COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0676

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN HENRY BALSEWICZ,

DEFENDANT-APPELLANT,

GARCEIA COLEMAN,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge.[1] *Reversed and cause remanded with directions.*

[1] The order was entered by the Honorable Laurence C. Gram, Jr. The trial court proceedings forming the basis for the decision in this appeal, however, were before the Honorable Frank T. Crivello.

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

¶1 PER CURIAM. John Henry Balsewicz, *pro se*, appeals from the circuit court order denying his motion for postconviction relief. He argues that he was "deprived of a fair trial and effective assistance of counsel" when his trial attorney: (1) "entirely failed to give due consideration, or investigate and/or present at trial/sentencing hearing an Insanity Defense"; (2) "failed to request a 'competency hearing' when the trial judge questioned him if he wished to be heard on the issue of [WIS. STAT.] § 971.14(14)"; (3) "failed to impeach State's witnesses with relevant evidence to disprove that he committed robbery as party to a crime"; and (4) "failed to produce relevant and crucial evidence to impeach State's witnesses." Balsewicz also argues that he should be granted a new trial because the prosecutor, in closing argument, improperly "vouched for 'ALL' of his witnesses," and because trial counsel was ineffective for failing to object to the prosecutor's comments. Finally, Balsewicz contends that he should be granted "a new appellate process" to raise these issues because appellate counsel failed to raise them.[2]

¶2 We conclude that Balsewicz has failed to establish that he was denied a fair trial by any failure of counsel to impeach the State's witnesses, or by the prosecutor's closing argument. We also conclude, however, that: (1) the trial court erred in failing to provide Balsewicz the competency hearing to which he

[2] The State concedes that Balsewicz may avoid the procedural bar of WIS. STAT. § 974.06(4), and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), on the ground that postconviction counsel allegedly was ineffective for failing to present the issues Balsewicz now pursues. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-82, 556 N.W.2d 136 (Ct. App. 1996). The State also points out that although Balsewicz's brief may be imprecise insofar as it refers to "appellate counsel" when it should refer to "postconviction counsel," this makes no difference where, as here, a defendant was represented by the same attorney for both postconviction and appellate proceedings.

was statutorily entitled, and that counsel was ineffective for failing to object on that basis; and (2) the trial court erred in precluding Balsewicz from attempting to enter a plea of not guilty by reason of mental disease or defect, and that counsel may have been ineffective for failing to object on that basis, as well. Accordingly, we reverse and remand for a hearing to determine: (1) whether Balsewicz was competent at the time of his trial; and (2) whether trial counsel was ineffective for failing to enter a plea of not guilty by reason of mental disease or defect.

¶3 We need not summarize the background of this case, having already done so in our decision affirming Balsewicz's conviction, following his previous appeal. *See* ***State v. Balsewicz***, No. 92-2140-CR, unpublished slip op. (Wis. Ct. App. Apr. 19, 1994). Instead, we focus on Balsewicz's two ineffective assistance of counsel claims, which, we conclude, require further consideration by the trial court.

¶4 Reviewing a claim of ineffective assistance of postconviction or appellate counsel for failing to raise the issue of whether trial counsel rendered ineffective assistance, we ultimately focus on the performance of trial counsel and, in effect, apply the two-pronged test of ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 618-20, 516 N.W.2d 362 (1994). Thus, to establish that postconviction or appellate counsel was ineffective, a defendant must show both that the underlying conduct of trial counsel was deficient and that such deficient performance was prejudicial. *See* ***Strickland***, 466 U.S. at 687; *see also* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶5 Balsewicz argues that trial counsel was ineffective for failing to request a competency hearing. The record clearly establishes that he is correct.

