COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2011

A. John Voelker
Acting 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. 2010AP1748

Cir. Ct. No. 1993CF934492A

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID MICHAEL MURRELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. David Michael Murrell, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2009-10)[1] postconviction motion without

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

a hearing. Murrell alleged that postconviction counsel was ineffective for failing to bring three additional witnesses to a ***Machner***[2] hearing, where he was challenging the effectiveness of trial counsel. The circuit court ruled that even if the witnesses had been called, there was no reasonable probability of a different result at trial. We affirm.

BACKGROUND

¶2 In August 1995, Murrell was convicted by a jury on five counts of first-degree reckless injury, while armed, as a party to a crime, for a shooting at a nightclub. Murrell was sentenced to five consecutive fifteen-year terms of imprisonment. He filed a postconviction motion for a new trial, alleging ineffective assistance of trial counsel for failing to call two witnesses, and claiming newly discovered evidence, consisting of a witness who claimed to know that Murrell was not the shooter.

¶3 The circuit court concluded that some of trial counsel's performance was deficient, but there was no prejudice to Murrell. The circuit court also concluded that the newly discovered witness was incredible, so there was no reasonable probability of a different result at trial with her testimony. Accordingly, the circuit court denied the postconviction motion. Murrell appealed and we affirmed. *See* ***State v. Murrell***, No. 1997AP1773-CR (Ct. App. Aug. 18, 1998). A petition for review was denied, as was a 2003 petition to the federal court for a writ of *habeas corpus*.

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶4 In May 2010, Murrell filed the underlying *pro se* WIS. STAT. § 974.06 motion. He alleged that postconviction counsel was ineffective: (1) for not realizing that three additional witnesses had useful information that trial counsel should have identified and (2) for not challenging trial counsel's failure to introduce these witnesses in his defense. As noted, the circuit court denied the motion without a hearing. Murrell appeals. Additional facts will be set forth below as needed.

DISCUSSION

¶5 A motion brought under WIS. STAT. § 974.06 is typically barred if filed after a direct appeal unless the defendant shows a sufficient reason why he or she did not, or could not, raise the issues in a motion preceding the first appeal. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may constitute a "sufficient reason" for not previously raising an issue. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996). To demonstrate ineffective assistance of postconviction counsel and overcome the procedural bar, the movant must show that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶6 To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's action or inaction constituted deficient performance and that the deficiency prejudiced the defendant. *See* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. To prove deficiency, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the results of the proceeding

would have been different. ***Id.*** If we conclude that a defendant has failed to demonstrate one of the prongs, we need not address the other. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

A. The testimony of Rodney Clayborn

¶7 Rodney Clayborn was a security guard at the nightclub. He gave a statement to police that he "saw someone 5'6" to 5'8" and medium build" pull out a gun and start shooting. Murrell, who asserted in his postconviction motion that he is six feet tall and slim,[3] complains that postconviction counsel should have challenged trial counsel's failure to utilize Clayborn's "exculpatory" testimony.

¶8 The circuit court rejected this challenge, noting that witness Jermaine Burrage, who testified at length about the shooting, had "clearly [seen] the defendant committing the shooting" and that Clayborn's testimony was not likely to change the result of the trial. Indeed, Murrell bases his argument on only *part* of Clayborn's description. Clayborn also told police that the shooter was "wearing a designer sweater with several colors," consistent with the testimony of at least three other witnesses who described Murrell's clothing that night, as well as with Murrell's own testimony. We thus agree with the circuit court that Clayborn's testimony would not have altered the result at trial. This means that there was no prejudice, so neither trial nor postconviction counsel was ineffective for failing to raise an issue regarding Clayborn. *See **Love***, 284 Wis. 2d 111, ¶30.

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[3] Murrell points to no evidence in the record that would corroborate his height or build.

