**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 07, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP2025** **Cir. Ct. No. 1994CF941965**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**STANLEY L. FELTON,**

**DEFENDANT-APPELLANT.**

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

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Stanley L. Felton appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion for postconviction relief and from an order denying his motion for reconsideration. He argues: (1) a Wisconsin Supreme Court case that was released seven years after we affirmed Felton's conviction on direct appeal entitles Felton to a new trial; (2) postconviction counsel was ineffective for not alleging trial court ineffectiveness in several areas; and (3) the trial court erroneously applied the doctrine of laches to Felton's motions. We reject Felton's first two arguments, making it unnecessary to decide his last argument, and affirm the orders.

## BACKGROUND

¶2 Felton was convicted of one count of first-degree intentional homicide while armed after a jury found him guilty for the shooting death of Paul Anton, a jewelry store owner. It was undisputed that Felton shot and killed Anton in the jewelry store; at issue was whether Felton fired in self-defense. In support of his claim, Felton sought to admit the testimony of Wayne N. Hill, who was to testify that the physical evidence supported Felton's story that he fired the gun several feet away from Anton, rather than at point-blank range as the State suggested. The trial court refused to allow Hill's testimony, concluding that Hill was not a qualified expert in the subject about which he was to testify. The trial court rejected Felton's argument that without Hill's testimony, Felton would be denied his constitutional right to present a defense.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 Felton appealed and we affirmed Felton's conviction in ***State v. Felton***, No. 1995AP2485-CR, unpublished slip op. (Wis. Ct. App. July 31, 1996). We addressed four arguments in that appeal:

> (1) whether the trial court erroneously exercised its discretion in excluding evidence of the victim's additional guns; (2) whether the trial court erred in excluding Felton's "expert" witness; (3) whether sympathy cards present at the jury view prevented him from receiving a fair trial and whether his trial counsel was ineffective for failing to make this argument; and (4) whether his conviction should be reversed pursuant to [WIS. STAT. § 752.35].

***Id.*** at 1-2. We concluded that the trial court did not erroneously exercise its discretion in excluding the additional gun evidence or testimony from proffered expert witness Hill; that the presence of sympathy cards at the jury view did not prejudice Felton; and that there was no reason to exercise our discretionary authority under WIS. STAT. § 752.35. ***Felton***, No. 1995AP2485-CR, unpublished slip op. at 2. The supreme court denied Felton's petition for review. *See* ***State v. Felton***, 207 Wis. 2d 285, 560 N.W.2d 274 (1996).

¶4 In April 2004, Felton filed a WIS. STAT. § 974.06 motion for postconviction relief. He alleged that a 2002 Wisconsin Supreme Court case, ***State v. St. George***, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777, created a change in the law concerning the admission of expert testimony and that he is entitled to a new trial based on that case. Felton also alleged that his postconviction counsel provided ineffective assistance when he failed to allege that trial counsel had been ineffective for: (1) failing to obtain a qualified expert; (2) providing a poor closing argument in which trial counsel "abandoned" Felton's only theory of defense; and (3) advising Felton not to testify in his own defense.

¶5 The trial court denied Felton's motion without a hearing, concluding that Felton's claims were barred by ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and by the doctrine of laches. With respect to the admission of the proffered expert testimony, the trial court concluded that Felton could not raise issues that had been addressed in a prior appeal. The trial court denied Felton's motion for reconsideration and this appeal followed.

## DISCUSSION

### I. Potential applicability of *St. George*

¶6 Felton argues that ***St. George*** requires reexamination of the trial court's decision to deny his request to present the expert testimony of Hill. In ***St. George***, the court considered whether the trial court erroneously exercised its discretion when it excluded the defense's proffered testimony of an expert witness in a child sexual assault case. 252 Wis. 2d 499, ¶¶5, 30-73. The defendant claimed that the exclusion of the testimony deprived him of his constitutional right to present a defense. ***Id.***, ¶30.

¶7 The supreme court held that when making an evidentiary ruling on the admission of expert opinion testimony in a criminal case where the defendant has alleged that his right to present a defense would be violated if the expert were not allowed to testify, the trial court is required not only to adhere to evidentiary rules applicable to expert witnesses, but also to "consider constitutional law principles in making its evidentiary ruling." ***Id.***, ¶38. An error of law results if a trial court fails "to consider the constitutional claims presented by the defendant in exercising its discretion." ***Id.***, ¶48.

