COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1745-CR **Cir. Ct. No. 2012CM275**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN W. KACZMAREK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

¶1 BLANCHARD, P.J.[1] John W. Kaczmarek appeals a judgment of conviction for misdemeanor bail jumping and an order of the circuit court denying

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

his motion for postconviction relief on the grounds that he received ineffective assistance of counsel in multiple respects from his counsel in connection with his bail-jumping trial. I conclude that, in each instance, Kaczmarek fails to show that the conduct of his counsel either constituted deficient performance or, assuming deficient performance, resulted in prejudice. Thus, I affirm the judgment and the decision denying Kaczmarek's motion for postconviction relief.

BACKGROUND

¶2 The following facts are taken from the bail-jumping trial and the subsequent ***Machner***[2] hearing regarding Kaczmarek's postconviction claims of ineffective assistance of trial counsel.

¶3 In 2011, Kaczmarek was charged with issuing a worthless check as a misdemeanor offense. Kaczmarek was released from custody on a bond requiring him to appear at all court dates. It is uncontested that Kaczmarek failed to appear at a "calendar call" hearing on December 15, 2011, (the "calendar call" or "the hearing"), and that this qualified as a court date under the bond condition. He was charged with misdemeanor bail jumping.

¶4 At Kaczmarek's bail-jumping trial, the deputy clerk testified that on October 10, 2011, the court mailed a notice of the calendar call to Kaczmarek, at the last address for him known to the court. She further testified that Kaczmarek was not present at the calendar call, and that there was nothing in the court file for Kaczmarek's worthless check case indicating that he had attempted to contact the court to explain that he would be absent or why he was absent. On cross-

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

examination, defense counsel did not question the deputy clerk as to whether she had any reason to believe that Kaczmarek had not received the mailed notice.

¶5 After the clerk stepped down, the State rested its case. Defense counsel moved for dismissal, as defendants are allowed to do, on the grounds that the evidence presented in the State's case, even when considered in the light most favorable to the State, was not sufficient to prove guilt beyond a reasonable doubt. *See* ***State v. Scott***, 2000 WI App 51, ¶12, 234 Wis. 2d 129, 608 N.W.2d 753. The court denied the motion, on the grounds that the State had shown that Kaczmarek "was given notice, and he did not appear" at the calendar call.

¶6 Defense counsel then called Kaczmarek as the only witness for the defense. Kaczmarek did not contest the existence of the bond condition at issue, or that he failed to appear at the calendar call. He testified that he planned to attend the calendar call, but did not because he lacked the ability to travel from his residence in Madison to the hearing in Janesville on that particular day. He testified that he did not own a car or possess a driver's license, and that he did not have money for a bus ticket or a taxi on the day of the calendar call. As to his finances, Kaczmarek testified that he received Social Security payments, but that he had not received benefits for the month of December. Kaczmarek also testified that he "splits" the rent and bills for his apartment with his roommate, in addition to having other financial responsibilities such as food, paying fines, pets to care for, and a Madison Metro bus pass. Kaczmarek testified that he had "absolutely" no money during the week of December 15. Kaczmarek testified that he had asked a number of people to give him a ride to the hearing, or money for transportation, but each had declined. Kaczmarek also testified that he had no family members who could have given him a ride to the hearing.

¶7 Defense counsel did not ask Kaczmarek during his examination at the bail-jumping trial whether Kaczmarek had received the mailed notice. However, during the State's cross-examination, Kaczmarek testified that he had not received the mailed notice, and that "the only notice that [he] received" was a written notice of the calendar call, handed to him as he left the last hearing before the calendar call. Kaczmarek further testified as follows:

> [THE STATE]: When did you find out you were supposed to be in court on December 15th?
>
> [KACZMAREK]: I did not know anything about it until my attorney … informed me of it because I called him asking him when my court date was supposed to be.
>
> [THE STATE]: …. When did you make that call?
>
> [KACZMAREK]: … I called [my attorney] on the 13th.
>
> [THE STATE]: Of what?
>
> [KACZMAREK]: Of December, asking him when my court date was because I knew it was coming up, and he informed me that it was on the 15th of December.

