COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP663-CR **Cir. Ct. No. 2014CF2088**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAMUEL L. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: RICHARD T. WERNER and JOHN M. WOOD, Judges. *Affirmed*.

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. Samuel Jones was convicted of attempted first-degree intentional homicide following a jury trial. On appeal, Jones argues that he received ineffective assistance of counsel when his trial counsel failed to present cell phone records at trial that, Jones asserts, show he was in Chicago, Illinois, at the time that the crime occurred in Beloit, Wisconsin. The circuit court rejected this argument at a postconviction hearing.[1]

¶2 We conclude that Jones's ineffective assistance of counsel claim fails because Jones has not shown that his trial counsel was deficient by not presenting the cell phone records. We reach this conclusion because Jones has failed to present evidence showing that Jones's trial counsel knew or should have through ordinary diligence discovered that, at the time of the crime, Jones had access to or used the cell phone that is the subject of the records. Accordingly, we affirm.

BACKGROUND

¶3 At around 7:30 A.M. on October 27, 2014, the victim was shot in Beloit. The victim identified Jones as the shooter and the State charged Jones with attempted first-degree intentional homicide. Jones's theory of defense at the jury trial that followed was that, at the time of the shooting, he was in the basement apartment of his mother Alice Jones's house in Chicago, where he was then living. Alice's Chicago address is approximately 107 miles from the scene of the shooting in Beloit. The jury found Jones guilty as charged.

[1] The Honorable Richard T. Werner presided over trial and entered the judgment of conviction. The Honorable John M. Wood entered the order denying the defendant's postconviction motion.

¶4 Jones filed a postconviction motion, arguing that he received ineffective assistance of counsel when his trial counsel failed to present at trial phone records that, he asserted, "establish that Jones was in Chicago around the time of the shooting."[2] The circuit court held an evidentiary ***Machner***[3] hearing on Jones's ineffective assistance of counsel claim. The court denied Jones's postconviction motion, and Jones appeals.

DISCUSSION

¶5 Jones's sole argument on appeal is that his trial counsel was ineffective for not presenting at trial the phone records for a cell phone that we will refer to as "the 312 phone," in reference to the area code of the number assigned to the phone. As we explain, we reject this argument because Jones fails to show that Jones's trial counsel knew or should have discovered that, at the time of the shooting, Jones had access to or used the 312 phone. Therefore, we conclude that Jones has not shown that his trial counsel performed deficiently by not presenting the records for that phone at trial.

¶6 In the sections that follow, we first state the applicable legal principles and standard of review; we next set forth the details of Jones' argument; and we then review the pertinent postconviction hearing evidence and apply the legal principles to that evidence.

I. Legal Principles and Standard of Review

[2] The postconviction motion raised other arguments that were rejected by the circuit court. Jones does not renew those arguments on appeal.

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶7 To succeed on a claim of ineffective assistance of counsel, a defendant must "establish that counsel's performance was deficient and that the deficient performance was prejudicial. If the defendant fails to satisfy either prong, we need not consider the other." ***State v. Breitzman***, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93. We decide this appeal on the deficiency prong.

¶8 Whether trial counsel performed deficiently is a question of law we review de novo. ***Id.***, ¶38. "To establish that counsel's performance was deficient, the defendant must show that it fell below 'an objective standard of reasonableness.'" ***Id.*** (quoted source omitted). A defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "In general, there is a strong presumption that trial counsel's conduct 'falls within the wide range of reasonable professional assistance.'" ***Breitzman***, 378 Wis. 2d 431, ¶38 (quoted source omitted).

II. Jones's Argument

¶9 As stated, Jones argues that his trial counsel was ineffective for not presenting at trial pertinent phone records for the 312 phone, which he asserts, together with other evidence presented at the postconviction hearing, show that he was in Chicago at the time of the shooting. Specifically, Jones points to two entries in those records.

¶10 The first entry shows that the 312 phone was within range of a cell tower located within one-half mile of Alice's Chicago address at 8:22 A.M. on October 27, 2014 (or approximately fifty minutes after the shooting in Beloit). The second entry shows that a call was made from the 312 phone to Alice's residential landline phone at 8:51 A.M. on October 27, 2014 (or approximately

one hour and twenty minutes after the shooting in Beloit), and that the 312 phone remained within range of the same cell tower at that time. Alice testified at the postconviction hearing that the 312 phone was her cell phone in October 2014 and that Jones "was … using" the 312 phone in October 2014.

¶11 Jones argues that trial counsel was ineffective for not presenting these two entries for the 312 phone because, he asserts, the entries, taken together with Alice's testimony at the postconviction hearing, show that: (1) the 312 phone was in Chicago at 8:22 A.M. and 8:51 A.M. on the day of the shooting; and (2) Jones was in possession of the 312 phone at those times. Jones argues that the entries show he did not commit the shooting because he could not have travelled to Chicago from Beloit between 7:30 A.M. (the approximate time of the shooting) and either 8:22 or 8:51 A.M. (when the 312 phone was in Chicago).

III. Pertinent Postconviction Hearing Evidence and Analysis

¶12 At the postconviction hearing, Alice and Jones's trial counsel presented the following pertinent testimony. Alice testified that she had two phones at the time of the shooting: the 312 phone and a residential landline. Alice also testified that, to her knowledge, Jones did not have a phone in October 2014, and therefore Jones was using the 312 phone during that month.

¶13 Jones's trial counsel testified that, according to a report written by his private investigator, which had been prepared before trial and was admitted into evidence at the postconviction hearing, the 312 phone number was Alice's number. Trial counsel also testified that according to the report, Alice told the investigator that on the day of the shooting Jones had a cell phone with a different number, which Jones had been using for a couple of months before the shooting; and that Jones also used Alice's landline.

¶14 Jones's trial counsel also testified that he did review phone records before trial. He testified that the phone records he would have reviewed were for the phones Alice told Jones's private investigator Jones was using, namely, Jones's cell phone and Alice's landline. He testified that he reviewed phone records for all the phones that he was told were associated with Jones. He testified that, while he could not recall whether he also requested the records for the 312 phone, he would have had no reason to do so based on the information provided to his investigator that the 312 phone was Alice's cell phone.

¶15 Jones does not point to any evidence in the record indicating that Jones's trial counsel was informed prior to trial that Jones had access to or used the 312 phone. Instead, Jones apparently argues that counsel had reason to obtain the records for the 312 phone because counsel knew that the 312 phone was Alice's cell phone, and Alice testified at trial that Jones called her residential landline from the 312 phone on the morning of the shooting. However, what Alice testified to at trial does not alter the information that was available to counsel *before* trial, which is when counsel made the decision concerning which phone records to obtain and review. And, according to counsel's unrebutted testimony regarding the investigator's report, what counsel knew before trial was that at the time of the shooting, while Alice had her own 312 cell phone, Jones had access to and used his own cell phone that was not the 312 phone, and Alice's landline. Counsel's unrebutted testimony also indicates that he obtained and reviewed phone company records for both of those phones.

¶16 As far as the record reflects, reasonable trial counsel would have had no reason to obtain or to present at trial records for a phone that counsel had not been informed Jones had access to or was using at the time of the shooting. Accordingly, Jones has not shown that his trial counsel performed deficiently by

failing to present at trial records for the 312 phone. *See* ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325 ("This court will not find counsel deficient for failing to discover information that was available to the defendant but that defendant failed to share with counsel."). As a result, Jones's ineffective assistance of counsel claim fails.

CONCLUSION

¶17 For the reasons stated above, we affirm.

By the Court.—Judgment and order affirmed.

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