¶8 To properly consider a defendant's constitutional claim, a trial court must conduct a two-part inquiry that enables the trial court "to determine the accused's interest in admitting the evidence and to determine whether the evidence is clearly central to the defense and the exclusion of the evidence is arbitrary and disproportionate to the purpose of the rule of exclusion, so that exclusion 'undermine[s] fundamental elements of the defendant's defense.'" ***Id.***, ¶53 (footnote omitted). ***St. George*** explained:

> In the first part of the inquiry, the defendant must satisfy each of the following four factors through an offer of proof. The defendant must show:
>
> 1) The testimony of the expert witness met the standards of Wis. Stat. § 907.02 governing the admission of expert testimony.
>
> 2) The expert witness's testimony was clearly relevant to a material issue in this case.
>
> 3) The expert witness's testimony was necessary to the defendant's case.
>
> 4) The probative value of the testimony of the defendant's expert witness outweighed its prejudicial effect.
>
> After the defendant successfully satisfies these four factors to establish a constitutional right to present the expert testimony, a court undertakes the second part of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence.

***Id.***, ¶¶54-55 (footnotes omitted).

¶9 Because ***St. George*** was decided years after Felton's trial, the trial court did not have the opportunity to apply its specific analysis. At issue, therefore, is whether Felton should have the opportunity to have the analysis outlined in ***St. George*** applied to his case. Felton assumes, without offering support for his assumption, that ***St. George*** should be applied retroactively to his

case, even though his appeal was completed six years before ***St. George*** was issued.

¶10 In ***State v. Lagundoye***, 2004 WI 4, 268 Wis. 2d 77, 674 N.W.2d 526, the Wisconsin Supreme Court reviewed the rules with respect to retroactivity of changes in the criminal law. The court stated:

> There are three lines of cases that govern whether a rule should be applied retroactively to criminal cases on appeal. These cases establish that whether a rule should be applied retroactively is dependent upon two threshold determinations: 1) whether the rule is a new rule of substance or new rule of criminal procedure and 2) whether the case which seeks to benefit from retroactive application is on direct review or is final, such that it is before the court on collateral review.
>
> First, a new rule of substantive criminal law is presumptively applied retroactively to all cases, whether on direct appeal or on collateral review. Second, Wisconsin follows the federal rule announced in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), that new rules of criminal procedure are to be applied retroactively to all cases pending on direct review or non-finalized cases still in the direct appeal pipeline.
>
> Third, a new rule of criminal procedure generally cannot be applied retroactively to cases that were final before the rule's issuance under the federal nonretroactivity doctrine announced by the Supreme Court plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989), and later adopted by the majority of the Court in *Graham v. Collins*, 506 U.S. 461, 467 (1993). Under *Teague*, a new rule of criminal procedure is not applied retroactively to cases on collateral review unless it falls under either of two well-delineated exceptions. First, a new rule of criminal procedure should be applied retroactively to cases on collateral review if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" Second, a new rule of criminal procedure should be applied retroactively to cases on collateral review if it encompasses procedures that "'are implicit in the concept of ordered liberty.'"
>
> While *Teague*, read narrowly, applies only to federal habeas corpus proceedings, Wisconsin has adopted the

> *Teague* framework in all cases involving new rules of constitutional criminal procedure on collateral review pursuant to Wis. Stat. § 974.06. Further, this court has extended the *Teague* retroactivity analysis to cases on collateral review involving a new rule based on a statutory right.

***Lagundoye***, 268 Wis. 2d 77, ¶¶11-14 (citations and footnote omitted).

¶11 ***St. George*** did not address whether its holding should be applied retroactively, or whether the analysis it requires represents a change in procedural or substantive criminal law. Thus, if we were to consider on the merits the potential applicability of ***St. George***, we would have to apply the analysis outlined in ***Lagundoye***. The threshold question would be whether ***St. George*** announced a new rule of substantive criminal law or a new rule of procedure (or neither). *See* ***Lagundoye***, 268 Wis. 2d 77, ¶11. If we were to conclude that ***St. George*** established a new rule of procedure, we would then have to analyze whether one of the two ***Teague*** exceptions has been established. *See* ***Lagundoye***, 268 Wis. 2d 77, ¶¶13-14.

¶12 Unfortunately, neither party has provided this court with analysis of the retroactivity issue.[2] Indeed, neither party even cites ***Lagundoye***. We decline to develop Felton's argument for him and engage in the complex analysis required by ***Lagundoye*** without the benefit of argument and reference to legal authorities on this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (We need not consider arguments which are undeveloped or

[2] Felton provides a detailed analysis of how ***St. George*** would be applied to the facts of his case, but does not address the threshold question: whether ***St. George*** can be applied to his case after his direct appeal rights have been exhausted. He also does not address the fact that this court has already rejected his argument that refusing to allow the expert testimony denied Felton's constitutional right to present a defense. *See* ***State v. Felton***, 1995AP2485-CR, unpublished slip op. (Wis. Ct. App. July 31, 1996).

unsupported by references to relevant legal authority.). Thus, we will not consider further Felton's argument that he is entitled to a new analysis of the trial court's decision to deny the proffered expert testimony from Hill.

