COURT OF APPEALS DECISION DATED AND RELEASED

July 27, 1995

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.

No. 94-1776

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL C. MARTIN,

Defendant-Appellant.

APPEAL from an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Sundby, JJ.

EICH, C.J. It was inevitable that we would one day receive a case such as this. Martin argues that his trial counsel was ineffective, that his first postconviction counsel was ineffective in failing to establish the ineffectiveness of his trial counsel, and that his second postconviction counsel was ineffective for failing to establish the ineffectiveness of his trial counsel *and* his first postconviction counsel.

It is not surprising that this is the third appeal in the case.

Because we are satisfied that Martin's claim of ineffectiveness directed toward his original trial counsel must fail, we need not proceed further. We once again affirm his conviction.

Martin was charged with burglary and third-degree sexual assault in connection with a break-in and assault at the home of Kristin Pascoe on September 25, 1988. He was charged with trespass and fourth-degree sexual assault on similar facts at the home of Carol Nachtreib "on or about" July 14, 1986.

Throughout this time, Martin and his wife, Pascoe and her husband, and Nachtreib and her companion, were all good friends. They frequently "partied" together, often drinking to excess and spending the night at each others' houses. In the instances giving rise to these charges, the women testified that they had been awakened during the night by Martin having, or attempting to have, sex with them.

Martin's trial counsel, Ron Walker, testified at the postconviction hearing that he pursued the following theory of defense in the cases: After Pascoe's husband "caught" her having consensual sex with Martin and "beat her up," her good friend Nachtreib "chipped in to help [Pascoe]" by fabricating a story that Martin had assaulted her in a similar fashion several years earlier.

The jury acquitted Martin of "burglary" or unlawful entry to the Pascoe home, but found him guilty of sexually assaulting both Pascoe and Nachtreib and of criminal trespass to Nachtreib's home.

Martin obtained a new lawyer and filed postconviction motions alleging, among other things, that Walker had provided ineffective legal assistance. The trial court denied the motion and Martin appealed, arguing nine separate instances of ineffective assistance on Walker's part, including most of those at issue here. We rejected each of Martin's arguments and affirmed the

conviction. ***State v. Martin***, No. 89-1348-CR, unpublished slip op. (Wis. Ct. App. Jan. 18, 1990).

Martin then moved for a new trial on the basis of newly discovered evidence. The trial court denied the motion and another appeal followed. We again affirmed the conviction.

Martin then hired another lawyer, who filed a third postconviction motion seeking a new trial on the basis of still other newly discovered evidence. The motion was denied and Martin appealed again. This appeal was voluntarily dismissed after Martin hired still another lawyer and filed a fourth motion--the one now under consideration.

In this motion, Martin reiterates his claim that Walker was ineffective on several counts: failing to investigate a possible alibi, advising Martin not to testify, and deciding not to seek an instruction on his failure to testify. He adds several ineffective-assistance claims against his first and second postconviction counsel, most of them relating to their alleged failure to establish Walker's ineffectiveness. All of the lawyers who had represented Martin in the course of the proceedings testified at the hearing. Martin also presented testimony from several citizen witnesses and an attorney-expert who testified on several areas in which he felt Walker and the other lawyers had been ineffective.

The trial court denied Martin's motion in a lengthy written decision, ruling that the performance of all counsel was proper and that none was ineffective. Significantly, noting Martin's repeated claims that the testimony of all four of his attorneys was untrue and that his own testimony represented the true facts, the court made specific findings on the credibility of Martin and the other witnesses. After recounting several inconsistencies in Martin's testimony at the postconviction hearing[1] and referring to his assertions that the original trial judge had participated in "changing and modifying transcripts" and had "pressur[ed] defense counsel into changing his mind as to

[1] The court noted, among other things, that Martin's own testimony "[w]ould change to accommodate the position the question placed him in."

trial tactics"--charges the trial court "assume[d] ... came from [Martin's] imaginative mind"--the court stated:

> It is the Court who is called upon to determine the issues of credibility at these motion hearings. The Court chooses to accept the testimony of the Trial Counsel and Appellate Counsel over the credibility of the defendant and his witnesses.... The more credible testimony before the Court is that of the attorneys .... Instead of adding credence to the defendant's claims, the defendant's [own] witnesses added credence to the position of ... counsel.

Other facts will be discussed in the body of the opinion.

I. Applicable Legal Standards

For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish that counsel's actions constituted deficient performance, *and* that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). And because representation is not constitutionally ineffective unless both elements of the test are satisfied, ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992), *aff'd*, 176 Wis.2d 845, 500 N.W.2d 910 (1993), we may dispose of an ineffective assistance of counsel claim where the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

On appeal, the issues are of both fact and law. ***Strickland***, 466 U.S. at 698. The trial court's findings on what the attorney did, what happened at trial and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). However, whether counsel's actions were deficient and, if so, whether they prejudiced the defense are questions of law which we review independently. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992), *cert. denied,* 114 S. Ct. 99 (1993).

