

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 7, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**Nos. 94-0641-CR
94-1321**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KARL JULIUS JAMES,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Karl Julius James appeals, *pro se*, from a judgment convicting him of first-degree intentional homicide while armed, and from an order denying postconviction relief. James claims that: (1) trial counsel was ineffective; (2) trial counsel had a conflict of interest; (3) the prosecutor made

apparently contradictory statements; and (4) the State failed to turn over alleged exculpatory evidence.¹ We reject his arguments and affirm.

I. BACKGROUND.

In 1992, James and the victim, James's girlfriend, came from Atlanta to Milwaukee and stayed at the home of Linda Smith. On the night of the murder, James and the victim engaged in an argument. The victim left the home and proceeded to a corner where there were two outdoor phones. Smith observed the victim leave and then observed James follow her. The victim's body was discovered later at the telephone booths on the corner. She had been shot four times. One of the bullets had been fired while the gun was pressed against the right side of the victim's chest. The other shots were fired at a range of two inches to two feet. Four shell casings were found by the body which matched the .380-caliber semi-automatic handgun that belonged to the victim. The murder weapon was found underneath a row of bushes about two blocks from the scene of the murder when Ollie Davis observed three young boys picking something up. She approached and discovered that it was a gun and called the police.

At trial, evidence was admitted relating to an incident in Atlanta that occurred approximately two weeks before the murder. An Atlanta police officer testified that he responded to a battery complaint involving the victim and James.

¹ James also raises numerous other issues on appeal that were waived. He claims four errors at the preliminary hearing, but without appealing to this court before trial, his claims are waived. *State v. Wolvorton*, 193 Wis.2d 234, 254, 533 N.W.2d 167, 174 (1995) (defendant who claims error at his preliminary hearing must obtain relief before trial by seeking immediate review in the court of appeals). James's additional claims that his statements to police were hearsay; that the trial court erred in admitting crime scene photographs and also evidence of a prior altercation between the defendant and victim; and that the State failed to call certain witnesses were also waived. *State v. Peters*, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991) (a party must specify grounds for an objection at trial to preserve the issue for review).

Also at trial, inmate Corey Williams testified that in a conversation with James in the jail day room, the defendant recounted the sequence of events of the night of the murder. Williams testified that James admitted to murdering the victim.

The defense presented no witnesses and the jury convicted James of first degree intentional homicide while armed.

II. ANALYSIS.

A. Ineffective assistance of counsel.

James claims that trial counsel provided ineffective assistance of counsel when he withdrew the portion of the suppression motion alleging warrantless arrest. The withdrawal was based upon trial counsel learning that Linda Smith had given permission for the police to enter her home. James additionally claims that trial counsel was ineffective for failing to object to the withdrawal of exhibits after the verdict. James contends the exhibits would have bolstered his claim that an investigating detective committed perjury.

When a postconviction motion of ineffective assistance of counsel is raised, a hearing must be conducted to determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies. *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979). Because we cannot find facts, and no *Machner* hearing was requested, we do not address the merits of this claim.

B. Conflict of interest.

James claims that his trial counsel provided ineffective assistance due to a conflict of interest. James argues that because trial counsel insisted that James wear new clothing that was purchased for him, instead of the orange jail

jumpsuit, trial counsel had a conflict of interest, apparently questioning James's competency to stand trial.

A claim of a conflicting interest need not undergo the analysis established in *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Dadas*, 190 Wis.2d 340, 343, 526 N.W.2d 818, 820 (Ct. App. 1994). The burden is on the defendant to show by "clear and convincing evidence that trial counsel actively represented a conflicting interest." *Id.* at 339, 526 N.W.2d at 820. James has not met this burden. The fact that trial counsel was persistent in requesting that James change into the clothes that were purchased for him is not clear and convincing evidence of a conflict of interest. Instead, it patently represents effective representation because trial counsel was concerned with the image that James would convey to the jury dressed in his jail garb. The trial court issued a cautionary instruction about the clothing. We find in the record no evidence of a conflict of interest.

C. Prosecutor's statements.

James claims that the prosecutor presented two versions of the sequence of events the night of the murder. James points to the pretrial motion hearing where the prosecutor stated that James caught up with the victim *before* she reached the telephone booth. At trial, several months later, the prosecutor stated that James caught up with the victim *at* the telephone booth. It should be noted that a detective testified that James told him that he caught up with the victim just before or at the telephone booth. James does not explain why this difference is significant or, more importantly, why it deprived him of a fair trial. This is a non-issue.

D. Prosecutor's duty to disclose.

James claims that due process was violated by the prosecution's failure to identify the names of three inmates who were present when James confessed to Corey Williams. He contends that the names of the other inmates would have given him the opportunity to impeach Williams. James also claims that the prosecutor withheld the names of the three boys who found the murder weapon. He argues that without these names, he could not impeach Ollie Davis, who discovered the three boys pointing at the gun.

Suppression of evidence violates due process if it is material to either guilt or punishment. *State v. Pettit*, 171 Wis.2d 627, 644, 492 N.W.2d 633, 641 (Ct. App. 1992). Exculpatory evidence is material if there is a reasonable probability, that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 644-45, 492 N.W.2d at 639. It is not apparent from the record that the three inmates that James makes reference to, even exist. Even so, it is unclear what their testimony would have been. There is nothing on the record that demonstrates the State possessed information favorable to the defense and that would have impacted the trial's outcome.

Similarly, as to the three boys who discovered the gun, James has shown no evidence that the State knew of any relevant information of their identity. Without such information on the record, we reject the defendant's argument.

In sum, we reject all of James's arguments and affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.