¶6 On April 22, 1991, the trial court ordered a competency evaluation for Balsewicz, pursuant to WIS. STAT. § 971.14(2) (1989-90),[3] which, together with § 971.14(1), provides, in part, that "whenever there is reason to doubt a defendant's competency to proceed," the trial court "shall appoint one or more examiners … to examine and report upon the condition of the defendant." Kenneth H. Smail, Ph.D., examined Balsewicz and, on May 2, 1991, filed his report with the court advising, among other things, that Balsewicz "gave no response at all when asked about the charges against him or how he intended to plea [sic]," and "would not perform well as a defendant if he was not more active with his attorney during pre-trial conferences than he was during my attempted interchange with him." Dr. Smail reached no conclusion on the question of competency, but recommended that Balsewicz be committed for further assessment. On May 3, 1991, the trial court committed Balsewicz to the Mendota Mental Health Institute for further evaluation.

¶7 Following his examination of Balsewicz at Mendota, Robert D. Miller, M.D., Ph.D., filed a report on May 17, 1991. Dr. Miller's report summarized the findings and opinions of various doctors and forensic assessment personnel who had evaluated Balsewicz, at Mendota and previously, and their various views of his condition and whether he was, among other things, manipulative or psychotic. Dr. Miller also wrote that "[b]ecause of [Balsewicz's] presentation, it was difficult to determine whether or not he was suffering from an organic brain disorder." Nevertheless, Dr. Miller concluded that Balsewicz: (1) "possesses the requisite mental capacities to understand the nature of the

[3] All references to the Wisconsin Statutes are to the 1989-90 version unless otherwise noted.

proceedings against him and to cooperate with counsel in the preparation of a defense"; and (2) would "be expected to maintain his present level of competency throughout the proceedings against him."

¶8 On May 20, 1991, with the agreement of the parties, the trial court adjourned further proceedings on the question of Balsewicz's competency until the day scheduled for trial. On May 28, 1991, the trial court proceedings commenced with the following, relevant to both the competency and special plea issues presented in this appeal:

> THE COURT: The one matter that I want to clear up before we pick the jury is the matter of Mr. Balsewicz's competency. [Defense Counsel], have you had an opportunity to go over Dr. Miller's report with your client?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Do you *or your client* desire to challenge the report?
>
> [DEFENSE COUNSEL]: *He told me that he felt that at the time this crime was committed he was mentally ill and he intended to enter a plea along those lines that he was mentally ill at the time this was committed.* This is not my advice but what he told me this morning.
>
> THE COURT: My question to you, [Defense Counsel], on the morning of trial is whether you went over this competency report with your client.
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Do you *or either your client* [sic] *challenge this competency report*?
>
> [DEFENSE COUNSEL]: *Yes, he does*. That is what I was saying to you, Judge.
>
> And part of that report says that he's okay. I don't disagree with the report. I'm telling you what my client has told me.
>
> THE COURT: Let me see the attorneys in Chambers.

(IN CHAMBERS CONFERENCE NOT RECORDED.)[4]

THE COURT: All right. Mr. Balsewicz, the only question that I'm attempting to ask right now is whether or not you have gone over this report that says you understand everything right now. Pass the microphone over there, please. Would you sit up a little bit and listen to me, please, Mr. Balsewicz? Thank you. You have gone over this report with your lawyer, is that right?

DEFENDANT BALSEWICZ: Yeah.

THE COURT: *And do you agree with the part of the report that says you understand what is going on right now?*

DEFENDANT BALSEWICZ: *I don't understand nothing*.

THE COURT: *What is it about this report that you don't understand, Mr. Balsewicz?*

DEFENDANT BALSEWICZ: *First he says that I have some problems, and then he turns around and says I ain't got no mentally ill problems*.

THE COURT: *I'm trying to find out from you, sir, if you understand what is going on in court right now*.

DEFENDANT BALSEWICZ: *No*.

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[4] Once again, we regret having to note the difficulties presented to the parties and this court when, on appeal, review of the record is undermined by off-the-record trial court communication. As we have previously emphasized:

> "We recognize that sidebar conferences and after-the-fact summations of those conferences are commonplace in some courtrooms. We caution, however, that appellate review is better served by counsel following the [WIS. STAT. § 901.03(1)(a)] procedure of stating objections and grounds on the record. If a matter is significant enough to invite appellate review, it is too important to subject to a remote summation procedure." We acknowledge that, at times, trial judges and trial attorneys are understandably reluctant to interrupt the flow of testimony. Under such circumstances, brief side-bar conferences certainly are appropriate. Whenever possible, however, they should be on the record. When they are not, it is essential that the subsequent on-the-record comments repeat or summarize the arguments and *confirm exactly what was presented to the trial court at the time of its ruling.*

State v. Munoz, 200 Wis. 2d 391, 402-03, 546 N.W.2d 570 (Ct. App. 1996) (quoting ***State v. Mainiero***, 189 Wis. 2d 80, 95 n.3, 525 N.W.2d 304 (Ct. App. 1994)).

> THE COURT: Do you wish to be heard on the issue of [WIS. STAT. §] 971.14?
>
> [DEFENSE COUNSEL]: Judge, I have no quarrel with the report. I have been talking to Mr. Balsewicz on and off since this case began and I spoke to him this morning and it's my opinion as an officer of this court and as a professional who appears regularly in these kinds of cases that he does understand what is happening. He is very candid about the various kinds of pleas. I explained an Alford plea to him this morning. I discussed a guilty plea and not guilty. He understands. He uses terms like first degree reckless, second degree intentional. I think his repertoire has that kind of language in it and he understands completely what is going on.
>
> I understand that I'm his counsel for purposes of this trial and will do the very best I can for Mr. Balsewicz. I must say *I disagree with him entirely on the issue of this report*. I believe the doctor is correct and I believe that he does understand what is happening. That's my lay opinion.
>
> THE COURT: *I'm going to find that the defendant has the present capacity to understand the nature of the proceedings against him and to assist counsel in his own defense. As to the issue of whether or not the defendant now wishes to interpose a plea of not guilty by reason of mental disease or defect, I'll not entertain that motion at this time. I will run this trial. Put your hand down. And I'll do it according to the rules of law and not what you decide to make up in your heads from one moment to the next. When I ask you to talk, you can talk. If you need to talk you can talk to your lawyer*.
>
> DEFENDANT BALSEWICZ: He wouldn't come and talk to me.
>
> THE COURT: Are you prepared for trial, [Defense Counsel]?
>
> [DEFENSE COUNSEL]: Your Honor, I'm prepared for trial.

(Emphases and footnote added.)

¶9 WISCONSIN STAT. § 971.14(4)(b) provides, in part:

> If the district attorney, *the defendant* and defense counsel waive *their respective opportunities* to present other evidence on the issue [of competency], the court shall promptly determine the defendant's competency …. *In the*

> *absence of these waivers, the court shall hold an evidentiary hearing on the issue*.

(Emphases added.) Under the statute, a defendant has the right to challenge an examiner's opinion regarding competency and, notwithstanding defense counsel's position, a defendant must be afforded "a reasonable opportunity to demonstrate that he is not competent to stand trial." *See* ***State v. Guck***, 176 Wis. 2d 845, 851, 500 N.W.2d 910 (1993).

¶10 In ***Guck***, the supreme court decided "whether a defense attorney can waive an evidentiary hearing *on behalf* of a defendant." ***Id.*** at 853. In a four-to-three decision, the supreme court concluded that defense counsel is permitted to waive what, in the words of WIS. STAT. § 971.14(4)(b), is the defendant's "respective opportunit[y]" to have an evidentiary hearing to challenge the examiner's opinion on competency. ***Id.*** at 857. Clearly, however, the supreme court allowed defense counsel to waive the hearing on behalf of a defendant only "'in the absence of the express disapproval of the defendant on the record.'" ***Id.*** (quoting ***State v. Albright***, 96 Wis. 2d 122, 133, 291 N.W.2d 487 (1980)). Indeed, the supreme court emphatically warned:

> In cases where the defense attorney makes a waiver against the defendant's wishes or fails to properly inform the defendant before making the waiver, *the defendant should bring a motion based on the failure to obtain the effective assistance of counsel*. In such cases, the attorney might also be subject to discipline under the rules of ethics.