An attorney's performance is not deficient unless it is shown that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***Guck***, 170 Wis.2d at 669, 490 N.W.2d at 38 (citation omitted). We thus assess whether such performance was reasonable under the circumstances of the particular case, ***Hubanks***, 173 Wis.2d at 25, 496 N.W.2d at 105, and to prevail in the argument the defendant must show that counsel "`made errors so serious that [he or she] was not functioning as the "counsel" guaranteed ... by the Sixth Amendment.'" ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847 (quoted source omitted). And in assessing counsel's conduct, we pay great deference to his or her professional judgment and make every effort to avoid basing our determination on hindsight. We consider the claim "from counsel's perspective at the time of trial, and the burden is ... on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Id.***, 449 N.W.2d at 847-48.

Because Martin has not persuaded us that his trial counsel was ineffective, we need not address the "prejudice" component of the analysis.

II. Claimed Ineffectiveness of Trial Counsel

A. Failure to Investigate Possible Alibi Defense

Martin argues first that Walker's performance fell below that of an ordinarily prudent lawyer when he failed to "fully investigate [an] alibi defense to the Nachtreib assault and trespass charges." He claims that a few days before trial Walker was informed of the existence of an invoice from Martin's job as a truck driver that would have placed him in another part of the state on the date the Nachtreib assault was alleged to have taken place and that Walker's failure to investigate this "alibi" and pursue it at trial was deficient performance. In so arguing, he relies on the testimony of Michael Devanie, an attorney testifying as an expert witness for the defense, that Walker, given his knowledge of the purported alibi defense, should have, in the exercise of ordinary care as a lawyer, "promptly and immediately investigate[d] fully the alibi defense."

Walker testified at the postconviction hearing that well before trial he had "prodded" Martin to go over his trucking records to see whether he may have had an alibi to the Nachtreib incident or other evidence that might establish that it occurred outside the statute of limitations. Martin did so and

told Walker that he had found nothing. According to Walker, "Mr. Martin specifically told me he checked his books and [there] was not a thing there to help us. That's all I heard about [log]books until after the trial."

Martin testified that he had given the information to Walker a day or two before the trial. As we have set forth above, however, the trial court expressly assigned greater credibility to Walker's version of the facts, and that is a decision to which we pay great deference. In ineffective-assistance-of-counsel cases, as in others, "[t]he credibility of the witnesses, including the defendant's, ... is exclusively for the trier of fact." ***State v. Wyss***, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985).

> Such deference to the trial court's determination of the credibility of witnesses is justified ... because of ... the superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony. Thus, the trial judge, when acting as the factfinder, is considered the "ultimate arbiter of the credibility of a witness," and his [or her] finding in that respect will not be questioned unless based upon caprice, an abuse of discretion, or an error of law.

Estate of Dejmal, 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980) (citations and quoted source omitted).

Given the court's findings on the credibility of Martin's and Walker's testimony, Martin has not persuaded us that Walker was ineffective for failing to investigate and present alibi evidence.

B. Failure to Have Martin Testify

Martin next argues that Walker's performance was defective for failing to call him as a witness in the case. The argument was rejected by the trial court over five years ago and we upheld that decision on appeal, concluding that Walker's testimony at an earlier postconviction hearing was sufficient to sustain a finding that, while Walker had "advised Martin of his opinion concerning the wisdom of [his] testifying," it was Martin himself who "made the ultimate decision" that he would not testify. ***Martin***, No. 89-1348-CR, slip op. at 3.

Martin now says that the issue was not whether he or Walker decided whether he would testify but whether the advice Walker gave him--and which he accepted--was deficient. His expert witness, Devanie, testified that an ordinarily prudent lawyer would have "strongly advised" Martin to testify.

Walker testified at the hearing on Martin's most recent postconviction motions that Martin agreed with his (Walker's) advice that he not testify at trial. Walker said that he based that advice on several factors, the foremost being the fact that, had Martin testified, he would have faced cross-examination concerning a tape- recorded conversation with Nachtreib's companion, Jim Lewis, in which Martin asks Lewis to testify falsely with respect to the Nachtreib charges.[2] Walker also testified that, had Martin taken the stand, Lewis was prepared to testify in rebuttal that Martin had "confess[ed] everything" to him; furthermore, there was a possibility that cross-examination of Martin would reveal his involvement in a similar incident in the past.

All these factors caused Walker to recommend against Martin's testifying. After extensive discussion both on and off the record, Martin informed the trial court that he agreed with Walker's advice. According to Walker, he never "coerce[d] or force[d]" Martin to testify, and "if he wanted to testify, he would have testified."

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[2] At some point after the charges had been filed against Martin, Lewis tape-recorded a conversation in which Martin attempted to get him (Lewis) to testify that he had given Martin permission to enter the house he shared with Nachtreib. Such testimony would have given Martin a defense to the illegal-entry portion of the Nachtreib charge.

