

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 21, 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. 95-2821-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONNIE LEE LACY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Donnie Lee Lacy appeals from a judgment of conviction for six misdemeanor counts, including three counts of bail jumping, and from an order denying postconviction relief.

Lacy claims he was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution and article I, section 7 of the Wisconsin Constitution for two reasons: trial counsel failed to move to dismiss the bail jumping charges even though a stipulation relating to those charges was not read to the jury until the jury instructions were given, and trial

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

counsel failed to move to dismiss the bail jumping charges at the conclusion of evidence on the grounds that the stipulation of the parties concerning the bail conditions constituted insufficient proof of Lacy's knowledge of the bail conditions.

Because Lacy's trial counsel exercised reasonable trial strategy in not moving to dismiss the bail jumping charges, and because Lacy was not prejudiced by his trial counsel's alleged failure to move to dismiss the bail jumping charges for insufficient evidence, this court affirms.

I. BACKGROUND

During 1993 Lacy was arrested for allegedly committing five misdemeanors. The charges stemmed from three separate incidents and, as a result, Lacy executed three separate personal recognizance bonds so that he could be released on bail. It is undisputed that a condition of the bonds was that he would not commit any crimes. On February 10, 1994, Lacy was arrested and charged with battery and, as a consequence, was also charged with three counts of bail jumping. The consolidated cases were tried March 3 through March 8, 1995.

Prior to taking testimony, the trial court attempted to obtain a written stipulation regarding the bail bond violations. Lacy's counsel agreed to stipulate that one of the conditions of the bail bonds was that Lacy refrain from committing any crimes. However, he would not stipulate that Lacy had knowledge of this condition. Although the parties agreed to the conditions of bail, there was disagreement as to how the stipulation would be worded. As a result, the trial court assumed the task of drafting a stipulation to be approved by both parties, which would be read to the jury before the State rested its case. The trial court also took judicial notice of the bail bond documents.

During its opening argument, the State mentioned that a stipulation existed relating to the conditions of the bail bonds, and that the jury would hear about it. The stipulation, however, was not made part of the record during the State's case. After the State rested, Lacy moved to dismiss the other charges but did not move to dismiss the bail jumping counts.

Included in the trial court's instructions to the jury was the stipulation that Lacy, while out on bond, was not to commit any new crimes. Lacy's counsel did not object to the reading of the stipulation. After the instructions were read, Lacy's counsel moved to dismiss the bail jumping charges essentially on the basis of insufficiency of evidence. The trial court denied the motion. The jury convicted Lacy of disorderly conduct, two counts of battery and three counts of bail jumping. Lacy's counsel moved for judgment notwithstanding the verdict, arguing that the evidence of Lacy's knowledge of the conditions of bail based on the stipulation that Lacy signed bond documents, was insufficient. The motion was denied. Next Lacy moved for a new trial based on ineffective assistance of trial counsel. After a hearing, the trial court denied the motion. Lacy now appeals.

II. DISCUSSION

A. Failure to Move to Dismiss the Bail Jumping Charges.

Lacy claims first that his trial counsel was ineffective when he failed to move to dismiss the bail jumping charges after the State neglected to inform the jury of the stipulation relating to those charges during its case. He argues that since the stipulation was not entered into evidence, there was no evidence properly before the jury upon which convictions could be based. He further argues that, if his trial counsel would have moved to dismiss, the trial court would have had to dismiss the charges.

Standard of Review

There is a two-part test for determining whether a criminal defendant's right to effective assistance of counsel has been denied. First, the defendant must show that counsel's performance was deficient, and second, the defendant must show that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because deficient performance and prejudice from that performance must both be shown by a defendant to prevail on an ineffectiveness claim, failure to meet either test is fatal to such a claim. *Id.* There is no set order of analysis in deciding the claim. *Id.* The appropriate measure of attorney performance is reasonableness, *State*

v. Brooks, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985), considering all the circumstances. *Strickland* at 687-88. "A defendant is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation." *State v. Rock*, 92 Wis.2d 554, 560, 285 N.W.2d 739, 742 (1979). Thus, a mere contention that defense counsel should have conducted the defense differently does not establish that counsel was ineffective. *Id.* The question is whether there is a basis in reason for trial counsel's actions.

Analysis

Lacy has failed to establish that his trial counsel's performance was deficient. At the Machner hearing, trial counsel, when asked why he did not move to dismiss at the close of the State's case, offered the following relevant explanation:

But I have a recollection to the effect that I did catch that. That the stipulation was never entered as an exhibit formally prior to closing arguments.

And I believe we were sitting at the same table you're at now, and I turned to Donny [sic], and I said ... that we have -- we could object to it, but I recommended to him that we don't without going into the reasons why.

And my recollections as he [sic] said he was going to trust my judgment And here's the complicated reasons why I thought it would not be a good idea to try to make that move.

In the first place there was a stipulation between the parties that was worked out by the judge. The judge actually prepared the document that was the actual stipulation for me to stipulate to and then to turn around and ... basically double cross the Court and the DA on the stipulation.

I wasn't sure if that was going to work. I felt that I couldn't be positive that the judge would in fact grant my motion to dismiss for lack of a formal motion by the DA to enter the stipulation into evidence.

I couldn't be certain that we would be successful, but I was relatively certain that this would -- this being somewhat of a personal attack on the DA's ability to conduct a trial ... would do nothing for the relationship between the parties that was going on during this trial.

And I felt ... it was part of my job to prepare for potential conviction in this case and not do anything that might cause the DA to become reactionary.

....

And I felt we needed to maintain a professional good rapport between the parties ... for a couple of reasons. One, Donny [sic] could have been convicted of the other charges and sometime we were going to have to deal with that very same DA on potential recommendations after the conviction.

