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. 95-2129

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. MINNIECHESKE,

Defendant-Appellant.

APPEAL from an order[1] of the circuit court for Shawano County: RAYMOND W. THUMS, Judge. *Affirmed*.

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

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[1] The notice of appeal states that Minniecheske also appeals the judgment of conviction. The judgment of conviction has already been affirmed. Following the filing of a petition for a writ of habeas corpus in this court, we ordered the trial court to entertain an additional motion under § 974.06, STATS. This appeal from the order denying that motion is not an appeal under RULE 809.30(2)(j), STATS., and the judgment of conviction is not reviewed in this appeal.

PER CURIAM. Donald Minniecheske appeals an order denying his postconviction motion in which he alleged that his trial counsel was ineffective for: (1) failing to conduct an individual voir dire with five of the jurors who stated they knew Minniecheske; and (2) for failing to impeach a witness, Richard Kauffman, on his prior inconsistent statements, his previous conviction for perjury, a statement made earlier in the trial that he had been a liar all his life and an admission at the preliminary hearing that he stole the tractors Minniecheske was charged with retaining and transferring. We reject these arguments and affirm the order.

To establish ineffective assistance of trial counsel, Minniecheske must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Our assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time. ***Id***. at 689. Judicial scrutiny of counsel's performance must be highly deferential, and Minniecheske must overcome the presumption that the challenged action might be considered sound trial strategy. ***Id***. at 689. To establish prejudice, Minniecheske must show that his counsel's errors "so upset the adversary of balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374 (1986). He must prove that counsel's deficient performance actually had an adverse effect on the defense, and not just some conceivable effect on the outcome. ***Strickland***, 466 U.S. at 693.

Minniecheske has not established either deficient performance or prejudice resulting from his counsel's failure to individually question jurors who stated that they knew Minniecheske. Each of the five jurors indicated that their knowledge of or familiarity with Minniecheske or the case would not prevent them from sitting as jurors, from being impartial or from deciding the case based on the facts presented at trial. A fair trial does not require that the jurors have absolutely no knowledge of the case. *See* ***Hammill v. State***, 89 Wis.2d 404, 414, 278 N.W.2d 821, 825 (1979). In light of the jurors' assurances that their knowledge of or familiarity with Minniecheske would not influence their verdict, it is pure speculation to conclude that additional questioning would have uncovered bias or prejudgment.

Minniecheske has also failed to establish that he was prejudiced from his counsel's limited cross-examination of Kauffman. Minniecheske's trial counsel testified that he limited his cross-examination because he believed Kauffman had impeached himself in his direct testimony and that he thought it was more effective to have Kauffman impeach himself than in response to defense questions. This decision was a strategic or tactical choice that cannot be second guessed on appeal. ***Strickland***, 466 U.S. at 690.

The record supports counsel's assertion that Kauffman's testimony was impeached without intensive questioning from Minniecheske's attorney. On direct examination, Kauffman testified that he had been living in Waupun, that he had been convicted of "about" five crimes, that he and Minniecheske were "tax evading buddies," that he had been in jail for falsifying a statement to wear a gun, that he was removed from the Life Science Church board while in jail and that he "went to the Holiday Inn for nine months for falsifying a statement." On cross-examination, Kauffman admitted to legal disputes he had with Minniecheske, prior inconsistent statements he had made, and his own involvement with the tractors and with various people involved. On cross-examination by a co-defendant's counsel, he was cross-examined about many of the details of his testimony and his disagreements with Minniecheske about money. This evidence supports counsel's trial strategy of allowing Kauffman to primarily impeach himself. The performance of Minniecheske's trial counsel does not cause this court to lack confidence in the jury's verdict. ***Strickland***, 466 U.S. at 694. Effective representation is not equated with acquittal. ***State v. Koller***, 87 Wis.2d 253, 263, 274 N.W.2d 651, 657 (1979).

By the Court.—Order affirmed.

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