

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 4, 1997

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. 95-3224-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

George G. Kidd,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. George G. Kidd appeals from a judgment of conviction entered after a jury found him guilty of first-degree intentional homicide, while armed, as party to a crime, contrary to §§ 940.01(1), 939.63, and 939.05, STATS. He also appeals from an order denying his postconviction motion, which alleged that he received ineffective assistance of trial counsel. He claims that his trial counsel provided ineffective assistance by failing to impeach

one of the State's identification witnesses, Samuel Johnson. Because Kidd did not receive ineffective assistance, we affirm.

I. BACKGROUND

On December 18, 1993, James Anderson was murdered. Two days later, Johnson unequivocally identified Kidd from a photo array as the individual who committed the murder. Kidd was arrested and charged with first-degree murder. In January 1994, Johnson was charged with two misdemeanor offenses, battery and driving after suspension. In June, Johnson pled guilty to the battery charge and was placed on probation. The driving after suspension charge was dismissed.

The day after he entered his plea to the misdemeanor offense, Johnson testified at Kidd's homicide trial. Kidd was convicted. Kidd filed a postconviction motion alleging that his trial counsel was ineffective for failing to impeach Johnson on the basis that he was testifying for the State in order to receive favorable treatment regarding the misdemeanor offenses. The trial court held a *Machmer*¹ hearing. Trial counsel testified that he did not impeach Johnson regarding the misdemeanor charges because in his opinion the jury would find this alleged bias "laughable." The trial court denied Kidd's motion. Kidd now appeals.

II. DISCUSSION

Kidd claims that he received ineffective assistance of trial counsel. Specifically, he argues that his trial counsel should have questioned Johnson regarding his motivation for testifying. Kidd argues that because Johnson was also being prosecuted for the misdemeanor offenses, the jury could have inferred that Johnson was testifying for the State in order to receive some favorable consideration with respect to the charges pending against him. We reject Kidd's claim.

¹ See *State v. Machmer*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The United States Supreme Court set out the two-part test for ineffective assistance of counsel under the Sixth Amendment in *Strickland v. Washington*, 466 U.S. 668 (1984). The first prong of *Strickland* requires that the defendant show that counsel's performance was deficient. *Id.*, 466 U.S. at 687. This demonstration must be accomplished against the "strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The second *Strickland* prong requires that the defendant show that counsel's errors were serious enough to render the resulting conviction unreliable. *Strickland*, 466 U.S. at 687. In reviewing the trial court's decision, we accept its findings of fact, its "underlying findings of what happened," unless they are clearly erroneous, while reviewing "[t]he ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. *Johnson*, 153 Wis.2d at 127-28, 449 N.W.2d at 848 (citations omitted).

In assessing Kidd's claim that his counsel was ineffective, we need not address both the deficient-performance and prejudice components if Kidd cannot make a sufficient showing on one. See *Strickland*, 466 U.S. at 697. Because Kidd cannot make a sufficient showing on the prejudice prong, we need not address the deficient-performance prong of the *Strickland* test. We address only the prejudice prong. To prove prejudice, Kidd must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* As recently restated, the "prejudice" component of *Strickland* "focusses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 504 U.S. 364, 372 (1993). Stated another way: "In order to show prejudice, [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (quoting *Strickland*, 466 U.S. at 694).

In reviewing the record before us, we conclude that Kidd cannot sufficiently demonstrate that counsel's failure to impeach Johnson was prejudicial. Our conclusion is based on several factors. First, according to the record, Johnson identified Kidd before he was charged with the misdemeanor offenses, before he was prosecuted and before he was placed on probation. Because Johnson made the original identification before any potential bias

arose, the impeachment Kidd requests would have been of marginal value. Second, the prosecutor in Kidd's case refused to provide any consideration to Johnson and Johnson was told this prior to giving testimony. Third, Johnson was sentenced on the misdemeanor charge before he testified as a witness in Kidd's case. In other words, Johnson's prosecution had concluded, he was not offered any consideration for his testimony and at the time he testified, he was not "under the State's thumb." Fourth, another eyewitness identified Kidd as the person who committed the homicide. Finally, Johnson was impeached with evidence that he had twice been convicted of a crime. The jury, therefore, was provided with information that Johnson had broken the law, and could fairly assess his credibility. Based on all of the foregoing, trial counsel's failure to impeach Johnson with the facts that he was being prosecuted by the State and that Johnson had at one time encouraged his attorney to seek favorable consideration from the State, is not sufficient to undermine confidence in the outcome. Even if this impeachment had occurred, the result of the proceeding would not have been different.²

By the Court. – Judgment and order affirmed.

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

² Kidd also argues that trial counsel was ineffective for failing to impeach Johnson with evidence that Johnson lied about attempting to elicit favorable consideration from the State in exchange for his testimony. At the postconviction hearing in the instant case, Johnson testified that he never asked for such consideration. Johnson's attorney testified that Johnson did raise this issue but when counsel mentioned it to the prosecutor, the prosecutor refused to offer any favorable consideration in exchange for Johnson's testimony. Because this did not occur until the postconviction hearing, we will not speculate as to whether Johnson would have lied about this issue at trial.