COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2002AP3022 **Cir. Ct. No. 1995CF954451**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN C. SPINKS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kevin C. Spinks appeals, *pro se*, from an order denying his postconviction motion, alleging ineffective assistance of appellate counsel. Spinks claims: (1) his appellate counsel provided ineffective assistance when he failed to meet with, or speak to, Spinks personally before filing the

appeal; and (2) his appellate counsel was ineffective for failing to raise issues of ineffective assistance of trial counsel. Because the record demonstrates that Spinks failed to prove that any deficient performance on the part of appellate counsel resulted in prejudice, we affirm.

BACKGROUND

¶2 This appeal arises following a series of postconviction motions filed by Spinks. Initially, he argued that his trial counsel provided ineffective assistance, but that motion was denied based on ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The trial court ruled that claims of trial counsel's ineffective assistance could have been brought during Spinks's direct appeal and thus were procedurally barred.

¶3 Subsequently, Spinks alleged that his appellate counsel, Michael Artery,[1] was ineffective for failing to raise issues of trial counsel ineffectiveness. Thus, the trial court granted Spinks the opportunity for an evidentiary hearing to prove this claim. As noted by the trial court, the ineffectiveness of appellate counsel can be a sufficient reason to allow a subsequent appeal despite the procedural limitations of ***Escalona-Naranjo***.

¶4 Because this is the second time Spinks has appealed to this court, we need not repeat in full the facts and circumstances of his crime. For a more complete review of that information, please see this court's decision following

[1] Sometimes Michael Artery is referred to as postconviction counsel and sometimes he is referred to as appellate counsel. For ease of reference we use the term appellate counsel.

Spinks's direct appeal. ***State v. Spinks***, No. 97-0213, unpublished slip op. (Wis. Ct. App. Mar. 10, 1998).

¶5 On March 9, 1996, a jury found Spinks guilty of one count of first-degree intentional homicide. The shooting occurred when Spinks and two of his associates went to a party to buy marijuana. A disagreement occurred and the victim, Keith Sewell, confronted Spinks. Spinks then told his companions to shoot Sewell. It was unclear whether Spinks, or his companions, actually shot Sewell, but Sewell died from gunshot wounds. At the trial, the defense theory was that Spinks did not shoot Sewell and, if he did, it was self-defense. The State put into evidence statements Spinks made to police officers following the incident. Spinks decided against testifying on his own behalf. The trial court ruled there was insufficient evidence to submit a self-defense instruction to the jury, and the jury convicted Spinks.

¶6 Subsequently, Artery was appointed to represent Spinks for postconviction proceedings. Artery sent several letters to Spinks asking him to identify appellate issues. Eventually, a direct appeal was filed with this court, even though Artery never met with or spoke with Spinks. This court affirmed. Then Spinks began his series of postconviction motions.

¶7 At the evidentiary hearing, the trial court heard testimony from Spinks, his trial counsel, Thomas Wilmouth, and appellate counsel, Artery. The trial court ruled that Artery was deficient in his performance for failing to actually meet or speak with Spinks, which he had promised to do via written correspondence. However, the trial court found that the deficient performance did not prejudice Spinks. Spinks testified at the hearing that if Artery had talked to him, he would have requested that Artery pursue an ineffective assistance of trial

counsel claim based both on Wilmouth's advice to Spinks not to testify and Spinks's claim that if he knew the trial court could decide not to submit self-defense to the jury, he would have insisted on testifying. Spinks indicated that his testimony would have included the fact that Sewell threatened to kill him, and was reaching for, what Spinks believed to be, a weapon.

¶8 The trial court made several findings following the hearing, including that the version of events Spinks offered now was entirely incredible. The finding was based in part on Wilmouth's testimony that his recommendation against having Spinks testify was based on the fact that Spinks's statements to the police officers were admitted, and those statements contained Spinks's version of events. Spinks never told Wilmouth, at the time of trial, about Sewell's threats or weapons. The trial court found that Spinks made up this new version in order to try to get a new trial. The trial court also found that Spinks knowingly and voluntarily waived his right to testify, that Wilmouth had properly advised Spinks as to this right, and that ultimately, Spinks made his own decision in this regard. The trial court also found that Wilmouth had good reasons for advising Spinks not to testify—including the risk of cross-examination about Spinks's other bad acts, and the poor impression Spinks would make on the jury.

¶9 In sum, the trial court found that Wilmouth was not ineffective and therefore, Artery's deficient conduct in failing to speak to Spinks as promised, was not prejudicial because Spinks would have offered Artery a fabricated, incredible version of events that would not have resulted in a different outcome. Accordingly, the trial court denied Spinks's postconviction motion. Spinks now appeals.

DISCUSSION

¶10 Spinks's claim in this appeal is that Artery provided him with ineffective assistance of appellate counsel. Specifically, he claims Artery's failure to speak with him before filing the direct appeal resulted in his inability to assert that Wilmouth provided ineffective assistance of trial counsel, and that Spinks did not knowingly waive his right to testify. He alleged that Wilmouth was ineffective for failing to properly advise him regarding his right to testify and for failing to adequately present his self-defense theory. We reject Spinks's claim.

¶11 In order to succeed on an ineffective assistance claim, Spinks must prove that counsel's performance constituted deficient conduct, and that such conduct prejudiced the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697. In order to prove prejudice, Spinks "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990).

