COURT OF APPEALS
DECISION
DATED AND RELEASED

February 27, 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.

No. 94-2601-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID M. BEASLEY,

Defendant-Appellant.

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

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. David M. Beasley appeals from a judgment of conviction, after a jury trial, for delivery of a controlled substance—cocaine, contrary to §§ 161.16(2)(b)(1) and 161.41(1)(c)(1), STATS. Beasley presents two issues for review. First, he argues that he received ineffective assistance of counsel when his trial counsel allegedly failed to: (1) properly investigate and prepare for trial; (2) file motions alleging an illegal arrest and seeking to

suppress evidence arising out of an illegal arrest; (3) challenge the reliability of the lineup that occurred at the time of the defendant's arrest; and (4) make appropriate objections to the in-court identification of the defendant. Second, he argues that the trial court erred by failing to grant him a new trial in the interest of justice. We reject Beasley's arguments and, accordingly, we affirm.

I. BACKGROUND.

On January 12, 1990, City of Milwaukee Police Officer Gregory Jackson went to an upper flat located on Milwaukee's near north side to make an undercover "controlled buy" of cocaine. Jackson went to the front door where a man opened the door. Jackson gave the man $20 and the man then went upstairs and returned a couple of minutes later with a piece of white paper filled with a white powdery substance. The substance later tested positive as cocaine base. Jackson later described the individual who gave him the cocaine as a black male between 22 and 26 years of age, about 5'8", 150 pounds with some facial hair, a short "afro" or medium-length hair, and wearing a gray three-quarter-length coat.

Six days later, Jackson returned to the same address to execute a search warrant. Jackson stayed in an undercover van while other officers entered the premises. Police then detained Beasley outside the home as he walked toward the porch. The police conducted a pat-down search and then took Beasley and a few other individuals detained outside the building into the residence. Beasley was arrested. Officer Jackson entered the residence. On seeing Beasley inside with the other individuals the police had detained, Officer Jackson stated that Beasley was the man from whom he purchased cocaine six days earlier. The State charged Beasley with delivery of a controlled substance—cocaine, and he received a jury trial. During the trial, Officer Jackson made an in-court identification of Jackson as the individual who sold the cocaine. The jury convicted Beasley and he filed postconviction motions seeking a new trial based on, *inter alia*, his contention that he received ineffective assistance of counsel prior to and during his trial. After a ***Machner***[1] hearing, the trial court denied Beasley's motion for a new trial, concluding that Beasley's trial counsel was not ineffective.

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

II. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Ineffective assistance of counsel claims are reviewed under the two-pronged test set out by the United States Supreme Court in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). The first prong requires that the defendant show that counsel's performance was deficient; that is, that counsel made such serious errors that counsel is no longer functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. ***Strickland***, 466 U.S. at 687. The second prong requires that the defendant show that the deficient performance prejudiced his or her defense. ***Id***. To show prejudice, "[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." ***Id***. at 694. "`[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceedings.'" ***Pitsch***, 124 Wis.2d at 641, 369 N.W.2d at 718 (citations omitted).

Whether Beasley received ineffective assistance of counsel presents a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. We will only reverse a trial court's findings of fact if they are "clearly erroneous." ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 714. Questions of whether counsel's performance was deficient and whether it prejudiced the defendant's defense are questions of law that we review *de novo*. ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572, 575 (1989). Lastly, if the defendant fails to adequately show one prong of the ***Strickland*** test, we need not address the second. ***Strickland***, 466 U.S. at 697.

Upon appeal, Beasley raises four bases for his ineffective assistance of counsel claim. We address each separately.

A. Investigation and Preparation for Trial.

First, he argues that he received ineffective assistance of counsel by his trial counsel's alleged failure to properly investigate and prepare for trial. Ostensibly, Beasley is arguing that his trial counsel was deficient for not discovering earlier the specific situation surrounding Beasley's arrest. He argues that if counsel would have properly investigated the arrest, counsel would have filed a motion for suppression of Officer Jackson's identification of Beasley as it was evidentiary poisonous fruit of his allegedly illegal arrest.

