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DISTRICT II

April 4, 2018

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

2017AP1170-CR State of Wisconsin v. Nicolas J. Avina, Jr. (L.C. #2013CF279)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Nicolas J. Avina, Jr., appeals from an order denying his postconviction motion seeking a new trial based on ineffective assistance of counsel. Upon reviewing the briefs and the record,

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm the order.

A jury found Avina guilty of manufacturing or delivering THC and cocaine. Postconviction, he moved for a new trial alleging that defense counsel was ineffective for not calling his two co-defendants, Sonja Anderson and B.S., as witnesses at trial.[2] The circuit court, the Honorable Timothy Van Akkeren presiding, who also presided over the trial, denied Avina's motion without a hearing, in a written order. The court found that Avina's motion was insufficient under ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, because he had not alleged what either witness' testimony would have been. The court said Avina could provide additional information to support his motion for a new trial.

Avina presented an affidavit from Anderson in which she said she had loaned Avina money to buy tattooing supplies and equipment and to pay bills and back child support.[3] Avina's trial counsel, Attorney Meg O'Marro, testified at the hearing on his new-trial motion. On Avina's motion, the court adjourned the hearing and scheduled another. Before the second hearing, Avina withdrew his motion for a new trial, asserting that the grounds for the ineffectiveness claim "have [been] shown to lack merit," negating the need for the hearing.

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

[2] We refer to the co-defendants as we did in our decision rejecting Avina's no-merit appeal. *See* ***State v. Avina***, No. 2015AP514-CRNM, unpublished op. and order at 3 (WI App Aug. 2, 2016).

[3] Anderson and Avina have a child together. The theory of defense was that and the money from Anderson and the numerous back-and-forth phone calls and texts related to a haircutting and tattoo business Avina was starting, not drug distribution.

Postconviction counsel filed a no-merit appeal. This court rejected it and remanded the case for the circuit court to decide Avina's postconviction motion. The court, now with the Honorable Kent Hoffman presiding, held an evidentiary hearing on the motion. Anderson testified that, had she been called at trial, she would have testified consistent with her affidavit and also likely would have asserted her Fifth Amendment privilege if asked about matters involving her, such as phone calls and text messages. Evidence was presented at trial that she and Avila communicated via telephone and text message about matters allegedly pertaining to drug sales. Concluding that Avina had not proved either deficient performance or prejudice, the court denied his motion. He appeals.

To prove an ineffective assistance claim, the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The claim presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). We will affirm the circuit court's findings of historical fact about counsel's performance unless they are clearly erroneous; the ultimate question of ineffective assistance is one of law this court decides independently. ***Id.*** at 324-25. "A motion for a new trial is addressed to the sound discretion of the trial court and we will not reverse the trial court's decision unless it erroneously exercised its discretion." ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).

Avina first asserts that the circuit court erroneously exercised its discretion in denying his motion for a new trial without a thorough review of O'Marro's performance because Judge Hoffman did not preside over the trial or the first part of the postconviction hearing and "without reviewing any trial transcripts." The first part of his protest is irrelevant. The second part is

false. The court plainly stated, "For the record, I have read … the trial transcript including the openings, all the testimony, and the closing arguments."

Avina next complains that the circuit court erred in concluding that he did not prove either deficient performance or prejudice because O'Marro should have called Anderson to testify, given her postconviction testimony that she had been willing to do so.[4] We need not make a determination of deficiency because Avina has failed to show that the alleged deficiency prejudiced him. *See* ***Strickland***, 466 U.S. at 697 (court may address components in either order; if defendant fails to prove one, court need not consider the other). To prove prejudice, Avina must show that trial counsel's errors had an actual, adverse effect on the defense. *See* ***id.*** at 693.

Avina argues that, because prosecution witnesses testified that he attempted to purchase drugs with money Anderson recently had given him, not allowing the jury to hear Anderson testify that she gave him money for business materials and to pay bills and child support prejudiced him. We disagree. However credible, Anderson's testimony that she lent Avina money for specific purposes would not have proved how he spent it.

More importantly, the court noted that the text messages were "very strong evidence" against and "very damaging" to Avina, as they used code words common to the drug world but not to a haircutting and tattoo business, a point that jibed with Anderson's hearing testimony. The court found that, regardless of whether Anderson testified at trial consistent with her hearing testimony or exercised her Fifth Amendment privilege, "calling her would have really hurt the

[4] On appeal, Avina abandons his claim that trial counsel was ineffective for not calling B.S. as a witness at trial. We therefore do not address the circuit court's findings and conclusions relative to her.

defendant's case even more." The court thus concluded that Avina had "not shown prejudice at all" by O'Marro's failure to call Anderson as a witness.

The court's findings are not clearly erroneous. We agree that Avina has not shown prejudice. Avina has not shown that the circuit court erroneously exercised its discretion in denying his motion for a new trial.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals