

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2425-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILLIP C. ZIEGLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Phillip Ziegler appeals from a judgment convicting him of one count of armed robbery and fifteen counts of theft, all as party to the crime and with gang enhancers. He claims he is entitled to a new trial, either because the State withheld evidence that would have supported his claim that he

was no longer a member of the gang at the time of the robbery and thefts or because counsel failed to introduce the evidence at trial. However, we conclude that Ziegler has failed to carry his burden of showing that the State withheld the evidence or that he was prejudiced by counsel's failure to introduce it. Accordingly, we affirm.

BACKGROUND

¶2 A group of young people discovered a gun collection in the basement of Peter Lehmann's residence. Most of the young people were members of a gang called the West Side City Crips. Someone in the group took a handgun from the gun collection, and the next day several gang members returned, broke into Lehmann's residence, and stole more firearms.

¶3 Ziegler was not among those who returned to the residence to steal the additional firearms. However, the State contended that he was a gang leader, that he had directed others to steal the guns, that he had purchased one of the guns, and that he had acted as lookout while some of the guns were hidden. Accordingly, it charged him as party to each of the crimes with enhanced penalties for gang activity.

¶4 Ziegler admitted that he was a gang leader at one time, and that he was present when some of the guns were being hidden. However, he claimed that he had left the gang earlier that summer, and that he was not in any way involved with carrying out the burglary and thefts. There was conflicting testimony from other witnesses regarding Ziegler's role in the burglary and thefts and his status in the gang at the time of the offenses.

¶5 The police recovered a spiral notebook during their investigation. One of the pages was titled “W.S.C.C. Meeting” and dated August 4, 1997. The page listed a series of thirteen statements that appeared to be either items discussed at a meeting or rules for gang members to follow. The page was signed by five people, but not by Ziegler. This document was never presented at trial and was not used to confront or refresh the recollections of any of the witnesses. Ziegler claims he was prejudiced by these omissions because the absence of his signature from the document supports his contention that he had left the gang. He assigns error either to the State’s failure to turn over the document or to his counsel’s failure to utilize it, and he claims that the trial court should have granted him a new trial on these bases.

STANDARD OF REVIEW

¶6 The decision whether to grant a new trial lies within the trial court’s discretion. *See* WIS. STAT. § 805.15(1) (1997-98);¹ *State v. Kimpel*, 153 Wis. 2d 697, 702, 451 N.W.2d 790 (Ct. App. 1989). We will sustain discretionary determinations so long as the trial court rationally applied the proper legal standard to the facts of record. *See State v. Rogers*, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (Ct. App. 1995).

¶7 Claims of ineffective assistance of counsel present mixed questions of law and fact. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the circuit court’s findings about counsel’s actions and the reasons for them unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2);

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

State v. Pitsch, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is a legal determination, which this court decides *de novo*. *See id.* at 634.

ANALYSIS

Newly Discovered Evidence

¶8 In order to obtain a new trial based upon newly discovered evidence, a defendant must show by clear and convincing evidence that: (1) the evidence was discovered after the trial; (2) the defendant was not negligent in seeking to discover the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to evidence already adduced at trial; and (5) the evidence creates a reasonable probability that a different result would be reached at a new trial. *See* WIS. STAT. § 805.15(3); *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

¶9 The trial court found that Ziegler had failed to show by clear and convincing evidence that he had not discovered the document entitled "W.C.C.C. Meeting" and dated August 4, 1997, until after trial. The trial court's determination was supported by the State's assertion at the postconviction hearing that it had included the document in a packet of materials turned over to the defense and by defense counsel's failure to recall whether he has seen the document prior to trial. Furthermore, it was undisputed that Ziegler had received a police report which described the document in question. Therefore, the trial court did not misuse its discretion when it refused to grant a new trial on this basis.

Ineffective Assistance of Counsel

¶10 Accepting the trial court's finding that counsel probably had seen the document prior to trial and had at least enough information to have asked for it, Ziegler argues that counsel deprived him of effective assistance by failing to use it. We disagree.

¶11 The test for ineffective assistance of counsel has two elements: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. *See Strickland*, 466 U.S. at 687. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *See State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. *See Strickland*, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *See id.*

¶12 Here, we conclude that Ziegler has failed to establish prejudice. No one testified concerning who drafted the meeting document, when it was prepared, who was present when it was prepared, or what it signified. Aside from the admissibility problems presented by this lack of authentication, there is nothing on the document itself indicating that the signatures were meant to represent attendance at the meeting or membership in the gang. As the State points out, the signatories could have been a subset of those present at the meeting, or those present at the meeting could have been a subset of all gang members. Given the

amount of evidence presented at trial about Ziegler's gang affiliation and involvement in the burglary and thefts, we conclude the document does not render the conviction unreliable. The trial court properly exercised its discretion by denying Ziegler's motion for a new trial.

By the Court.—Judgment and order affirmed.

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

