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You are hereby notified that the Court has entered the following opinion and order:

2015AP249-CR State of Wisconsin v. Gary A. Amaya (L.C. # 2009CF2388)

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Gary A. Amaya was convicted of one count of conspiracy to deliver cocaine (more than one gram and less than five grams) and four counts of possession of cocaine, all as a second or subsequent offense. *See* WIS. STAT. §§ 961.41(1)(cm)1r., 939.31, 961.41(3g)(c), and 961.48 (2007-08).¹ On appeal, Amaya argues that the circuit court erred when it refused to allow Amaya's attorney to withdraw. Amaya also raises several claims of ineffective assistance of trial

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

counsel. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Background

In 2006, police began an investigation into Amaya's involvement in cocaine trafficking. Authorities placed a GPS tracker on Amaya's car. They obtained a court-ordered pen register and trap and trace for a cell phone used by Amaya. A federal search warrant, aimed at Amaya's text messages, was obtained. Lastly, a wiretap was authorized for Amaya's cell phone. Ultimately, Amaya was arrested and charged with conspiracy to deliver more than fifteen grams but not more than forty grams of cocaine. For ease of reference, we will refer to that first case as "the 2007 case."

Amaya was initially represented by retained counsel in the 2007 case. That attorney was permitted to withdraw after Amaya ran out of resources to pay him. Thereafter, Amaya was represented by appointed counsel. His second attorney withdrew after discovering a conflict. The next four attorneys were permitted to withdraw due to irreconcilable differences and a breakdown in communication. Amaya's seventh attorney filed and litigated a suppression motion in June and July, 2009. On July 17, 2009, the State moved to dismiss the case without prejudice.

On August 26, 2009, the State filed a new criminal complaint, charging Amaya with one count of conspiracy to deliver a smaller amount of cocaine and six counts of possession of cocaine, all as a second or subsequent offense. Shortly after the complaint was filed, Amaya fled to El Salvador. Amaya was apprehended fifteen months later. Because of the delay, a new attorney, Anthony Brown, was appointed. Brown soon moved to withdraw, citing a "breakdown

in communication.” The State objected, citing the history of withdrawals for that same reason over the course of the two cases. After exploring the nature of Amaya’s dissatisfaction with his attorney, the circuit court denied the motion to withdraw.

Amaya filed a suppression motion, raising the same arguments that were litigated in the 2007 case. After reviewing the transcripts from the suppression hearing held in the 2007 case, the circuit court denied the motion. Amaya waived his right to a jury trial and a trial to the court was held. The court found Amaya guilty of the conspiracy count, guilty of four counts of possession of cocaine, and not guilty of two counts of possession of cocaine.²

Representing himself, Amaya filed a postconviction motion challenging the circuit court’s denial of his request for new counsel and raising several claims of ineffective assistance of trial counsel. The State filed a comprehensive brief opposing the motion. The circuit court’s order denied Amaya’s motion, “adopt[ing] *in toto*” the State’s “exceptional reply” to the motion. Amaya appeals. Further facts will be stated below as necessary.

Denial of New Counsel

Amaya argues that the circuit court erred when it denied his request for a new attorney. Amaya describes his request as his only request for a new attorney in this case. Amaya argues that Brown “never contacted” him in the nine months before trial and that, therefore, his representation was “unethical and unconstitutional.”

² Amaya stipulated that he had a prior conviction within the meaning of WIS. STAT. § 961.48.

When a defendant represented by appointed counsel seeks a new attorney because of an alleged breakdown in communication, the circuit court must consider two factors: (1) whether the request for a new lawyer is timely, and (2) whether the alleged conflict is so great that it likely results in a total lack of communication that prevents an adequate defense and frustrates a fair presentation of the case. *See State v. Boyd*, 2011 WI App 25, ¶8, 331 Wis. 2d 697, 797 N.W.2d 546. “Whether trial counsel should be relieved and a new attorney appointed is a matter within the circuit court’s discretion.” *State v. Jones*, 2010 WI 72, ¶23, 326 Wis. 2d 380, 797 N.W.2d 378. This court will sustain the circuit court’s decision if the court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Id.* (quoted source omitted). This court independently reviews whether Amaya’s constitutional rights have been violated. *See id.*

