COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 00-1784-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDUARDO D. HANDAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROGER P. MURPHY, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Eduardo D. Handal appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. The issue on appeal is whether Handal received ineffective

assistance of trial counsel. Because we agree with the circuit court's conclusion that Handal did not receive ineffective assistance of trial counsel, we affirm.

¶2 Handal was convicted after a jury trial of solicitation to commit first-degree intentional homicide because of a plan to kill his wife. His defense at trial was that he was coerced into taking the actions he did by another inmate, and that he never intended to actually harm his wife. After trial, Handal brought a motion for postconviction relief arguing that his trial counsel had been ineffective because he failed to call certain witnesses who would have bolstered Handal's coercion defense. Handal further argued that since these witnesses would have established his defense, he was prejudiced by counsel's failure. Handal was represented at trial by Attorney James Dumke. The court held hearings and heard the testimony of many witnesses over a long period of time. The trial court denied the motion.

¶3 The evidence at the trial established that at the time of the underlying incident, Handal was in the Waukesha County Jail.[1] While there, Handal asked another inmate, Darwin Olson, to find someone to kill his wife. Olson did nothing at first, but Handal persisted. Eventually, Olson contacted his own lawyer, who contacted the Brookfield police department. They came up with a plan to have a police officer pose as a hit man, and gave Olson a phone number to give to Handal. Handal spoke with the undercover officer three times by phone. The conversations were taped. During the last conversation, Handal told the undercover officer that he wanted him to kill someone. Handal then gave the

[1] Handal was in jail because he and his girlfriend had engaged in an elaborate plan to set his wife up. They had stabbed his girlfriend, planted evidence in his wife's car, and then had his wife arrested for the stabbing. His wife was jailed for two months on these false charges.

officer information about his wife, including her address and the license plate number of her car. They also negotiated a price.

¶4 Handal's defense at trial was that he was coerced into this situation because of his fear of Olson, who he referred to as "the Indian." Handal testified that Olson had threatened him on more than one occasion and had tried to convince him to hire a hit man to kill his wife. Handal also testified that at the times he placed the phone calls to the undercover officer, Olson stood next to him and threatened him. Handal further testified that he had told several people about this situation and they had told him to play along with Olson.

¶5 The defense called two witnesses to support Handal's argument that he had been coerced. The first, Michael Benfield, a correctional officer at the Waukesha jail, testified that Handal had said that Olson was out to get him (Handal). Benfield also testified that he told Handal that he had heard a rumor that Handal was being set up. A second witness, Clark Bowerman, a member of a religious civic group who visited Handal in jail, testified that Handal had said that "the Indian" was harassing him and he was afraid of him. Handal also testified that Olson had threatened him physically and emotionally.

¶6 During the hearings on Handal's motion for postconviction relief, Handal argued that Attorney Dumke was ineffective because he failed to call a number of other witnesses who would have supported the defense theory of coercion. Specifically, Handal argued that Dumke should have called seven additional witnesses: Stanley Kaplan, James Doppenberg, Gary Hartley, Milton Silva, Father Joseph Wanner, Julian Anderson and Hanafi Monem.

¶7 After hearing testimony, the circuit court denied the motion. The court found that Dumke's performance was not deficient and in fact "was far

above the standards of 'ineffective assistance of Counsel' and better than the normal standards of Defense Counsel's Trial representation." Handal appeals from the conviction and the denial of his motion.

¶8 On appeal, Handal argues that the circuit court erred when it found that Dumke provided effective representation. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *See* ***id.*** at 697. We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***Id***. at 690. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶9 There is a strong presumption that counsel rendered adequate assistance. ***Strickland***, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** at 689. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶10 Handal argues that the trial court erred both in its findings of fact and its conclusions of law when it found that he received effective assistance of counsel. Handal argues that Dumke should have called the additional witnesses to corroborate his defense that he was coerced into making the phone calls and asking the undercover officer to kill his wife. Handal asserts that since he did not dispute that he made the phone calls to the undercover officer, the testimony of these additional witnesses was the only way in which the defense of coercion could have been effectively presented to the jury.

¶11 The State in its response agrees with Handal that trial counsel needed to present some corroborating evidence to support Handal's testimony that he was being coerced by Olson. But, the State argues, this does not mean that Dumke had to call every witness who could provide some corroborating evidence.

¶12 We are not convinced by Handal's assertion that the circuit court's findings of fact were clearly erroneous. The circuit court, in a thorough and well-reasoned order of forty-seven pages, discussed in detail the evidence each of these witnesses would have offered, and Dumke's stated reasons for not calling each of them. We need not repeat those detailed findings here, nor do we see any reason to disturb them.

¶13 The circuit court's findings generally were that Dumke did not call the additional witnesses because they did not have firsthand knowledge of what happened at the jail and, for the most part, would be testifying only to what Handal had told them. The court also found that Dumke was aware of the testimony that each of these additional witnesses would have given, but made a reasoned tactical decision not to call them. The court found that Dumke conferred with Handal about which witnesses to call and Handal appeared to be in

agreement. In addition, the court found that Handal did not have any complaints about the way Dumke was handling the trial until after he was sentenced.

¶14 Since we affirm the circuit court's findings of fact, the question then becomes whether Dumke was ineffective as a matter of law. The decision by defense counsel of which witnesses to call to achieve the defense goal is one that we, in general, will respect. We conclude that Dumke's selection of witnesses was a strategic trial decision rationally based on the facts and the law. *See* ***id.*** at 464. As such, we will not use the benefit of hindsight to second-guess the decision. We agree with the circuit court's conclusion that Handal did not receive ineffective assistance of trial counsel. The judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

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