On a separate topic, during cross-examination, the State impeached Kaczmarek with the fact that he had sixteen prior convictions.

¶8 After Kaczmarek testified, the State recalled the deputy clerk and asked her whether the court file contained any documents indicating "that the notice that got sent out on October 10th to the defendant was returned to the Clerk of Courts office." The deputy clerk testified that the notice was "returned" to the clerk's office with the stated reason, "forward[ing] time expired."

¶9 After the close of all testimony, the court held an on-the-record jury instruction conference. Defense counsel asked the court to add to the jury

instruction for bail jumping additional language regarding "intent," namely, that found in WIS JI-CRIMINAL 923A, which provides that:

> "Intentionally" means that the defendant must have had the purpose to [fail to appear at the hearing].
>
> "Intentionally" also requires the defendant must have acted with knowledge that [he was required by condition of his bond to appear at the hearing].

The circuit court declined to include the entirety of this particular instruction, and defense counsel did not object, based on an adjustment the court agreed to make:

> [THE COURT]: [WIS JI-CRIMINAL 923A] brings in some other things I don't think are really—let's see, I will add the sentence *intentionally also required the defendant must have acted with knowledge that he was required to appear on December 15th* ….
>
> [DEFENSE COUNSEL]: I think that's reasonable.

(Emphasis added.) The version of the jury instructions read to the jury stated the following, in relevant part:

> Bail jumping … [is] committed by one who was released from custody on bond and intentionally fails to comply with the terms of that bond. Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that … the defendant intentionally failed to comply with the terms of the bond. This requires that the defendant knew of the terms of the bond and knew that his actions did not comply with those terms. Intentionally also requires that the defendant must have acted with knowledge that he was required to appear in court on December 15th, 2011.

¶10 After his conviction at trial, Kaczmarek filed a motion for postconviction relief, which included a request for a new trial due to ineffective assistance of counsel. The court granted Kaczmarek's request for a ***Machner*** hearing.

¶11 At the ***Machner*** hearing, the court heard testimony from two persons who Kaczmarek considered to be potential defense witnesses (Kaczmarek's roommate, Peggy Ann Revels, and Kaczmarek's landlord, Steve Bohan), as well as from the attorney who represented Kaczmarek in both the worthless check and bail-jumping cases in the circuit court.

¶12 Revels had been subpoenaed to appear at the bail-jumping trial. However, at the ***Machner*** hearing, defense counsel testified that he decided not to call her because her testimony might have conflicted with Kaczmarek's. Specifically, counsel testified that while Kaczmarek had told him that "he was responsible for paying a significant portion of the rent," Revels had informed him that "she actually paid the full amount of the rent, and that [Kaczmarek] had merely helped out along the way." Counsel further testified that he did not call Revels

> because I based my case largely on Mr. Kaczmarek's inability to pay for the transportation. And in order to do that, I believe, convincingly, we had to delve into Mr. Kaczmarek's finances. And it [posed a] dilemma to me because Mr. Kaczmarek's version of how his finances were and what he contributed and why he didn't have any money was different enough from what Peggy Revels had told me[, and therefore] I was worried that either if I called Ms. Revels to the stand and during cross-examination she was asked about her insight into Mr. Kaczmarek's finances, that she would either provide an incongruent version that would damage our case or—and this was something I was worried about too—Mr. Kaczmarek would feel compelled to change his story ….

¶13 Bohan testified at the ***Machner*** hearing that defense counsel had not interviewed him in advance of trial, nor subpoenaed him to the trial. Bohan further testified that, had he been called as a witness, he would have testified that the "day before" the calendar call, Kaczmarek had asked Bohan "if he could

borrow some money [to] get to court" or if Bohan could give him a ride to the hearing.

