COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2670-CR **Cir. Ct. No. 2003CF173**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES H.P., JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

Before Higginbotham, Vergeront, Lundsten, JJ.

¶1 PER CURIAM. James H.P., Jr. appeals a judgment, entered after a court trial, convicting him of repeated sexual assault of the same child while as a person responsible for the child's welfare, contrary to WIS. STAT. §§ 948.025(1)

and (2m) (2007-08).[1] James also challenges the denial of his motion for postconviction relief. James seeks a new trial on grounds his trial counsel was ineffective by failing to call him as a witness during a suppression motion hearing. James also contends there is newly discovered evidence justifying a new trial. We reject James's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged James with two counts of repeated sexual assault of his daughter—the first count alleging offenses occurring between May and November 2000, and the second count alleging offenses occurring between May 2001 and July 2002. James's pretrial motion to suppress a confession made to a police officer was denied after a hearing. Following a bench trial, James was convicted of count two and acquitted of the remaining count. In June 2004, the court imposed a thirty-five year sentence consisting of twenty years' initial confinement and fifteen years' extended supervision.

¶3 In March 2007, this court granted James's *pro se* petition for a writ of *habeas corpus* and reinstated his WIS. STAT. RULE 809.30 appeal rights. James subsequently filed a postconviction motion for a new trial on grounds he was denied the effective assistance of trial counsel and there was newly discovered recantation evidence. After a ***Machner***[2] hearing, James's motion for postconviction relief was denied. This appeal follows.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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

DISCUSSION

I. Ineffective Assistance of Trial Counsel

¶4 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶5 The benchmark for determining whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, James must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. ***Strickland***, 466 U.S. at 694.

¶6 In order to establish deficient performance, 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." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial

scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** at 689 (citation omitted). Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶7 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. If James fails to establish prejudice, we need not address deficient performance. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶8 Here, James argues his trial counsel was ineffective at the suppression motion hearing by failing to call him as a witness to testify that the interrogating officer's handling of his holstered gun caused James to be frightened "out of his skin." It is undisputed, however, that James never mentioned the gun or his attendant fear of the gun to his attorney before the suppression motion hearing. Counsel is not deficient for failing to pursue a matter about which he or she has not been informed because "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." ***Strickland***, 466 U.S. at 691.

¶9 James nevertheless contends that once counsel learned at the hearing that the officer was wearing his gun in the interrogation room, she was ineffective for failing to pursue whether an armed interrogator impacted the voluntariness of James's confession. The officer testified that his gun was holstered during the interview, and although it "probably" would have been visible to James from

where he was sitting, the officer never removed the gun from its holster or made any reference to it. At the ***Machner*** hearing, trial counsel acknowledged that the presence of a gun is a factor to consider in determining voluntariness but "felt at that point in time, as part of my strategy, that that was an innocuous enough remark on behalf of the officer. That there were many more important things to cover." Counsel explained that her strategy at the suppression motion hearing was to argue that James was coerced into signing his confession "because the officer had called his daughter a liar" and essentially put the daughter's accusations into James's mouth. Moreover, counsel did not believe James would do well on the stand "at that point in time." We acknowledge there is strategic value in not allowing the cross-examination of a defendant at a preliminary stage, as it can potentially expose any weakness the defendant may have as a witness. Because counsel pursued a reasonable strategy at the suppression motion hearing, James has failed to establish his counsel was deficient.

¶10 In any event, we conclude James has failed to establish how he was prejudiced by any claimed deficiency on the part of his trial counsel. The court found James's postconviction hearing testimony incredible and rejected the notion that James would have confessed to sexually assaulting his daughter merely because the interrogating officer placed his hand on a holstered gun.[3] The fact that James failed to even mention the gun to his attorney supports a conclusion that it was not significant to his confession. At any rate, in its order denying James's motion to suppress, the trial court found that James's interrogation was "short and

[3] To the extent James challenges this finding, the trial court, in its capacity as fact finder, is the ultimate arbiter of witness credibility, *see* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345, and we are not persuaded by James's argument that the court's credibility determination at the postconviction hearing is undermined by any credibility determinations it made during earlier proceedings.

reasonable" in length, conducted in a "business and professional-like way," and did not include "relays of investigators," "psychological coercion," "physical abuse," or "promises of leniency." The court further found that James was not uniquely susceptible, deprived of anything or confronted with "substantial theories of angry denials." In light of the totality of the circumstances surrounding his confession, we conclude there is no reasonable probability that testimony regarding James's claimed fear of the holstered gun would have altered the outcome of the suppression motion hearing. In fact, the trial court concluded that even if James had testified at the suppression motion hearing, the court's decision to deny the motion would not have changed. Because James has failed to establish either deficient performance or prejudice, we reject his ineffective assistance of counsel claim.