Initially, we reject Amaya’s assertion that the circuit court could not consider the history of representation in the 2007 case. Both cases stem from the same investigation and rely on the same evidence.³ The State moved to dismiss the 2007 case after the circuit court indicated, before trial, that the communications relied on by the State likely did not constitute sufficient evidence of the alleged conspiracy. The 2007 case was dismissed without prejudice. The State then changed its theory of prosecution, and within six weeks, charged Amaya with six counts of possession of cocaine and one count of conspiracy to deliver a smaller amount of cocaine. Given the factual and legal interrelationship of the two cases, as well as the temporal proximity of the cases, we see no reason why the circuit court could not view Amaya’s representation as a single

³ Generally, the State relied on the same facts in both matters and Amaya raised the same challenges to the admissibility of the wiretap evidence.

continuum. Therefore, the circuit court did not err when it considered Brown to be the fifth attorney that Amaya sought to discharge because of a breakdown in communication.

The State does not argue that Amaya's request for a new attorney was not timely raised. *See Boyd*, 331 Wis. 2d 697, ¶8 (request for a new attorney is timely if made when the "total lack of communication" becomes evident (quoted source omitted)). Therefore, we turn our attention to whether the conflict between Amaya and his attorney "was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *Id.* (quoted source omitted). "Mere disagreement over strategy" does not necessitate granting a motion for a new attorney. *Id.*, ¶13. To require a new attorney, the record must be such that counsel's continued representation is "untenable." *Id.* (quoted source omitted).

At the hearing on Amaya's motion, Brown informed the circuit court that he had communicated with Amaya and was "willing to explore issues ... and discuss" the case with him. Brown stated, however, he was "very uncomfortable" because Amaya thought he was not competent. The circuit court observed that the history of the two cases suggested that Amaya "creat[ed] ... an environment in which lawyers don't want to represent him." The court advised Amaya that an attorney's job was to "express ... opinion[s]" about the case and consider "possible defenses." The court noted that Brown was telling Amaya his views and analysis of the case, and Amaya was disagreeing with them, but that the disagreement did not support a motion to withdraw. Amaya strenuously argued that the texts and wiretap evidence should be suppressed, and Brown informed the court that he had filed a suppression motion that was pending before the court. The court concluded its inquiry with the following remarks:

[A]t this point, the Court is satisfied that there isn't a complete breakdown of communication. It's a misunderstanding of Mr.

Amaya at this point [about] what an attorney is. How you raise certain motions. How you make those arguments. And under the circumstances, the Court finds there isn't a complete breakdown of communication. That Mr. Brown intends to and wants to present the defenses that are in the best interest of Mr. Amaya.

The court then denied the motion.

The record shows that the circuit court considered whether the conflict between Amaya and Brown was likely to “prevent[] an adequate defense” and “frustrate[] a fair presentation of the case.” *Boyd*, 331 Wis. 2d 697, ¶8 (quoted source omitted). The circuit court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Jones*, 326 Wis. 2d 380, ¶23 (quoted source omitted). The circuit court did not err when it considered Amaya’s history of poor communication with counsel. The court properly exercised its discretion when it denied Amaya’s request for a new attorney.

Ineffective Assistance of Counsel

Amaya raises several challenges to the effectiveness of Brown’s representation. We first set forth the general legal principles.

To succeed on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s representation was deficient and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the defendant is unable to show one prong, the court need not address the other. *Id.* at 697.

In order to establish deficient performance, a defendant must show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. A defendant must establish that counsel’s conduct falls

below an objective standard of reasonableness. *Id.* at 687-88; *State v. Thiel*, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. However, “every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The objective standard of reasonableness encompasses a wide range of professionally competent assistance. *See State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). We presume that counsel’s performance was satisfactory; we do not look to what would have been ideal, but rather to what amounts to reasonably effective representation. *See id.*

To prove prejudice, “the 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.’” *Thiel*, 264 Wis. 2d 571, ¶20 (quoting *Strickland*, 466 U.S. at 694).

We now review Amaya’s claims. As the State did in its brief, we will group Amaya’s claims when appropriate.

A. Text messages

Amaya faults his attorney for not arguing that the seizure of text messages pursuant to the federal search warrant and the inclusion of text messages in the criminal complaint violated his constitutional rights. This argument fails for two reasons. First, counsel did challenge the constitutionality of the seizure of the text messages in the suppression motion. Second, and more

importantly, the State did not introduce any of the text messages at trial and, therefore, the result of the proceeding was not affected by counsel's performance.⁴ Amaya cannot show that counsel was ineffective. See *Strickland*, 466 U.S. at 694 (to prove prejudice, the 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).