Id. (emphasis added).

¶11 Here, initially, the trial court asked the correct questions, probing whether *either* Balsewicz *or* defense counsel wished to challenge the report. But the court then failed to properly respond to Balsewicz's explicit disagreement, and counsel's confirmation of Balsewicz's disagreement, with Dr. Miller's

competency conclusion. The court was required to hold an evidentiary hearing to afford Balsewicz his "respective opportunit[y] to present other evidence on the issue." *See* WIS. STAT. § 971.14(4)(b). Unquestionably, therefore, the trial court could not find, in the absence of such a hearing, that Balsewicz was competent. Thus, counsel was deficient for failing to object to the trial court's finding, and counsel's deficiency was prejudicial because it, in combination with the trial court's action, resulted in denying Balsewicz the hearing to which he was entitled under § 971.14(4)(b).

¶12 The State argues, however, that "throughout the trial, the court specifically inquired of Balsewicz whether he understood what was going on and Balsewicz repeatedly responded that he did." The State, however, overstates the record, and misconceives the importance of the trial court's inquiries.[5]

¶13 The trial court did ask Balsewicz whether he was able to follow the trial proceedings and communicate with defense counsel. It did so, however, not "throughout the trial," but rather, on two occasions during the trial. While these colloquies may be relevant to the trial court's ultimate determination, on remand, of whether Balsewicz was competent, they neither establish that proposition "throughout the trial" nor serve as a substitute for the hearing Balsewicz was denied.

¶14 The record with respect to whether counsel was ineffective for failing to enter a plea of not guilty by reason of mental disease or defect is less

[5] The State also inaccurately cites the record at 46/4 in support of its argument. There Balsewicz responded, "No," to the trial court's inquiry regarding whether he understood what was going on in court at that time. It appears that the State intended to cite the record at 48/4, and we have considered the State's argument on that basis.

certain, but equally troubling. Counsel advised the trial court that Balsewicz "told [him] that he felt that at the time this crime was committed he was mentally ill and he intended to enter a plea along those lines that he was mentally ill at the time this was committed." Defense counsel offered no information about whether he had explored the possible propriety of a plea of not guilty by reason of mental disease or defect, and no explanation for why he had concluded that such a plea was not viable. Without further comment or explanation, however, the trial court simply concluded, "As to the issue of whether or not the defendant now wishes to interpose a plea of not guilty by reason of mental disease or defect, I'll not entertain that motion at this time." And without an evidentiary hearing as required under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), we are unable to determine whether counsel's failure to enter a plea of not guilty by reason of mental disease or defect constituted ineffective assistance.

¶15 In his *pro se* postconviction motion, Balsewicz contended that "counsel never considered to investigate, independently, whether Balsewicz, in fact, had a mental disease or defect, either during the commission of his crime or criminal proceedings." The State responds that Balsewicz "offers *no* evidence to suggest that he was in fact mentally ill *at the time he committed the offenses*," as distinct from the time of trial and the period in custody immediately preceding trial. We disagree for two reasons.

¶16 First, the 1991 examiners' reports, which Balsewicz included with his postconviction motion, provided brief descriptions of his mental health condition and history, some of which could have supported a plea of not guilty by reason of mental disease or defect. Second, defense counsel's comment to the trial court, that Balsewicz "felt that at the time this crime was committed he was mentally ill and he intended to enter a plea along those lines that he was mentally

ill at the time this was committed," in combination with the wholly vacuous record of whether counsel did anything to evaluate the viability of such a plea, confirmed at least the basis for Balsewicz's challenge. Thus, at the stage where Balsewicz, in prison and *pro se*, filed his postconviction motion, he hardly could have been expected to, in the State's words, "offer" any more "evidence to suggest that he was in fact mentally ill *at the time he committed the offenses*."[6] Ultimately, that might have to be developed at a ***Machner*** hearing in order to determine whether counsel's alleged failure, if proven, was prejudicial.

¶17 Thus, the record unequivocally establishes that Balsewicz, almost nine years ago,[7] was tried without having received the required hearing to determine whether he was competent to stand trial, and without counsel's explanation or the court's reasoned determination that he was not entitled to be tried on the basis of a plea of not guilty by reason of mental disease or defect.

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[6] Balsewicz also maintained:

> In 1995, prison psychiatrists and psychologists ("physicians") placed Balsewicz on the "Special Management Unit" (SMU) (for mentally deficient) when he began to deteriorate. Physicians conducted their psychiatric tests and diagnosed him as being "Paranoid Schizophrenia[,"] severely depressed with psychotic features. (SEE: APPENDIX "C[,"] "D[,"] and "E[."] [Dr. Miller's 1991 report; psychiatric and psychological reports from 1995]) Balsewicz contends that if said physicians had performed the appropriate testing in 1990 and 1991, that they would have came [sic] to the same conclusion, which would have given him an affirmative defense (his only defense) to the charges he has been convicted of unfairly.

While the probative value of 1995 evaluations would have to be determined, in light of all the evidence at a ***Machner*** hearing, *see* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), the relevance, for purposes of Balsewicz's postconviction motion, is clear. Balsewicz, in prison and *pro se*, could hardly have been expected to locate any other evidence to support his claim.

[7] The State does not argue that Balsewicz's claims are barred under the doctrine of laches.

Accordingly, we remand this case for the trial court to hold the competency hearing required under WIS. STAT. § 971.14(4)(b), and the ***Machner*** hearing to determine whether trial counsel was ineffective for failing to enter a plea of not guilty by reason of mental disease or defect.[8]

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

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[8] We also have reviewed Balsewicz's arguments regarding what he views to be defense counsel's failure to impeach certain State witnesses. We conclude that these arguments have no merit. *See* ***Libertarian Party v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (appellate court need not address issues that "lack sufficient merit to warrant individual attention").

Finally, Balsewicz argues that the prosecutor impermissibly "vouched" for all the State's witnesses when, in closing argument, he stated:

> And, Ladies and Gentlemen, I have been trying these cases a long time and maybe too long. Let me tell you something. You give these guys credit for getting up here and reaching out and pointing their fingers at these guys. And I'm telling you it's a hard thing to do and it's tough.

Balsewicz maintains that these remarks improperly "place[d] the prestige of the government behind the witness [sic], by making explicit personal assurances of the witnesses [sic] veracity, or indicating that information not presented to the jury supports their testimony." Noting that defense counsel did not object to these remarks, Balsewicz also argues that they "were so egregious that they rise to the level of "Plain Error." We disagree. As we noted in ***State v. Kruzycki***, 192 Wis. 2d 509, 527, 531 N.W.2d 429 (Ct. App. 1995):

> [The defendant] argues that the prosecutor's unobjected-to conduct was plain error warranting a new trial. A defendant's failure to object to a plain error affecting substantial rights does not preclude us from taking notice of the error. To be "plain" an error must be so fundamental that a new trial or other relief must be granted, and the error must be obvious and substantial, or grave. The plain-error rule is reserved for cases in which it is likely that the error denied the defendant a basic constitutional right.

(Citations omitted.) Having reviewed the prosecutor's entire closing argument, we read nothing in the challenged comments to have improperly "vouched" for the State's witnesses, invoked the prestige of government on their behalf, or bolstered their credibility by implying knowledge of something beyond the evidence in the case.