**II. Alleged ineffective assistance of counsel**

¶13 Felton argues that his trial counsel provided ineffective assistance when he: (1) failed to obtain a "qualified expert" to testify on Felton's behalf; (2) conceded issues during closing argument; and (3) prevented Felton from testifying. Although these claims generally would be procedurally barred because Felton failed to raise them in his original postconviction appeal, *see* ***Escalona-Naranjo***, 185 Wis. 2d at 177-78, Felton attempts to circumvent ***Escalona-Naranjo*** by arguing that his appellate counsel was ineffective for failing to argue ineffective assistance of trial counsel. Assuming that Felton is not procedurally barred from raising these issues, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681-84, 556 N.W.2d 136 (Ct. App. 1996), we nonetheless conclude that the trial court properly denied Felton's motion because Felton has not proven that trial counsel provided ineffective assistance.

¶14 To show ineffective assistance of counsel, a defendant must show that the attorney's performance was deficient and that such performance prejudiced the defense. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Performance is deficient if it falls outside the range of professionally competent representation. *See* ***id.*** at 636-37. We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See* ***id.***; ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). We indulge in a strong presumption that counsel acted reasonably within professional norms. ***Pitsch***, 124 Wis. 2d at 637. To prove prejudice, the

defendant must show that counsel's errors were so serious that the defendant was deprived of a fair and reliable outcome. *See* ***Strickland***, 466 U.S. at 687.

¶15 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

¶16 If an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its findings that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, this court's review of this determination is limited to whether the trial court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

**A. Alleged failure to procure an expert**

¶17 Felton argues that his trial counsel was ineffective for failing to obtain a qualified expert to testify on his behalf. We reject this argument and

affirm the trial court's order denying relief on this issue. Felton assumes that an expert who would support his theory of the case could have been found after Hill's proffered testimony was rejected. He provides no affidavits or other information in support of his assumption that there are experts who would agree with his interpretation of the physical evidence. It can hardly be said that trial counsel was ineffective for failing to locate an expert if no such expert was available.

¶18 Felton asserts in his ineffective assistance claim that trial counsel "jeopardized the defendant's only chance to present a defense when trial counsel attempted to use a 'fraudulent expert' such as Wayne Hill as [its] expert witness instead of acquiring a 'Qualified Expert' who had firsthand knowledge of [homicide investigations]." Yet, earlier in his brief, Felton devotes seven pages to his assertion that Hill was a competent expert who should have been allowed to provide crucial testimony. He states: "[I]t cannot be disputed that Wayne Hill's training, experience, and research clearly supplied him with knowledge beyond that which is generally known in the community." Felton's inconsistent positions with respect to Hill's qualifications as an expert underscore that it is really the trial court's discretionary decision to prohibit Hill's testimony (which we affirmed years ago) to which Felton objects. Felton's acknowledgment of Hill's expert credentials belies the claim that his attorney was ineffective for proffering a witness with those credentials.

**B. Performance at closing argument**

¶19 Felton argues that trial counsel rendered ineffective assistance when he made a statement at closing argument which, Felton claims, conceded that Felton shot the victim at close range, as opposed to from five feet away as Felton told the police. We reject Felton's argument.

¶20 We note at the outset that the jury was instructed that closing argument is not evidence and that its decision should be based solely on the evidence. It is presumed the jury followed the instructions. ***State v. Smith***, 170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992). However, even if we assume that one can provide prejudicial deficient performance at closing argument, we conclude that this is not such a case.

¶21 At trial, a witness for the State testified that gunshot powder stippling, or "embedding of particles that have struck the skin," suggested that one shot had been fired within twelve inches of Anton's face. This contradicted Felton's theory of defense that he fired in self-defense, five feet away from Anton. If Hill had been allowed to testify, he would have offered his opinion that the "stippling" pattern on Anton's face was not gunpowder, but instead "pseudo stippling caused by the explosion of glass through which" a bullet had been fired.