¶14 Defense counsel testified at the ***Machner*** hearing that Kaczmarek had asked him to inform the court that Kaczmarek was unable to appear at the calendar call, and that counsel had done so. Counsel testified, specifically, that he "explain[ed] to the judge that because [Kaczmarek] had no money and no means of transportation," he was unable to appear at the hearing.

¶15 At the close of the ***Machner*** hearing, the circuit court denied Kaczmarek's postconviction motion. This decision was implicitly based, in part, on the circuit court's finding that, as a routine matter, defendants in criminal cases who are about to leave a hearing are provided with a card reflecting written notice of the date of the next hearing in the case. As the court explained, "Every appearance in our court, … the bailiff gives them a written card as to what date the next hearing is."

¶16 Kaczmarek now appeals.

DISCUSSION

¶17 Kaczmarek argues that his trial counsel in the bail-jumping case was ineffective for failing to: (1) investigate in advance of trial whether the mailed notice of the calendar call hearing had been returned undelivered, then cross-examine the deputy clerk on this issue during the State's case; (2) object to jury instructions that lacked a more specific instruction regarding intent; (3) call additional witnesses to corroborate Kaczmarek's testimony regarding his alleged efforts to attend the calendar call in light of obstacles Kaczmarek faced in appearing; and (4) make himself available as a witness to testify to Kaczmarek's

statement to the attorney on the day of the calendar call that he was not able to get to the courthouse. Kaczmarek argues that each of these was a failure in performance that warrants a new trial, because considered individually or together they were prejudicial.

¶18 A defendant is deprived of his or her right to counsel if defense counsel's performance is constitutionally deficient, that is, "if it falls below an objective standard of reasonableness," and the defendant was prejudiced by this constitutionally deficient performance. *See* ***State v. Thiel***, 2003 WI 111, ¶¶18-20, 264 Wis. 2d 571, 665 N.W.2d 305.

¶19 The test for deficient performance is whether "counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct," keeping in mind that "counsel's function is to make the adversarial testing process work in the particular case." ***State v. Marcum***, 166 Wis. 2d 908, 917, 480 N.W.2d 545 (Ct. App. 1992). "When evaluating counsel's performance, courts are to be 'highly deferential' and must avoid the 'distorting effects of hindsight.'" ***Thiel***, 264 Wis. 2d 571, ¶19 (quoting ***Strickland v. Washington***, 466 U.S. 668, 689 (1984)). Additionally, counsel's performance is not deficient where he or she has made "strategic or tactical decisions … based upon rationality founded on the facts and the law." ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983).

¶20 In order to warrant a new trial, counsel's deficient performance must have been prejudicial. *See* ***Thiel***, 264 Wis. 2d 571, ¶18. To demonstrate constitutionally prejudicial deficient performance,

> 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." The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings."

Id., ¶20 (quoted sources omitted). Depending on the facts, either "a single mistake" or "the cumulative effect of several deficient acts or omissions" may undermine confidence in the outcome of the proceedings. ***Id.***, ¶60.

¶21 A defendant's claim of ineffective assistance of counsel presents a mixed question of law and fact. ***Id.***, ¶21. I will uphold findings of fact including "'the circumstances of the case and the counsel's conduct and strategy'" unless they are clearly erroneous. ***Id.*** (quoted source omitted). I review de novo whether those facts satisfy the constitutional standard for ineffective assistance of counsel. ***Id.***

I. Notice of the Hearing

¶22 Kaczmarek argues on appeal that his trial counsel's performance was deficient because counsel failed to discover that the notice for the hearing that was mailed to Kaczmarek had been returned to the court undelivered, and because counsel failed to establish a lack of notice during the State's case based on this information. Kaczmarek argues that if counsel had discovered the fact that the notice had been returned undelivered, and then established this fact through examination of the deputy clerk, this would have required dismissal at the close of the State's case, because the State would have rested without presenting evidence that he had the notice necessary for him to have formed an intent to fail to comply with the appear-at-all-hearings condition of his bond.

