial court's comments on the credibility of a witness in the course of deciding the suppression motion. We disagree.

¶21 We first note, as the State points out, that a WIS. STAT. § 974.06 motion is not the proper avenue to challenge the appellate counsel's performance in a WIS. STAT. § 808.03(1) appeal. Rather, "[u]nder ***Knight***,[5] a claim of ineffective assistance of appellate counsel is properly raised by a petition for a writ of habeas corpus in the appellate court which heard the defendant's direct appeal." ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 797, 565 N.W.2d 805 (Ct. App. 1997) (footnote added). However, in the interest of judicial economy, we address both issues.

¶22 As noted, the trial court correctly determined that the holding in ***Jones*** requires a ***Batson*** challenge to be raised before the jury is sworn. Thus, a specific challenge to the trial court's ruling that the ***Batson*** challenge was untimely would have been unsuccessful. An attorney's failure to pursue a meritless objection or motion does not constitute deficient performance. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶23 As to Avant's second claim, that the trial court improperly commented on the credibility of the witness, we note that Avant misunderstands the trial court's role in deciding a motion to suppress evidence. The trial court acts as the trier of fact when presiding over a suppression motion, and has every right to comment on the credibility of the witnesses who testify. "A trial court has the responsibility, when acting as a trier of fact, to determine the credibility of each

[5] ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

witness." ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752.

¶24 Furthermore, this court must uphold the trial court's findings unless they are clearly erroneous. ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72; ***Dejmal v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Here, the trial court found that a witness, Dorice Hollis, who was pivotal to Avant's challenge to the admissibility of the seized evidence, was not credible. The trial court remarked that her memory was too good for a person who, unknowing of its significance, witnessed a car search months before the hearing, particularly when she claimed to have spoken to no one about her observations until several weeks before the motion was heard. Given the circumstances of this case, such a finding is reasonable and not clearly erroneous. Consequently, appellate counsel was not ineffective for failing to appeal the trial court's credibility determination at the motion to suppress.

E. The trial court properly denied the motion without a hearing.

¶25 In reviewing a trial court's refusal to hold an evidentiary hearing, we employ a two-part test with two different standards of review: (1) "If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing[, and w]hether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo," ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996); (2) "[h]owever, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in ***Nelson***[***v. State***], 54 Wis. 2d 489, 195 N.W.2d 629 (1972)." ***Bentley***, 201 Wis. 2d at 310-11. Discretionary

determinations are subject to the erroneous exercise of discretion standard. ***Id.*** at 311. The three factors enumerated in ***Nelson*** are: (1) "if the defendant fails to allege sufficient facts in his motion to raise a question of fact"; (2) if the defendant "presents only conclusionary allegations"; or (3) "if the record conclusively demonstrates that the defendant is not entitled to relief." 54 Wis. 2d at 497.

¶26 Thus, we conclude that Avant's motion failed to allege sufficient facts which, if true, would entitle him to relief. Moreover, the trial court determined that the record conclusively demonstrated that Avant was not entitled to relief:

> The defendant's motion does not set forth a viable claim for relief; consequently, there is no need for a hearing for purposes of taking the testimony of either trial counsel or postconviction counsel. There is absolutely no evidence that the defendant did not receive a fair trial in this case.

The trial court did not erroneously exercise its discretion when it denied Avant's postconviction motion without a hearing.

By the Court.—Order affirmed.

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