¶12 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "'The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous.'" ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987) (citation omitted). The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective

assistance of counsel is a question of law for which no deference to the trial court need be given. ***Id.***

¶13 Here, we need address only the prejudice component of the ineffective assistance test. Spinks's claim is that Artery's deficient performance—that is, his failure to meet with or speak with Spinks—resulted in the inability to assert two claims during Spinks's direct appeal. The claims were that: (1) Spinks did not knowingly and intelligently waive his right to testify; and (2) Wilmouth was ineffective for advising Spinks not to testify and inadequately presenting his self-defense theories.

¶14 Spinks contends that he did not properly waive his right to testify because Wilmouth never told him that the court could decide whether the evidence was sufficient to submit a self-defense instruction to the jury. Spinks claims that if he had known that, he would never have waived his right to testify. He would have insisted on testifying before the jury to tell them that Sewell threatened to kill him, that Spinks felt his life was in danger, and that Sewell gestured under his shirt as though he had a weapon. The trial court found that Spinks knowingly, voluntarily and intelligently waived his right to testify. We agree.

¶15 A defendant validly waives his right to testify when he is aware of the right and has discussed the right with counsel. ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. The record conclusively demonstrates that Spinks was aware of his right to testify and that he discussed this with his counsel. It is also clear that Spinks knew whether or not to testify was his decision, despite the advice given by counsel. Spinks concedes that he made the decision not to testify, but contends he would not have made that decision if he had known about the court's role regarding jury instructions. The trial court ruled

that even if Wilmouth had advised Spinks about the court's role with respect to giving instructions, Wilmouth's advice against testifying, and Spinks's ultimate decision not to testify would not have changed. We agree.

¶16 The trial court's decision was based in large part on its findings that the facts Spinks offered for the purpose of this appeal were not credible. The trial court found that at the time of trial, these additional facts regarding Sewell's threats and weapons did not exist, but were fabricated by Spinks later in an attempt to bolster his claims. These findings are not clearly erroneous and we are reluctant to disturb credibility findings made by the fact-finder. *See* ***State v. Arredondo***, 2004 WI App 7, ¶17, 269 Wis. 2d 369, 674 N.W.2d 647.

¶17 There is nothing in the record to suggest that at the time of trial, Spinks advised his counsel regarding Sewell's threats or indicated that he had a weapon. Quite to the contrary, Wilmouth testified that his advice against Spinks testifying was based on the fact that Spinks's version of events was already in evidence through the statement he made to police officers and that putting Spinks on the stand to testify would have offered no additional facts or benefit. In other words, Spinks could not have provided any information about self-defense in addition to that in his statement, which was already in evidence. Based on the trial court's findings, Spinks fabricated the additional facts after his direct appeal failed. At the time of trial, both Wilmouth and Spinks believed that the facts contained in his statement were sufficient to submit a self-defense instruction to the jury. Thus, even if Wilmouth had told Spinks that the trial court makes the decision regarding jury instructions after all the evidence has been entered, there would be no reason for Spinks to change his decision not to testify because no other self-defense facts existed.

¶18 Accordingly, based on these findings, Spinks failed to show that he invalidly waived his right to testify. Thus, he failed to show that he was prejudiced in regard to this issue by Artery's deficient performance in failing to consult Spinks about the issue. There is no reasonable probability that the outcome would have been different if Artery had personally discussed this with Spinks before filing the direct appeal.

¶19 Spinks's second claim is that Wilmouth provided ineffective assistance for failing to adequately present the self-defense theories to the jury. This claim fails for the same reason as the foregoing claim. Spinks's contention relies solely on his assertion that Spinks should have testified in his own defense because he would have told the jury about Sewell threatening to kill him and gesturing under his shirt as though he had a weapon. Spinks continues that if Wilmouth would have allowed this testimony, the trial court would have submitted self-defense to the jury and it would have resulted in a better outcome. We cannot agree.

¶20 The trial court found no deficiency in Wilmouth's failure to further pursue self-defense. This was based on the other findings that Spinks only recently fabricated the additional "Sewell threats and weapons" evidence. This evidence did not exist at the time of trial. Accordingly, putting Spinks on the stand would have offered little additional evidence besides what was contained in his police statements and would have posed serious risks by exposing him to cross-examination. The court concluded that it was reasonable to advise Spinks not to testify.

¶21 The trial court's decision is supported by the record. Wilmouth testified that Spinks did not report that Sewell threatened him by words or

weapon; thus, allowing Spinks to testify would not have resulted in any benefit to the defense. At the time of trial, there was no evidence of Sewell threatening Spinks or of Sewell reaching under his shirt for a weapon. This information was not presented in the record until Spinks made the self-serving statements in support of his subsequent postconviction motions, which is why the trial court found them to be incredible. Accordingly, Wilmouth felt that putting Spinks on the stand would create the risk of Spinks being impeached with former inconsistent statements, his juvenile record, the armed robbery for which he was also charged, and other acts evidence.

¶22 In light of Wilmouth's reasons for advising Spinks not to testify and the fact that Spinks had not informed Wilmouth of information that would add to the evidence in the statement made to police, we agree with the trial court that Wilmouth provided Spinks with effective assistance, both as to his advice regarding Spinks's decision not to testify and as to how Wilmouth handled the self-defense claim. Because Spinks has failed to prove that Wilmouth provided ineffective assistance it, in turn, follows that Artery's deficient performance in not consulting with Spinks was not prejudicial. If Artery had met with, or spoken to, Spinks about these issues, it would not have changed the outcome. Accordingly, the trial court correctly ruled that Spinks is not entitled to relief based on a claim of ineffective assistance of appellate counsel.

By the Court.—Order affirmed.

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