¶23 I assume without deciding that counsel's failure to discover the returned notice and to make use of it during the State's case constituted deficient

performance. This argument nonetheless fails, because these assumed deficiencies do not undermine the reliability of the trial result.

¶24 When deciding a defendant's motion to dismiss after the State has rested its case, the court draws all reasonable inferences in the State's favor and then determines whether the jury, viewing the evidence in the light most favorable to the State's theory, could reasonably find the defendant guilty beyond a reasonable doubt based solely upon the State's evidence. *See* ***Scott***, 234 Wis. 2d 129, ¶12.

¶25 Kaczmarek's argument rests on the premise that "the state's only evidence that Kaczmarek received notice of the [hearing] was the clerk's testimony that court records indicated that the court had mailed notice to Kaczmarek." However, this is not the only evidence that was available to the State. As explained above, during the ***Machner*** hearing, the circuit court made a finding that Kaczmarek would have received notice of the hearing via a notice card of the type that is routinely handed out at every hearing, providing notice of the calendar call. Implicit in the court's conclusion that Kaczmarek was not prejudiced by his counsel's failure to question the deputy clerk regarding the undelivered mailed notice was the following finding by the court: if the issue of the undelivered notice had come up during the cross-examination of the deputy clerk, the deputy clerk could have testified that she or another authority in the courtroom, as a matter of course, hands out to the defendant in each case the card giving notice of the next court date. That is, as soon as a question as to the adequacy of notice arose, the State would have provided evidence that Kaczmarek had notice, in a mode different from and additional to the mailed notice.

¶26 Kaczmarek does not challenge the circuit court's factual findings regarding the notice cards on appeal. Nor does he argue that if the deputy clerk had testified that the cards are handed out as a matter of course, this evidence would have been insufficient to establish that Kaczmarek had notice of the date, time, and location of the calendar call. Kaczmarek fails to make an argument that had this testimony been elicited, the deputy clerk would not have testified to notice provided to Kaczmarek via a notice card, and therefore Kaczmarek would have been entitled to dismissal. For these reasons, I conclude that counsel's failure to elicit testimony from the deputy clerk regarding the undelivered notice, if deficient, was not prejudicial.

II. Jury Instructions

¶27 Kaczmarek argues that counsel was ineffective for failing to object to jury instructions that did not directly quote from WIS. STAT. § 939.23(3), which had the effect of "omitt[ing] the 'purpose' prong of the definition of 'intent.'" Kaczmarek argues that this constituted an "omission of the intent element," and was "not harmless." Kaczmarek's argument fails for two reasons.

¶28 First, Kaczmarek's reliance on ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765, to support his argument is misplaced in multiple respects. It is sufficient to explain that the court in ***Gordon*** did not apply harmless error analysis to the question it addressed, and that the issue in ***Gordon*** was whether a claim for ineffective assistance of counsel may succeed where defense counsel fails to object to a jury instruction that omits *an element* of the offense charged. ***Id.***, ¶¶31-43. Here, the court did not omit an element of the bail-jumping charge from the jury instructions. As previously explained, the jury was instructed that it was required to determine whether Kaczmarek "intentionally

failed to comply with the terms of [his] bond." WIS JI-CRIMINAL 1795; *see also* ***State v. Taylor***, 226 Wis. 2d 490, 502, 595 N.W.2d 56 (Wis. Ct. App. 1999) ("The intentional component of the bail-jumping statute entails that 'the defendant knew of the terms of the bond and knew that his or her actions did not comply with those terms.'" (quoted source omitted)). Thus, the sole legal authority on which Kaczmarek relies does not support his argument.