B. The wiretap application, evidence, and the failure to seal text messages

Amaya raises several claims related to the wiretap. First, Amaya argues that counsel was ineffective because: (1) he did not object to the inclusion of text messages in the application for a wiretap; (2) he did not object to the State's failure to seal seized text messages; and (3) he did not argue that the failure to seal tainted the entire wiretap.

The record disproves Amaya's claims. Amaya's counsel in the 2007 case litigated a comprehensive motion, seeking the suppression of "all evidence derived from electronic surveillance ... [including] all evidence derived from a trap and trace, and ... from wiretap surveillance." A multi-day evidentiary hearing was held. Amaya's counsel in this case filed a similar motion and the parties relied on the record made in the 2007 case. Amaya's counsel raised the arguments that Amaya now claims he did not. The fact that the court ruled against Amaya does not mean that counsel was ineffective.⁵ See *State v. Teynor*, 141 Wis. 2d 187, 212,

⁴ Amaya also argues that the text messages "were used to coerce witnesses into testifying" and that his attorney did not object to their testimony. Amaya is factually wrong. His attorney did object, arguing that the witnesses would not be testifying but for information learned by the State in text messages. The circuit court recognized a "standing objection to the testimony of any witness ... testifying based upon the wiretap information" that Amaya argued was illegal.

⁵ The circuit court refused to order the suppression of all the wiretap evidence because the State failed to seal the text messages, relying on *State v. House*, 2007 WI 79, 302 Wis. 2d 1, 734 N.W.2d 140.

414 N.W.2d 76 (Ct. App. 1987) (merely because counsel’s strategy was unsuccessful does not mean that his performance was legally insufficient).

C. Execution of the wiretap

Amaya next argues that counsel was ineffective because he did not argue that the wiretap was not properly conducted so “as to minimize the interception of communications not otherwise subject to interception.” WIS. STAT. § 968.30(5). Amaya claims that the wiretap captured “too many calls to cite,” including conversations between himself and his young daughter.

The record shows that counsel argued that the State had violated WIS. STAT. § 968.30. Although counsel did not make a specific argument premised on the minimization requirements of WIS. STAT. § 968.30(5), Amaya does not adequately develop this argument on appeal. He neither provides record citations nor cites to any case law in support of his claim. We need not consider this claim further. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (arguments unsupported by legal authority will not be considered).

D. Venue

Amaya contends that counsel did not argue that the State failed to prove venue for the conspiracy charge. The record defeats this argument. In his closing argument, counsel reviewed the evidence of the conspiracy and argued, “[i]n short, I don’t think that the State has established that there was a conspiracy that had any connection with Wisconsin.” Counsel added that, if any criminal activity had been shown by the facts relied upon by the State, “it appears to have occurred in the State of Illinois.” The fact that the circuit court rejected that factual argument does not mean that counsel was ineffective. *See State v. Harper*, 57 Wis. 2d 543, 557, 205

N.W.2d 1 (1973) (effective representation is not to be equated with a not-guilty verdict).

E. Selective prosecution

Amaya next argues that counsel should have argued that Amaya was being selectively prosecuted under the Uniform Controlled Substances Act, WIS. STAT. ch. 961. Amaya states that the Act is expressly targeted at persons who “illicitly traffic commercially in controlled substances.” WIS. STAT. § 961.001(1r). Amaya contends that the evidence shows, at most, that he was a casual user of cocaine who occasionally provided the drug to friends and family members, but that he did not traffic cocaine commercially.

Amaya is relying on a general statement of legislative intent. WISCONSIN STAT. § 961.001 does not define any substantive crime. Amaya was not charged with violating that statute, but rather with violating WIS. STAT. §§ 961.41(1)(cm)1r. and 939.31 (2007-08), conspiracy to deliver between one and five grams of cocaine. The State presented sufficient evidence to support that crime. Any argument by Amaya’s counsel rooted in legislative intent would not have affected the evidence. Thus, Amaya has not shown that counsel was ineffective. *See Strickland*, 466 U.S. at 694 (to prove prejudice, the 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).

F. Execution of search warrant

Amaya argues that counsel should have challenged the July 5, 2007 execution of a search warrant at his house. Amaya asserts that money and savings bonds were seized during the search but not properly documented. This argument also fails on the prejudice prong. Nothing seized

during the search of Amaya's house was introduced at trial. Therefore, any challenge to the legality of the search would not have affected the result of the trial. *See id.*

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals