COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 97-3261-W
97-3319
97-3624

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

97-3261-W
STATE OF WISCONSIN EX REL. ALPHONSO HUBANKS,

PLAINTIFF-RESPONDENT,

V.

GARY R. MCCAUGHTRY, WARDEN, WAUPUN CORRECTIONAL INSTITUTION, HIS AGENTS, EMPLOYEES, OR THOSE ACTING BY HIS DIRECTION OR ON HIS BEHALF,

DEFENDANT-APPELLANT.

97-3319
97-3624
STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALPHONSO HUBANKS,

DEFENDANT-APPELLANT.

APPEALS from orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

HABEAS CORPUS original proceeding. *Writ denied.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Alphonso Hubanks appeals orders denying his § 974.06, STATS., postconviction motion and his motion for reconsideration. He also petitions for a writ of habeas corpus, alleging ineffective assistance of appellate counsel in his initial appeal.[1] The petition and postconviction motions allege that: (1) Hubanks' trial counsel was ineffective in several respects; (2) he was denied due process because evidence was destroyed after trial but before any DNA tests were performed; and (3) the trial court improperly denied a new trial on the basis of newly discovered evidence. We reject these arguments and affirm the trial court's orders and deny habeas corpus relief.

A jury convicted Hubanks of four counts of first-degree sexual assault, armed robbery and abduction, all as a party to a crime. The fifteen-year-old victim testified that she was sitting in a car with the motor running while her mother went into a store. Two men jumped in the car and put a baseball cap over her face, drove her to another location where they repeatedly sexually assaulted her, stole jewelry from her, and fled with the car. A police detective located the car and kept it under surveillance. About four hours after the abduction ended and one hour and forty-five minutes after he began surveillance, the detective observed Hubanks and another individual approach the car. When the car would not start,

[1] ***State v. Hubanks***, 173 Wis.2d 1, 496 N.W.2d 96 (Ct. App. 1992).

Hubanks opened the hood and started to walk across the street. At that point officers moved in to make an arrest. Hubanks threw something under the car that was later identified as the car keys and the victim's jewelry. Police also seized from Hubanks a glass smoking pipe later identified by the victim as the object she thought was a gun when she saw it through a small hole in the cap.

Because her face was covered, the victim was not able to identify her assailants by sight. She was able, however, to identify Hubanks by his distinctive deep voice that sounded "as though he had a frog in his throat." At a lineup, each of the participants read two statements made by the perpetrators: "Do you want to feel good or die?" and "Don't let me have to kill you." She positively identified Hubanks' voice at that time.

At trial, when the court granted the prosecutor's motion to require Hubanks to read those statements to the jury, Hubanks refused. The court denied his request for an in-court voice lineup. It instructed the jury to give Hubanks' refusal to speak whatever weight the jury thought it deserved, and the prosecutor repeatedly argued that Hubanks' refusal to allow the jury to hear his voice was incriminatory.

Hubanks argues that his trial counsel was ineffective for failing to object to the jury instruction that allowed the jury to consider Hubanks' refusal to speak. He describes the instruction as factually inaccurate because it did not inform the jury that Hubanks requested an in-court voice identification lineup. He characterizes the instruction as misleading because it suggested that he simply refused to give an in-court voice sample.

To establish ineffective assistance of counsel, Hubanks must show that his trial counsel's performance was deficient and that it prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, he 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. ***Id***. at 694.

Hubanks has not established ineffective assistance or prejudice from his trial counsel's failure to object to the jury instruction. The instruction was factually accurate and legally appropriate. In his initial appeal, this court held that the trial court properly ordered Hubanks to submit a voice sample, properly refused his request for an in-court voice lineup, and properly informed the jury of his refusal to give an in-court voice lineup. ***Hubanks***, 173 Wis.2d at 24, 496 N.W.2d at 104. While these rulings were made in the context of Hubanks' argument that he had a Fifth Amendment right not to speak, the result is the same when we focus on the instruction's accuracy. Hubanks' suggestion that the victim should identify his voice five months after the crime, however it might have changed and however he might disguise it, would have been unfair to the victim. There is no reason the jury should be informed of his untenable suggestion as an excuse for his refusal to obey the court's order. Trial counsel was not ineffective for failing to request a different instruction because the instruction the trial court gave was appropriate, and the suggested instruction was not.

Hubanks argues that his trial counsel was ineffective for failing to object to the content of the sentences he was asked to read at trial. They were the same two phrases that he spoke at the lineup. He argues that counsel should have

insisted that the voice sample consists of neutral words that are not "content-laden." He also argues that one of the two statements was not in evidence at the time he was asked to recite it. Having Hubanks recite the same phrases spoken at the lineup would not unfairly prejudice the defense. The jury would appreciate that he was reading phrases from a prepared script. There is no reason to believe the jury would have mistaken the significance of the words he read. That one of the phrases had not yet been introduced in evidence provides no basis for relief. Had his trial counsel objected, the State could easily have provided a foundation for using both phrases. As noted in Hubanks' initial appeal, "we believe that the defendant's decision not to comply with the court's order was in no way affected by the potential admissibility of one of the two sentences...." ***Hubanks***, 173 Wis.2d at 17 n.7, 496 N.W.2d at 101 n.7. Timely objection from defense counsel would not have made the trial court's order to give a voice sample any more palatable to Hubanks.