¶29 Second, there is no reasonable probability that the outcome of the trial would have been different if the circuit court had included the additional language that Kaczmarek now argues should have been included. Specifically, Kaczmarek argues that the jury should have been instructed, using the language of WIS. STAT. § 939.23(3), that the term "'[i]ntentionally' means the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." Sec. 939.23(3). However, Kaczmarek does not explain how the latter part of the instruction adds anything of significance to the instruction actually given, which was that intentional failure to comply "requires that [Kaczmarek] knew of the terms of the bond and knew his actions did not comply with those terms." Thus, there is no reasonable probability of a different outcome had the jury been instructed that Kaczmarek acted intentionally if he "had the purpose" or was "aware that his … conduct" was "practically certain" to cause him to fail to appear.

III. Failure to Investigate and Call Witnesses

¶30 Kaczmarek argues that his counsel was "ineffective by failing to investigate and call defense witnesses who would have testified about Kaczmarek's efforts to attend the hearing, thus negating the 'intent' element" of the bail-jumping charge. Specifically, Kaczmarek argues that defense counsel was

deficient in failing to interview and call Bohan, and for failing to call Revels. According to Kaczmarek, both of these witnesses "would have testified that Kaczmarek was not intentionally disregarding the calendar call, but was instead attempting to enlist their help in getting to the courthouse." As I understand the argument, Kaczmarek contends that if these witnesses had been called to corroborate Kaczmarek's own trial testimony regarding his efforts to appear, the jury would have appreciated the obstacles he faced and determined in light of those obstacles that he did not intentionally fail to appear. Corroboration was important, Kaczmarek contends, because his own testimony was undermined by impeachment due to his prior convictions and because the jury might have "discounted as self-serving" Kaczmarek's testimony regarding his efforts to appear.[3]

¶31 Kaczmarek's argument that defense counsel was deficient for failing to call Revels as a witness fails for at least the following reason: defense counsel articulated at the ***Machner*** hearing a reasonable strategic reason for his decision not to call her as a witness, explained above. This is an example of the "tactical decisions … based upon rationality founded on the facts and the law" that do not constitute deficient performance. *See* ***Felton***, 110 Wis. 2d at 502.

[3] Kaczmarek may mean to argue that defense counsel's failure to call these additional witnesses was prejudicial because calling them would have allowed Kaczmarek not to testify at all, thereby avoiding his being cast in a worse light in the eyes of the jury due to his prior convictions. If so, he fails to fully develop this argument. Moreover, such an argument would be undermined by testimony at the ***Machner*** hearing that Kaczmarek and his counsel jointly reached the decision that Kaczmarek should testify, based in part on the view that Kaczmarek had the capacity to be a "very jury-friendly" witness. This was a significant trial strategy aimed at increasing the odds of acquittal.

¶32 Turning to defense counsel's failure to interview or call Bohan as a witness, assuming without deciding that this failure constituted deficient performance, it does not undermine confidence in the outcome of the trial and, thus, it did not prejudice Kaczmarek for ineffective assistance purposes.[4]

¶33 The absence of Bohan's proffered testimony, summarized above, does not undermine confidence in the outcome of the trial for the following reasons.

¶34 As explained above, the pertinent question for the jury was whether Kaczmarek knew that his actions did not comply with the bond condition that he appear at all hearings. In this context, non-compliant actions must logically include non-compliant failures to act. Kaczmarek was therefore obligated, under the bond condition, to take the necessary steps to appear for hearings, and to avoid failures to act that would cause him to fail to appear for hearings. The bond condition was not qualified by a phrase such as, "or at least make efforts to appear for all hearings."

¶35 In order to resolve this issue, I need not determine the degree to which a defendant in a failure-to-appear bail-jumping case who claims to have faced what amounted to insurmountable or uncontrollable obstacles to appearance for a proceeding may have a valid defense, on the grounds that in such circumstances the defendant could not have acted, or failed to act, with awareness that action or inaction would not comply with the condition to appear. *See, e.g.*,

[4] Because I conclude that Kaczmarek's arguments regarding Revels and Bohan fail because defense counsel's actions either do not constitute deficient performance or undermine confidence in the outcome, I need not reach the issue briefed by both parties as to whether the testimony of these witnesses would have been inadmissible as hearsay.

