

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 26, 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(1), 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. 95-0181-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JIMMIE LEE FONDER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Racine County:

STEPHEN A. SIMANEK, Judge. *Affirmed.*

NETTESHEIM, J. Jimmie Lee Fonder appeals from a judgment of conviction for resisting or obstructing an officer pursuant to § 946.41(1), STATS. Fonder was sentenced as a habitual criminal pursuant to § 939.62, STATS. On appeal, Fonder contends that: (1) the evidence was insufficient to support the jury's guilty verdict, (2) his trial counsel was ineffective, and (3) the sentence represents a misuse of discretion. We reject all of Fonder's arguments. We affirm the judgment of conviction.

The relevant evidence at the trial established that on February 12, 1994, Racine police officer Robert Maciejewski received a dispatch reporting an assault complaint with a physical description of the suspect. Later, Maciejewski observed Fonder, who matched the description. Maciejewski questioned Fonder, who identified himself as Wendell Winnell, age thirty-four with a birthdate of May 5, 1958. When Maciejewski further questioned Fonder about his identity, Fonder supplied the names of Wendell Windy and, later, Wendell Windell with birthdates of May 6, 1958, and July 6, 1958. Based on these discrepancies, Maciejewski arrested Fonder for obstructing an officer.

At the police station, Fonder asked Maciejewski to take him to his girlfriend's home so that she could identify him. The police agreed and took Fonder to the address he provided. But once there, Fonder told the police that his girlfriend did not live there and that he did not know anyone in the area.

When the police and Fonder returned to the police station, Fonder next identified himself as Wendell Fonder. He also provided the name and telephone number of his girlfriend. Maciejewski called the girlfriend and he described Fonder's appearance to her. The girlfriend identified the person Maciejewski described as Jimmie Lee Fonder. Based on this information, the police obtained a file photograph of Jimmie Lee Fonder. The photo matched Fonder's appearance.

Against this evidence, Fonder testified that he provided Maciejewski with his correct name and date of birth. He also presented the

testimony of his girlfriend, who stated that Fonder is difficult to understand because he talks too fast.

The jury found Fonder guilty. He appeals.

SUFFICIENCY OF THE EVIDENCE

Fonder contends that the evidence is insufficient to support the jury's guilty verdict. We begin by addressing our standard of review for reviewing the determinations by a trier of fact and the sufficiency of the evidence.

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citation omitted).

Fonder first argues that the evidence fails to establish that he misrepresented his identify. In support, he cites his testimony that he provided the police with his correct name and date of birth. This testimony, however, was directly contrary to that of Maciejewski who testified that Fonder provided him with multiple identifications and dates of birth.

The resolution of this conflict was for the jury. Obviously, the jury chose to believe Maciejewski. The jury's choice to adopt Maciejewski's version is bolstered by the testimony of Fonder's girlfriend who confirmed that Maciejewski had called her in an effort to learn Fonder's true identity. If Fonder had previously accurately identified himself, there would appear to have been no need for Maciejewski to contact the girlfriend.

Fonder next appears to argue that his fast-paced manner of speech incorrectly led Maciejewski to conclude that he was providing false identification information. Again, this was a matter for the jury. We observe, however, that there is no similarity between Fonder's true name and the first three names (Wendell Winnell, Wendell Windy, and Wendell Windell) which Fonder supplied to Maciejewski. It strains credulity for us to conclude that Fonder's rapid recitation of his true name would sound like the names which Maciejewski stated Fonder provided.

Fonder further argues that even if he misrepresented his identify, his conduct did not obstruct Maciejewski. In support, Fonder points out that he ultimately provided the name and telephone number of his girlfriend—information which assisted the police in learning his true identity. However, we know of no law (and Fonder cites to none) which holds that such belated providing of collateral information which ultimately mitigates an act of

obstruction constitutes an absolute defense. At a minimum, this evidence presented a jury question.

Finally, Fonder contends that this case is governed by *State v. Hamilton*, 120 Wis.2d 532, 356 N.W.2d 169 (1984). There, Hamilton was questioned by a police officer as a possible witness to a shooting incident. *Id.* at 534, 356 N.W.2d at 170. Hamilton refused to identify himself or to provide any information regarding the event under investigation. *Id.* The supreme court held that Hamilton's conduct did not obstruct the investigating officer because other identifying information concerning the suspect and the event under inquiry was readily available from other available sources. *Id.* at 543-44, 356 N.W.2d at 175.

This is not a *Hamilton* case. First, unlike Hamilton, Fonder did not merely decline to identify himself. Instead, he misrepresented his identity. Second, and perhaps more importantly, Fonder's conduct compelled the police to pursue other means of obtaining his true identity, including the pointless effort of traveling to the girlfriend's alleged residence. These endeavors consumed valuable police time and effort. As such, Fonder's conduct hindered, delayed, impeded, frustrated or prevented the police in their investigation. *See id.* at 543, 356 N.W.2d at 175. This is the essence of the crime of obstructing an officer.

We hold that the evidence was sufficient to support the conviction.

INEFFECTIVE ASSISTANCE OF COUNSEL

Fonder argues that his trial counsel was ineffective for failing to object to the racial composition of the jury panel. However, the appellate record does not establish that Fonder ever brought a postconviction motion challenging the performance of his trial counsel. Such a motion is an essential prerequisite to appellate review of a claim that trial counsel was ineffective. *See State v. Machmer*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). From this, it logically follows that Fonder also failed to provide the testimony of his trial counsel. Such information is also an essential prerequisite to an appellate review of a claim that trial counsel was ineffective. *Id.* Without such a record, we cannot determine whether trial counsel's actions were the result of incompetence or deliberate trial strategy. *Id.*

We hold that Fonder has waived his right to appellate review of his ineffective assistance of counsel claim.

THE SENTENCE

Fonder contends that the sentence of thirty months was unduly harsh. This issue will not long detain us. Fonder brought a criminal record showing eighteen prior convictions to this sentencing. Some of these convictions represented violent offenses. Understandably, the trial court focused on this dismal history. The State asked for the maximum sentence of thirty-six months, a request consistent with the recommendation of the presentence report.

The trial court acknowledged that viewed in isolation, this crime was not serious. However, a sentencing is not conducted in a vacuum. The court properly and understandably looked to the entire history which Fonder brought to the sentencing proceeding. Viewed in that light, the court logically stated, "To not give prison would unduly depreciate the seriousness of this offense given the prior record"

Moreover, the trial court did not impose the maximum sentence as recommended by the presentence report and requested by the State. In addition, the court ordered that Fonder's sentence be served concurrently with a fourteen-month sentence imposed against Fonder as the result of his loss of probation in an unrelated matter.

We review a sentence under the misuse of discretion standard of review. *State v. Iglesias*, 185 Wis.2d 117, 127, 517 N.W.2d 175, 178, *cert. denied*, 513 U.S. ___, 115 S. Ct. 641 (1994). The weight to be given to each sentencing factor is left to the trial court's broad discretion. *Id.* at 128, 517 N.W.2d at 178.

Here, the trial court clearly weighed the options of the length and structure of Fonder's sentence. We hold that the trial court did not misuse its discretion.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.