II. Newly Discovered Evidence

¶11 James argues he is entitled to a new trial on grounds of newly discovered evidence. In order to grant a motion for a new trial based on newly discovered evidence, "the defendant must prove by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If these four criteria are proved by clear and convincing evidence, "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.*** When the newly discovered evidence is a witness's recantation, there is an additional requirement that the recantation "be corroborated by other newly discovered evidence." ***Id.*** at 473-74. The corroboration requirement is met if "(1) there is a

feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 477-78.

¶12 James recounts that the initial allegations against him were made in May 2003. In August 2003, both the victim and her brother met with the Assistant District Attorney and asked that the case against James be dropped. In a letter received by the court on November 3, 2003, the victim recanted her allegations, indicating she had lied, made the accusations "in revenge" and could not "see an innocent man go to jail [for] the rest of his life." At the April 2004 trial, the victim was questioned about the November 2003 recantation letter and testified that although the letter was untrue, she wrote it after her family pressured her to do so.

¶13 James now focuses on a November 2007 affidavit in which the victim reasserted her recantation and provided information regarding her decision to withdraw her original recantation. Specifically, the victim averred that a few days after she sent her original recantation letter to the trial court, she met privately with the prosecutor, and the prosecutor threatened her with criminal prosecution for perjury and falsifying statements to the court. The victim further averred that because she was so frightened by the prosecutor's threats, she withdrew her recantation and testified against her father. At the hearing on James's postconviction motion, the victim testified consistent with her affidavit—reasserting her recantation and recounting her November 2003 meeting with the prosecutor.

¶14 Even assuming the first four ***McCallum*** criteria are satisfied, and further accepting that the victim would maintain her assertion that the prosecutor

threatened her, we conclude there is no reasonable probability that the proffered information would lead to a different result at trial.[4] The court, as fact finder, was aware that the victim had made the allegations, recanted and then withdrawn the recantation. The victim testified at trial about the family pressure to recant, and her claimed motive to fabricate is dubious, especially in light of the detailed account of the assaults—details that were corroborated in several respects by James's own confession. The trier-of-fact ultimately "found the recantation to be untrustworthy and the original statement with its detail and its affirmance at trial to be persuasive." We therefore conclude that the additional layer of information regarding the victim's November 2003 meeting with the prosecutor would not result in a different outcome at trial.[5]

¶15 With respect to the newly asserted recantation, the circuit court found the recantation to be "incredible" as it lacked even a simple explanation. The court reasoned: "If it were [the victim's] intent to get her father in trouble by making an allegation of sexual assault, that would no way explain an elaborately detailed story, echoed by her father and corroborated by physical facts. A more

[4] Although the parties dispute whether this court applies a deferential or *de novo* review to the determination whether there is a reasonable probability of a different outcome at trial, we affirm the trial court's decision under either standard of review.

[5] Characterizing the November 2003 meeting between the victim and the prosecutor as exculpatory evidence, James alternatively argues his due process rights were violated by the State's failure to disclose the meeting at trial. Even assuming that information about the meeting is properly characterized as "exculpatory," the State is required to turn over exculpatory information in its "exclusive possession." ***State v. Sarinske***, 91 Wis. 2d 14, 36, 280 N.W.2d 725 (1979). Evidence is not in the State's exclusive possession if the defendant could have learned about the information by questioning the witnesses. Exclusive control is not to be presumed where a witness is available to the defense and the record fails to disclose an excuse for the defense's failure to question that witness. ***State v. Amundson***, 69 Wis. 2d 554, 573-74, 230 N.W.2d 775 (1975). Here, James had every opportunity to cross-examine the victim about her decision to withdraw the original recantation. We therefore reject James's due process violation claim.

plausible explanation is that, under relentless pressure, she has simply given up." In context, it is clear that the court found that the victim's new assertion would not be believed by a new fact finder. We agree. Because there is no reasonable probability the newly discovered evidence would result in a different outcome at trial, the court properly denied James's request 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.