People v. Branch, 852 N.Y.S.2d 676 (N.Y. Crim. Ct. 2007) (defendant's inability to appear for hearing because he was incarcerated is affirmative defense to bail jumping); *cf.* ***Payne v. State***, 731 S.W.2d 235 (Ark. Ct. App. 1987) (alleged illness rejected as reasonable excuse for failure to appear at trial in part because defendant did not notify court or his attorney of problem prior to trial).

¶36 All that is necessary to resolve this issue is my conclusion that Bohan's proffered testimony could not, under any view of the evidence presented in this case, have demonstrated efforts by Kaczmarek to overcome what amounted to insurmountable obstacles in complying with the appear-at-all-hearings condition. To repeat, the testimony would have been merely that, on the day before the hearing, Kaczmarek asked one person for a ride on the following day, or money to cover the costs of transportation. Even assuming that the jury would have fully credited Bohan's testimony, his "no" responses to Kaczmarek's request could not have been seen by the jury as representing an insurmountable obstacle to Kaczmarek appearing.

¶37 Put differently, based on the facts of this case, it would not have made a difference, under the correct legal standard, for Bohan to have testified that Kaczmarek made an eve-of-the-hearing request for a ride or a loan. The Bohan evidence would have been part of what would have amounted to a nullification defense, inviting the jury to acquit based on sympathy alone, despite the fact that Kaczmarek violated the bail-jumping statute by failing to take the steps necessary to appear. And, Kaczmarek does not argue that his counsel was ineffective for failing to pursue a sympathy-based nullification defense. Therefore, Kaczmarek fails to establish that there is a reasonable probability that the result of the trial would have been different if Bohan had testified.

¶38 For these reasons, it was not ineffective for counsel to have failed to call Revels or Bohan at trial.

IV. Defense Counsel as a Witness

¶39 Kaczmarek asserts that defense counsel "failed to appreciate the significance of his role as a witness" at the bail-jumping trial regarding Kaczmarek's "efforts to attend" the calendar call. For this argument, Kaczmarek points to the facts, established at the ***Machner*** hearing, that Kaczmarek asked defense counsel to explain to the court during the calendar call hearing that he was unable to appear, and that defense counsel informed the circuit court of this communication at the calendar call. From these facts, Kaczmarek argues that defense counsel's dual role as counsel and as a potential witness at the bail-jumping trial created a conflict of interest, which is per se ineffective assistance of counsel. In the alternative, Kaczmarek argues that, even if defense counsel was not per se ineffective, he was ineffective pursuant to ***Strickland*** for failing to either withdraw as Kaczmarek's attorney, so that he could present evidence as a witness at trial, or for failing to seek permission from the court to continue on as trial counsel, but testify under one of the exceptions to the rule against attorneys testifying in cases in which they have professional roles.

¶40 I need not summarize the legal standards regarding attorney conflicts and per se ineffective assistance, because Kaczmarek's argument does not get to square one in describing a conflict presented to his attorney for the same reason that counsel's failure to examine Bohan was not prejudicial. At best, the desired testimony of the attorney would have supported only a nullification defense.

¶41 For this same reason, I also reject Kaczmarek's argument that, even if defense counsel was not per se ineffective, he was ineffective under ***Strickland***

for failing to either withdraw as Kaczmarek's attorney or seek permission from the court to testify. There is no reasonable probability that this testimony, in support of a nullification defense, would have changed the outcome of the trial.[5]

CONCLUSION

¶42 For the foregoing reasons, I affirm the decision of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] Because I conclude that none of the alleged errors were prejudicial, I need not consider whether the aggregate of any deficient performance on defense counsel's part satisfies the standard for a new trial.