

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 18, 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. 95-3122-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**RICHARD R. BURCH,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Richard R. Burch appeals from a judgment of conviction for delivering less than ten grams of cocaine, as a second offender, contrary to §§ 161.41 (1)(c) and 161.48, STATS., 1991-92, and from an order denying his motions for postconviction relief. The issues are: (1) whether the trial court erred in concluding that Burch was not denied effective assistance of counsel at trial; and (2) whether the trial court erred in denying Burch's motion

for a new trial on grounds of newly-discovered evidence. We conclude that Burch's counsel provided effective assistance and that the trial court did not err in denying Burch's motion for a new trial. We therefore affirm.

The Rock County Metro Narcotics Unit, in cooperation with an informant, Anthony Bates, made a controlled purchase of cocaine from Burch.<sup>1</sup> Bates was wearing a "wire" which transmitted his conversations with Burch back to Narcotics Unit Officer Scott Wasemiller so that Wasemiller could hear and record the conversations. Some months later, after Bates assisted the Narcotics Unit with numerous controlled purchases, Burch was arrested for the sale of cocaine to Bates.

At trial, Bates testified that he had purchased drugs from Burch. In addition, Wasemiller testified about what he heard via the "wire." The jury found Burch guilty.

After the conviction, Burch filed a motion for a new trial on the grounds of newly-discovered evidence. The newly-discovered evidence was an unsigned letter to "Randy/Bank" offering to help "Randy/Bank" and "Rico" (Richard Burch) in their cases if they paid him money.<sup>2</sup> Burch's trial counsel obtained the letter from an assistant district attorney following the trial, but prior to sentencing. The letter had originally been sent to Randy Hughes, a defendant in another drug case, who turned the letter over to his counsel, Attorney Daniel. Bates did not testify at the hearing on the newly-discovered evidence, but the trial court relied upon the testimony of Bates regarding the same letter in another drug case. Bates admitted in that case that he had someone write the letter for him. The trial court denied Burch's motion, ruling that the evidence was merely cumulative to the testimony adduced by Attorney Nott attacking the credibility of Bates, and that it would not change the result of the trial.

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<sup>1</sup> Burch is known on the street as "Rico."

<sup>2</sup> In an affidavit filed in support of the motion by Burch's trial counsel, Attorney Nott, Nott states that "Bank" is Randy Hughes, a defendant in another drug case.

Burch also filed a postconviction motion alleging ineffective assistance of counsel. After an evidentiary hearing at which trial counsel testified, the court denied this motion. The court concluded that even if Burch's trial counsel's performance was deficient, Burch had not been prejudiced.

In evaluating whether a defendant has been deprived of the effective assistance of trial counsel, this court applies the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* The defendant has the burden to show prejudice. *State v. Sanchez*, \_\_\_ Wis.2d \_\_\_, \_\_\_, 548 N.W.2d 69, 70 (1996).

An ineffective assistance of counsel claim presents a mixed question of law and fact. *State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). The trial court's findings of fact will not be disturbed unless clearly erroneous. *Id.* at 634, 369 N.W.2d at 714-15. However, the determinations of whether counsel's performance was deficient and whether defendant was prejudiced are questions of law, which we review de novo. *Id.* The reviewing court may dispose of an ineffective assistance claim on either ground. See *State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

Burch argues that trial counsel was deficient because he did not cross-examine Wasemiller with the taped wire conversations. At the postconviction hearing, Burch pointed out some discrepancies between the officer's testimony and the taped wire conversations.

Trial counsel testified at the postconviction hearing that he discussed playing the tape with Burch. Trial counsel testified that he played the tape for his client and urged Burch to allow him to use the tape at trial to impeach Wasemiller. However, according to trial counsel, Burch refused to let him play the tape at trial because Burch was afraid the jury would identify his voice on the tape. Burch did not testify at the postconviction hearing.

Although the court did not determine whether trial counsel's performance was deficient, its discussion of counsel's performance shows that it implicitly accepted counsel's testimony as credible.

We conclude that counsel's decision to abide by his client's desire not to play the tape does not constitute deficient performance. *See* SCR 20:1.2(a) (a lawyer shall abide by a client's decisions concerning the objectives of representation).

Burch also argues that the trial court erred in denying his motion for a new trial on grounds of newly-discovered evidence, namely, the letter written by or for Bates.

Whether to grant a motion for a new trial is within the discretion of the trial court. *State v. Kaster*, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989). We do not reverse a discretionary determination if the court has considered the relevant facts, applied the proper law and, using a rational process, reached a conclusion a reasonable judge could reach. *Rodak v. Rodak*, 150 Wis.2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989). The moving party must prove that: (1) the evidence came to the moving party's notice after trial; (2) the moving party has not been negligent in seeking to discover it; (3) the evidence is material; (4) the evidence is not merely cumulative; and (5) it is reasonably probable that a new trial will reach a different result. *Kaster*, 148 Wis.2d at 801, 436 N.W.2d at 896. Each element must be satisfied to entitle the moving party to a new trial. *Id.*

The letter written by or for Bates suggested that, in exchange for money, he might testify falsely in order to clear Burch and defendants in other criminal cases of drug charges. The trial court decided that the first three criteria for newly-discovered evidence were met. However, the court determined that this evidence was cumulative and would not change the result of the case.

We conclude that the trial court properly exercised its discretion. The informant's testimony had already been impeached by testimony on his criminal record and on agreements he had with the State on charges pending

against him in exchange for his testimony. The trial court could properly conclude that the evidence was cumulative. Furthermore, evidence that merely impeaches the credibility of a witness does not warrant a new trial on this ground alone. *Greer v. State*, 40 Wis.2d 72, 78, 161 N.W.2d 255, 258 (1968), *cert. denied*, 393 U.S. 1122 (1969).

*By the Court.* – Judgment and order affirmed.

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