

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 9, 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(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. 95-1580-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL DIRKES,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Daniel Dirkes appeals his two convictions for delivery of marijuana and cocaine, after a trial by jury. On appeal, he argues that his trial counsel provided ineffective representation by failing to investigate and subpoena two witnesses, Susan Olson and Brian Block. These witnesses allegedly would have corroborated Dirkes' and his wife's testimony. According to their testimony, the drug buyer and police informant, Larry Olson, admitted to them that he purchased drugs from Block, not Dirkes. Dirkes claims that the uncalled witnesses, Block and Susan Olson, would have corroborated Dirkes' and his wife's claims about Larry Olson's inconsistent statement. Susan Olson is Larry Olson's wife and Dirkes' wife's sister. Dirkes also claims that his trial

counsel should have obtained a copy of a memorandum by Block's investigator documenting another statement by Larry Olson about the Block drug transaction. We see no ineffective assistance of trial counsel and therefore affirm Dirkes' convictions.

Courts use a two part process to determine whether an accused received ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the accused must show that his trial counsel's performance was deficient. *Id.* Second, the accused must show that the deficient performance prejudiced his defense. *Id.* The second component requires a showing that trial counsel's errors were so serious they deprived the accused of a fair trial. *Id.* Postconviction courts measure counsel's performance against the standard of a reasonably competent attorney, an objective standard of reasonableness. *Id.* at 687-88. In order to show prejudice, an accused must demonstrate 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. For the following reasons, we are satisfied that none of Dirkes' claims meet the *Strickland* criteria.

Dirkes showed no ineffectiveness in his trial counsel's failure to call Block as a witness. Dirkes has never claimed that Block had any knowledge of Larry Olson's alleged inconsistent statement to the Dirkeses. It was Larry Olson's alleged disclaimer of having a drug transaction with Dirkes that was the focal point of Dirkes' challenge to his conviction. The fact that Larry Olson may have bought drugs from Block did not tend to show, by itself, that Larry Olson disclaimed a drug transaction with Dirkes. In fact, Larry Olson testified at trial that he bought drugs from both Block and Dirkes. Further, when called to the stand in the postconviction hearing, Block asserted the Fifth Amendment privilege. It is speculation to suggest that Block had any exculpatory testimony and that Block's nonappearance was prejudicial.

Dirkes also showed no ineffectiveness by his trial counsel's failure to call Susan Olson as a witness. Trial counsel explained that he expected Susan Olson to testify in support of her husband. In the absence of contrary evidence, this rationale reflected a reasonable trial strategy. Dirkes has provided no information suggesting that trial counsel had reason to believe before trial that Susan Olson would contradict her husband and testify that her husband had disclaimed having a drug transaction with Dirkes. Further, when called to the

stand at the postconviction hearing, Susan Olson furnished no exculpatory testimony and basically denied knowledge of the matter. Her nonappearance at trial was not prejudicial.

Dirkes similarly showed no ineffectiveness by his trial counsel's failure to obtain and introduce a memorandum written by an investigator who represented Block. According to the memorandum, Larry Olson told the investigator that he purchased drugs from Block on February 12, 1993. This is the same date Larry Olson testified he purchased drugs from Dirkes. There is no evidence that Block overheard Larry Olson's disclaimer of a drug transaction with Dirkes. Moreover, the memorandum failed to show that Larry Olson purchased drugs exclusively from Block in February 1993. The investigator did not report that Larry Olson denied purchasing drugs from Dirkes. The investigator's memorandum was therefore not critical to Dirkes' defense. Larry Olson's statement referred only to Block's marijuana sales. It did not mention cocaine and therefore did not repudiate his testimony on that point.

Last, even if we assume *arguendo* that Block, Susan Olson, and the investigator's memorandum would have furnished relevant, admissible evidence on the issue of Larry Olson's alleged inconsistent statement, this evidence would not have met the *Strickland* prejudice prong. This evidence was cumulative to other evidence at trial. Dirkes' trial counsel cross-examined Larry Olson about his alleged inconsistent statement and the alleged purchase from Block. Larry Olson denied making the statement. He also testified that he purchased drugs from both Dirkes and Block on different occasions. Moreover, both Dirkes and his wife testified about Larry Olson's prior inconsistent statement. Their testimony and Larry Olson's presented the issue to the jury and rendered Susan Olson's and Block's testimony nonessential, in terms of the *Strickland* prejudice prong. In sum, Dirkes has not demonstrated that his trial counsel furnished him ineffective representation.

By the Court.— Judgment and order affirmed.

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