Hubanks argues that his trial counsel was ineffective because he did not seek to suppress the voice identification and failed to secure an audiotape of the voice lineup. A postconviction motion cannot rely on conclusory allegations, but must state ultimate facts sufficient to sustain a complaint against a demurrer. *See* ***State v. Bentley***, 201 Wis.2d 303, 313, 548 N.W.2d 50, 54-55 (1996). Hubanks' motion does not adequately allege facts that would support an argument that the lineup was suggestive. In addition, the record suggests that the victim's voice identification of Hubanks was reliable under the totality of the circumstances regardless of whether the lineup was unduly suggestive. The burden is on Hubanks to establish impermissible suggestiveness. If he meets this burden, the burden shifts to the State to demonstrate under the totality of the circumstances that the identification was reliable. *See* ***State v. Wolverton***, 193

Wis.2d 234, 264, 533 N.W.2d 167, 178 (1995). In determining whether identification was reliable despite the suggestive nature of the police procedure, the court is to consider the witness's opportunity to hear the criminal at the time of the crime, her degree of attention, the accuracy of her prior description, the level of certainty demonstrated and the time between the crime and the confrontation. ***Id***.

In this case, the victim heard Hubanks' voice on several occasions throughout the assault and paid close attention to it because she was unable to see. The voice lineup was her idea, demonstrating her confidence that she could identify her assailant's deep voice. She was "positive" at the lineup, even though she continued to be unable to identify her assailant by sight. The lineup occurred twelve hours after the crimes against her. Hubanks has not established any prejudice from his counsel's failure to challenge the voice identification or secure evidence to establish suggestiveness.

Hubanks argues that his trial and postconviction counsel were ineffective because they should have ordered DNA tests on the victim's semen stained garment before it was destroyed. The risk of DNA testing exceeded any potential benefit. If the DNA test linked Hubanks to the semen, it would be devastating to the defense. If the test did not link Hubanks to the semen, it would not be conclusive proof of his innocence because two men assaulted the victim. The second assailant has never been definitively identified.[2] Finding DNA that does not match Hubanks would not be inconsistent with the victim's testimony and identification of Hubanks. In addition, because of Hubanks' unexplained

[2] The other man arrested with Hubanks was excluded as a possible source of the semen by conventional enzyme typing.

possession of the car keys and jewelry approximately four hours after the victim was released, defense counsel had good cause to believe that DNA testing would further inculpate Hubanks.

Hubanks' due process rights were not violated by the destruction of the victim's clothing. Government conduct resulting in the loss or destruction of evidence does not violate a defendant's due process rights unless the evidence possesses exculpatory value that was apparent before it was destroyed. *See* ***State v. Greenwold***, 189 Wis.2d 59, 67, 525 N.W.2d 294, 297 (Ct. App. 1994). Alternatively, the defendant must establish bad faith on the part of the government actors. *See* ***Arizona v. Youngblood***, 488 U.S. 51, 58 (1988). The garment had no apparent exculpatory value at the time it was destroyed. Because a DNA test would not have eliminated Hubanks as an assailant but could have conclusively established his guilt, the lost evidence is not "apparently exculpatory." The record discloses no bad faith on the part of the police. The exhibits were destroyed pursuant to a "departmental policy." They were destroyed fifteen months after the trial and only one week before this court entertained oral argument on Hubanks' initial appeal. The timing of the destruction suggests no deliberate effort to destroy exculpatory evidence. At the time it was destroyed, no further laboratory testing had been suggested.

Finally, the trial court properly rejected Hubanks' assertion of newly discovered evidence. Hubanks states that his cousin would testify that he was with Hubanks at a bar when the crime was committed. To constitute newly discovered evidence, Hubanks must show that the evidence was not known to him until after the trial. *See* ***State v. Brunton***, 203 Wis.2d 195, 200, 207, 552 N.W.2d 452, 455 (Ct. App. 1996). Because Hubanks now suggests that he and his cousin were

together at the time of the crime, he obviously would have known that before trial. Equally dispositive, Hubanks cannot establish a reasonable probability that the new evidence would result in a different verdict. *See* ***id***. His cousin's statement that they were together at the time of the crime was made four years after the trial and he admitted that he "cannot be specific about the date." The record does not establish that Hubanks' cousin would have provided any exculpatory evidence.

By the Court.—Orders affirmed. Habeas corpus relief denied.

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