The trial court concluded that counsel's performance was not deficient. After reviewing the evidence presented at the ***Machner*** hearing, we agree with the trial court. It is clear from counsel's testimony that prior to trial he did not believe that there was a basis for challenging the arrest. Counsel interviewed Beasley about his arrest. He discussed the arrest with Beasley, and Beasley told him that he was arrested outside the house two weeks after the delivery of cocaine. He stated that police came to the apartment because his friend had his "head split open" with an iron pole. Beasley also said that the police recognized him as being wanted in connection with a crime, arrested him across the street and then took him upstairs into the apartment. Counsel believed Beasley's account of what happened. "Counsel's actions are usually based ... on information supplied by the defendant." ***Strickland***, 466 U.S. at 691. Further, "`the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.'" ***Pitsch***, 124 Wis.2d at 637 (citations omitted). Counsel's failure to pursue certain investigations may not be challenged later as unreasonable when the defendant has given counsel the reason to believe that pursuing those investigations would be fruitless. ***Strickland,*** 466 U.S. at 691. Counsel stated that he did not challenge the arrest because, after reviewing the police reports, he noted that the same officer made the arrest and the purchase of cocaine. Once counsel discovered during the trial that Beasley was seized outside the house, brought inside, and *then* arrested, he planned to bring a motion before the trial court challenging the arrest. The trial court heard his motions but denied the motion challenging the arrest, along with his second motion moving for a mistrial.

Therefore, counsel acted reasonably after discovering that Beasley's original account of what occurred was erroneous. Counsel properly conducted Beasley's defense based on the statements and information Beasley had given him. ***Strickland***, 466 U.S. at 691. Accordingly, counsel did not provide deficient performance.

B. Alleged Illegal Arrest Evidence.

Beasley next argues that Counsel was deficient for not seeking to suppress evidence obtained after the allegedly improper arrest. As we discussed above, however, counsel's actions at the time of trial were based on erroneous information given to him by Beasley. Once counsel discovered the erroneous arrest, he both challenged the arrest and moved for a mistrial. Counsel's actions were not deficient based upon the information given to him by Beasley.

C. Lineup Objections.

Beasley next argues that counsel's performance was deficient because he did not object to Officer Jackson's on-the-scene identification of Beasley as the person from whom he purchased cocaine two weeks earlier. Beasley mischaracterizes this identification. Beasley was not placed in a lineup for purposes of identification. He and the other individuals at the house were placed against the wall of the house, primarily for the protection of the arresting officers. Officer Jackson entered the house and then immediately recognized Beasley as the drug-seller from two weeks earlier. This was not a lineup "deliberately contrived by the police for purposes of obtaining an eyewitness identification of the defendant." ***State v. Marshall,*** 92 Wis.2d 101, 117, 284 N.W.2d 592, 599 (1979). Beasley has failed to show how his counsel was deficient by not objecting to this fortuitous identification.

D. In-court Identification Objections.

Finally, counsel did not perform deficiently by failing to object to Jackson's in-court identification of Beasley. An in-court identification will be admissible if the court deems it was based on an independent recollection. ***United States v. Crews***, 445 U.S. 463, 473 (1980); ***State v. Walker***, 154 Wis.2d 158, 188, 453 N.W.2d 127, 140 (1990). Jackson's in-court identification of Beasley was based on an independent recollection of their initial meeting at the original drug purchase; therefore, the in-court identification was reliable. ***Walker***, 154 Wis.2d at 188, 453 N.W.2d at 140. Accordingly, there was no reason for Beasley's counsel to object to the in-court identification.

In sum, after applying the two-pronged ***Strickland*** test, we agree with the trial court's determination that counsel acted reasonably and that his preparation of Beasley's defense was not deficient. Because we conclude that counsel's performance was not deficient, we need not address the prejudice prong of the test. ***Strickland***, 466 U.S. at 697.

III. NEW TRIAL CLAIM.

Beasley's final argument is that he is entitled to a new trial in the interests of justice. His argument is nothing more than a rehash of the issues already discussed. "We have found each of these arguments to be without substance. Adding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State,*** 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976). Thus, "[b]ecause we are not convinced that there has been a probable miscarriage of justice, that the defendant should not have been found guilty or that a new trial would lead to a different result," we affirm. ***State v. Johnson***, 135 Wis.2d 453, 467, 400 N.W.2d 502, 508 (Ct. App. 1986).

By the Court.—Judgment affirmed.

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