All during the course of this trial ... Mr. Griffin and I had off the record discussions about what might come of the case afterward and even discussions concerning settling the case in the middle of the trial.

And all during that time Mr. Griffin never took a nasty attitude toward me or toward Mr. Lacy and although he didn't give me an indication of what his eventual recommendation would be if he was convicted of any charges, the clear impression I got is Mr. Griffin was not going to get even so to speak for taking this case to trial.

....

Furthermore, there were two other different open cases that were going to be going to trial before this Court with Mr. Lacy....

And during discussions of the case, we also discussed what was going to happen to those two other different cases, and the impression ... was that we would be giving very favorable settlements on those ... after our trial was over.

So I was not only worrying about this trial, I was worrying about two other trials

....

And for all those reasons, I believe I turned to Donny [sic] and told him about this and said let's take a pass on this, and he went along with me.

....

As it turned out, that was right because the two cases that I felt ... that they had good cases on him. The District Attorney on the date of sentencing moved to and the Court did move to dismiss those two cases.

So in a sense, we were rewarded by not trying to show up the DA.

From this review, it is obvious trial counsel engaged in an exercise of professional judgment, balancing the advantages versus the disadvantages of making a motion, and weighed alternative courses of action in terms of how his professional action would affect his client. *State v. Felton*, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). He knew he had entered into a stipulation that Lacy was out on bail relating to some other charges and, as a condition of bail, Lacy was not to commit any other crimes. All that remained was for the trial court to reduce the stipulation to an acceptable form and read it to the jury. In the meantime, the District Attorney, in his opening statement, told the jury "... there's a stipulation in this case. You will hear about it," and then told the jury basically the contents of the stipulation. Trial counsel recognized that neither

the District Attorney nor the trial court had officially entered the stipulation in the record, but strategically chose not to move to dismiss on this basis because he felt objecting would not be beneficial, and would be viewed as a violation of the commitment he had made to enter into the stipulation. Trial counsel also felt that making the motion under these circumstances would not only have no positive impact on his client's case, but would actually have a negative effect on the eventual sentencing consequences facing his client.

Additionally, the only challenge counsel was asserting in regard to the bail jumping charges was that Lacy lacked knowledge about the conditions of bail, which was not part of the stipulation. Thus, this court cannot conclude that counsel's stratagem was without well founded reason and good lawyer common sense.

As additional support for his ineffective assistance of counsel claim, Lacy points to his counsel's failure to move for dismissal at the close of all evidence and his failure to object to the reading of the stipulation when the trial court instructed the jury. Although these assertions were only briefly alluded to and not developed or examined at the *Machner* hearing, most of the reasons trial counsel gave for not moving to dismiss at the close of the State's case apply here with equal persuasive force. The trial court inferentially found that trial counsel had good reason not to breach the stipulation. It further found that the contents of the stipulation were already in the record and, therefore, its actual reading to the jury was a matter of administrative formality. This determination is supported by the fact noted earlier that the court had taken judicial notice of the bail documents and their contents, which was the essence of the formalized stipulation. This finding is not clearly erroneous and, therefore, this court will not upset it. *State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985); § 805.17(2), STATS. Moreover, "[T]he conduct of a trial is largely within the discretion of the trial court and its determinations will not be disturbed unless the rights of the parties have been prejudiced." *Dutcher v. Phoenix Ins. Co.*, 37 Wis.2d 591, 606, 155 N.W.2d 609, 617 (1968); § 906.11(1) STATS. This court agrees with the trial court's conclusion that Lacy was not prejudiced because all parties agreed to enter into the stipulation and under the unique circumstances of this case, the actual timing of the stipulation's introduction was left to the trial court.

B. Failure to Dismiss for Insufficient Evidence.

Finally, Lacy claims, assuming arguendo, that the stipulation was properly before the jury, he was denied his right under both constitutions to effective assistance of counsel because his counsel failed to move to dismiss on the grounds that the stipulation in and of itself was insufficient proof of each count of bail jumping.

Standard of Review

In addition to the standards of review applied to Lucy's first claim of ineffective assistance of counsel, a reviewing court is free to consider the prejudice component first in the two-part test and need not deal with the performance component if the defendant makes an insufficient showing of prejudice.

Analysis

Lacy has failed to show that he was prejudiced by his counsel's claimed failure to move for dismissal for lack of sufficient evidence. From a procedural standpoint, after the jury was instructed, counsel did move to dismiss the bail jumping charges. Admittedly, the form of the motion was less than artful. Nevertheless, counsel requested "[w]e ought to kick those three charges." Then, referring to the activity that triggered the three charges, exclaimed "my client at the time could not have intentionally tried to violate his conditions of his release." The trial court summarily denied the motion. This court deems the motion to have been substantively a motion to dismiss for insufficient evidence.

After the jury returned guilty verdicts on the three bail jumping charges, counsel moved for judgment notwithstanding the verdicts. He argued that the evidence of Lacy's knowledge of the conditions of bail, based on the stipulation that he signed bail documents, was insufficient. In responding to the motion, the trial court first denied the motion on the basis of waiver, but then considered it on the merits. From a review of the record, this court agrees that the trial court's analysis was correct. It noted that Lacy had signed a bail document agreeing not to commit any new crimes as a condition of release. When this evidence is considered in a light most favorable to conviction, this

court cannot conclude that it is so insufficient in probative value and force that no trier of fact acting reasonably could be convinced beyond a reasonable doubt that “knowledge” of the conditions had been proven. *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). Thus, any deficiency on the part of trial counsel in the manner in which it posited motions to dismiss for insufficient evidence was not prejudicial. Accordingly, Lacy's ineffective assistance claim fails.

For the reasons stated, this court affirms.

By the Court. – Judgment and order affirmed.

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