¶22 In closing argument, trial counsel argued strenuously and at length that the evidence was consistent with Felton's theory of self-defense. However, having been denied the right to present evidence of pseudo stippling, trial counsel attempted to reconcile the evidence with Felton's version of events. Trial counsel stated:

> And by the way I absolutely agree with [] Dr. Teggatz that this was probably gunshot stippling. And I had not

> heard Mr. Lutz testify before … and he convinced me. So this part about pseudo stippling and the glass disregard. I don't believe that that's what happened. I think what happened was [Felton] fired at him once. Actually fired the warning shot. Then he fired at him again. Doing one of these. And then what happened is [Anton] did one of these. He's down like this and [Felton] – and if you remember as you were going through the doorway to get back there there was that swinging door. And if you walked in that little area, you could get in much closer. Much closer. That's where [Felton] was and that's when he fired a warning shot, fired a shot into the glass. And then [Anton] was like this. And that's when [Felton] shot the two. One here. One here, whichever was first, it doesn't matter. Five feet away from him.

¶23 Although we did not have the benefit of seeing what was apparently physical movement by trial counsel demonstrating the shooting, we are convinced, based on our review of the entire closing argument, that trial counsel did not "abandon" Felton's theory of self-defense. Lacking any admissible evidence to contradict the State's expert testimony on stippling, trial counsel argued that even if it was stippling, Felton still could have shot Anton in self-defense. We perceive no error that entitles Felton to a hearing or relief.

### C. Felton's decision not to take the stand

¶24 Felton contends that his trial counsel "erroneously advised and prevented [him] from testifying at trial in support of his claim of self-defense." (Capitalization omitted.) In support of this assertion, Felton filed with his motion for postconviction relief an affidavit in which he asserts that: (1) he wanted to testify at trial; (2) he told his trial counsel he wanted to testify; (3) trial counsel advised him not to testify because the State had prior bad acts evidence it would introduce that trial counsel would be unable to rebut; and (4) trial counsel "forgot" to ask for an adjournment to investigate the prior bad acts evidence. Felton's claim fails for two reasons.

¶25 First, the record demonstrates that Felton's decision not to testify was voluntary. *See* ***State v. Simpson***, 185 Wis. 2d 772, 778-80, 519 N.W.2d 662 (Ct. App. 1994) (record as a whole showed that defendant knowingly and voluntarily waived right to testify). The trial court listened to defense counsel and spoke with Felton about Felton's decision:

> [TRIAL COUNSEL]: We have made a decision in this case that Mr. Felton will not testify. [] I have discussed that decision with him. We have discussed the numerous and varied strategic reasons that we're making that decision at this time. It is a joint decision. [] I indicated to Stanley that it was his decision. [] [H]e indicated that he understood the exact situation that [had] presented itself. He has made the decision not to testify. I concur wholeheartedly in that decision….
>
> THE COURT: Is that correct, young man?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You've discussed it with your lawyer?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And it's a decision that you are voluntarily, knowingly, intelligently making; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And it's your choice not to testify?
>
> THE DEFENDANT: Yes, it is.
>
> THE COURT: Okay. The Court's satisfied.

¶26 At no point during the trial or sentencing did Felton suggest that he regretted his decision not to testify or that he felt unduly pressured by trial counsel to give up that right. Indeed, when the trial court asked Felton at the close of evidence whether he was "satisfied with the representation [he] received in this matter," Felton responded that he was.

¶27 Second, Felton fails to show how his attorney acted improperly. The only error he cites is presented in a conclusory and undeveloped manner. He asserts that trial counsel "forgot to move the court for an adjournment and investigate whether the 'prior bad acts evidence' existed and to acquire such alleged reports that the prosecution relied upon as constituting prior bad acts to determine whether they were exculpatory or not." Not only is this statement conclusory and undeveloped, it is contradicted by the record.

¶28 Over a month before the trial, there was an extended argument before the trial court about juvenile court records and other bad acts evidence the State had in its possession. The defendant was present for this argument. Although it is not clear from the record how this matter was resolved, it is clear that this issue was debated, which contradicts Felton's conclusory allegation that trial counsel "forgot" to investigate the other bad acts evidence.

¶29 In addition, to the extent that Felton had concerns about the potential admissibility of the other bad acts and whether he should decline to testify based on those acts, that information was known to him at the time of trial. Felton never indicated his concerns to the trial court when he waived his right to testify, during the trial or at sentencing. We conclude that trial counsel did not perform deficiently, and that Felton is not entitled to a new trial.

## III. Doctrine of laches

¶30 The trial court concluded that Felton's postconviction motion was also barred pursuant to the doctrine of laches. Because we affirm the orders on other grounds, we need not consider whether this doctrine can be applied to a WIS. STAT. § 974.06 motion for postconviction relief. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed); ***State***

***v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

*By the Court.*—Orders affirmed.

Not recommended for publication in the official reports.