The trial court, itself noting inconsistencies in Martin's testimony and his generally poor performance as a witness at the postconviction hearing, ruled that Walker's advice to Martin was professionally reasonable. Martin has not persuaded us to the contrary.[3]

C. Failure to Request Jury Instruction Wis J I--Criminal 315

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[3] Martin also suggests that "Walker's concern over the taped conversation" was itself ineffective assistance of counsel, and his expert witness, Devanie, so testified. Devanie stated that he read a transcript of the recording and "d[id]n't understand the link" between the tape and the decision not to testify. We do not see how that testimony could be considered sufficient to support a determination of Walker's ineffectiveness. As the trial court stated:

> Mr. Devanie has never heard the tape and is incapable of knowing the voice intonations recorded of Mr. Martin's conversation with Mr. Lewis. Without hearing the tape he makes a value judgement as to its use and the possible correcting testimony available to counter the contents of the tape. One would think Mr. Devanie would have at least reviewed the tape before making an evaluation of its damaging effects.

Finally, citing an American Bar Association publication admonishing lawyers to make a record of their advice to clients and the conclusions reached in cases involving significant lawyer-client disputes over trial tactics and strategy, Martin suggests that Walker's representation was deficient for his failure to make a "formal recordation of the decision to exclude the ... tape ...." We agree with the State that both the trial record and the record of the postconviction hearing are extensive on the subject of the tape recording. They establish that, during the trial, Walker and Martin had many meetings and discussions of the pros and cons of admitting the tape, many of them on the record and in the court's presence, leading up to Martin's decision--also on the record--not to admit the tape. Indeed, the trial court found that: (1) Walker had "numerous" meetings with Martin on the subject, in which he "would vacillate from one position to the other"; (2) Walker "informed the [trial judge] as to each change of mind"; and (3) "[i]t was quite apparent [that Martin] was making the decisions as to the use of the tape." The court had no reservations about the care with which Walker consulted with Martin or the extent of the record made on the subject. Nor do we.

Finally, Martin argues that Walker's representation was ineffective because he failed to request the standard instruction advising the jury that it should draw no inferences from a defendant's failure to testify.[4]

Martin made the identical argument in his first postconviction motion, and Walker testified at that time that he did not request the instruction because he did not want to call attention to the fact that Martin had exercised his right not to testify. On appeal, we noted that whether to ask for such an instruction is considered "a matter of trial strategy for defense counsel to determine,"[5] and concluded that "Martin has established neither deficient performance nor prejudice." ***Martin***, No. 89-1348-CR, slip op. at 6-7. Martin has added nothing new to his earlier claim,[6] and because the issue has been

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[4] The instruction states as follows: "A defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner." WIS J I--CRIMINAL 315 (1991).

[5] *See* ***Champlain v. State***, 53 Wis.2d 751, 757, 193 N.W.2d 868, 873 (1972). *See also* ***State v. Williquette***, 180 Wis.2d 589, 608, 510 N.W.2d 708, 714 (Ct. App. 1993), *aff'd*, 190 Wis.2d 678, 526 N.W.2d 144 (1995), where we stated:

> The trial court concluded that [the failure-to-testify instruction] would have highlighted Williquette's failure to testify. In ***Champlain*** ... the court considered the benefits and detriments of using the instruction, and concluded that its use was a matter of trial strategy for defense counsel to consider. If trial counsel considered the instruction and rejected its use, his performance was not ineffective.

[6] Here, as in his earlier postconviction motions, Martin attempts to use affidavits from jurors to suggest that his failure to testify affected the verdict. We rejected his attempt to do so in an earlier appeal in this case, holding that juror affidavits could not be received "as to any matter or statement occurring during the course of deliberations or to the effect of anything upon his or any other juror's mind as influencing him to assent to or dissent from the verdict or concerning his mental processes in connection therewith." ***Martin***, No. 89-1348-CR, slip op. at 6-7.

Martin argues here that we were wrong in so deciding because he is not attempting to "impeach" the verdict but simply "to confirm the substance of the verdict and the process by which it was derived" in order to show prejudice. First, because we have held that Walker's representation was not ineffective, we need not address the "prejudice" component of the analysis. Second, we held in the earlier appeal that "[a] claim of ineffective assistance of counsel is an inquiry into the validity of the verdict since

conclusively decided against him on a former appeal, he is precluded from relitigating it. *See* ***Lindas v. Cady***, 183 Wis.2d 547, 558-60, 515 N.W.2d 458, 463 (1994) (doctrine of "issue preclusion" bars a party from relitigating previously decided issues).

By the Court.--Order affirmed.

Not recommended for publication in the official reports.

(..continued)
a finding of ineffective assistance would result in the verdict being set aside." ***Id***. That holding disposes of Martin's assertions in this case.

Finally, as to Martin's reliance on his expert witness's opinion that Walker should have sought the instruction, we agree with the State that, while "Devanie is entitled to his opinion ... his opinion is not the law." Walker testified about his reasons for declining to seek the instruction (he did not want to draw attention to the fact that Martin was not testifying), and our function is not to second-guess that strategy.