B. The testimony of Steven Trotter

¶9 To discuss Murrell's claims relating to Steven Trotter, another security guard, it is necessary to first explain the prior testimony of Christopher Davis, also a security guard. After the shooting, Davis observed Murrell acting far too calm for the situation. Davis told Murrell to stop, and Murrell ran from the club. Davis gave chase. At trial, he testified that he followed Murrell towards the parking area. When Davis again told Murrell to stop, Davis observed him "bring something out"—a gun—and try to "toss it up under one of the cars there." However, Davis had also testified, prior to trial, at Murrell's probation revocation hearing. There, Davis testified that he had not actually seen Murrell drop a gun.[4]

¶10 Trotter had also testified at the revocation hearing. Murrell contends the following testimony "is a direct contradiction" of Davis's trial testimony:

> Q Okay. And you did not see Mr. Murrell throw a gun?
>
> A No.
>
> Q Okay. You said you saw a gun after Mr. Murrell was apprehended?
>
> A Found one -- They found one of the guns by the car, right as --
>
> Q Did you personally see a gun?
>
> A Yes, I saw two guns.
>
> Q Okay.
>
> A I saw the Glock that was sitting behind the car outside of the club in the parking lot right in front of

[4] In the first appeal, we addressed issues relating to the discrepancies in Davis's testimony. *See* ***State v. Murrell***, No. 1997AP1773-CR at 8-11 (Ct. App. Aug. 18, 1998).

> the front door, and they had another gun that was -- They went to the car that he was going to.
>
> [ALJ]: By "he" you mean Mr. Murrell?
>
> [A]: Yes.

In light of the so-called contradiction, Murrell contends that postconviction counsel was ineffective for not discovering this testimony and challenging trial counsel's failure to use it to impeach Davis.

¶11 As the circuit court noted, however, Trotter's revocation testimony does not contradict Davis's trial testimony. Trotter only indicated that he did not personally observe anyone throw a gun, and that he saw two guns in the parking lot after Murrell was apprehended. We agree with the circuit court that Trotter's testimony is not sufficient to undermine our confidence in the outcome.[5] Thus, there is no prejudice, so there is no ineffective assistance.

C. The testimony of Inda Lampkins

¶12 Murrell also contends that postconviction counsel should have challenged trial counsel's failure to have Inda Lampkins testify. Lampkins ostensibly purchased the "Glock" used in the shooting for her boyfriend, Freddie Yates. Trotter had testified that he had seen Yates, a month prior to the shooting, waving that particular gun in the air. Yates was also apparently in the nightclub on the night of the shooting. However, the fact that Lampkins bought the gun for

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[5] Murrell also asserted that Trotter's testimony would have corroborated the testimony of Danny DeNeal, which Murrell also thought should have been used to impeach Davis. DeNeal originally told investigators that someone other than Murrell had thrown one of the guns to the ground. Trotter's testimony does not corroborate that statement. At the ***Machner*** hearing, DeNeal testified he did not see who threw the gun, and that it was already on the ground when Davis got outside the nightclub. Trotter's testimony does not corroborate that statement, either.

Yates ten months prior to the shooting, and that Yates may have possessed it a month before, is not exculpatory evidence.[6]

¶13 Further, while Murrell argues that Lampkins' testimony "very well could have gotten the ball to start rolling in regards to adequate investigation that would have shined the light on someone else[,]" he fails to identify what evidence further investigation would have revealed. *See* ***State v. Thiel***, 2003 WI 111, ¶44, 264 Wis. 2d 571, 665 N.W.2d 305. We agree with the circuit court that Lampkins' testimony would not have changed the result of the trial. Failure to call her was not prejudicial; neither counsel was ineffective.

¶14 Murrell has not demonstrated that his trial counsel was ineffective for failing to identify Clayborn, Trotter, and Lampkins as witnesses. Therefore, Murrell has not satisfied us that postconviction counsel was ineffective for failing to challenge trial counsel's performance in that regard. Accordingly, we conclude the circuit court properly denied the 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.

[6] The State points out that calling Lampkins might have backfired, as Lampkins apparently also told police that Yates sold the gun to Murrell. Murrell asserts that this was an "inadmissible statement by Freddie Yates," but does not elaborate on why he thinks so, nor does he cite any authority for the proposition that the statement, whoever made it, was inadmissible.