COURT OF APPEALS DECISION DATED AND FILED

December 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.**

Appeal No. 2011AP642

Cir. Ct. No. 2004CF2483

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRYL ALLEN FLYNN,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Darryl Allen Flynn appeals orders denying his motions for postconviction relief. *See* WIS. STAT. § 974.06 (2009-10).[1] Flynn argues that: (1) he is entitled to a new trial based on newly discovered evidence; (2) he received ineffective assistance of postconviction counsel; and (3) he is entitled to a new trial in the interest of justice. We affirm.

¶2 Flynn was convicted of first-degree reckless homicide while armed after a jury trial in 2004. On direct appeal, we affirmed Flynn's judgment of conviction. In 2010, Flynn filed a motion for postconviction relief under WIS. STAT. § 974.06. After an evidentiary hearing, the circuit court denied the motion.

¶3 Flynn first argues that he is entitled to a new trial based on newly discovered evidence. At trial, there was disputed testimony about whether the victim's arms were raised in the air in a gesture of surrender when he was shot or whether, as asserted by Flynn, the victim's arms were down and he was reaching across his body with his left arm for a weapon on the right side of his waistband. Flynn proffers an affidavit from Kenneth Siegesmund, a ballistics expert, that Flynn contends supports his assertion that the victim's arms were down and he was reaching for a gun when Flynn fired one shot into the back portion of his arm, which exited through the other side of his arm into his chest, killing him.

¶4 A defendant seeking a trial on the basis of newly discovered evidence must prove that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative."

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

State v. Plude, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (quotation marks and citation omitted). If the defendant proves all four criteria, then the circuit court must determine whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt about the defendant's guilt. ***Id.*** "The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion." ***Id.***, ¶31.

¶5 The flaw with Flynn's argument is that the proffered evidence, while obtained by Flynn after his conviction, could have been obtained and presented during his trial. There is nothing to suggest that Siegesmund's opinions are based on improvements in forensic science since Flynn's conviction. The evidence is thus not "newly discovered." Moreover, the State's expert at trial, Dr. Jeffrey Jentzen, who is a forensic pathologist, gave similar testimony on cross-examination at trial. Dr. Jentzen testified that the victim's arms could not have been raised high in the air fully extended from his body based on the wounds he received. Instead, the victim's arms must have been down compressed against his chest when he was shot, either with his hands up, bent at the elbow, next to his chest, or with his arm down and reaching across for a weapon as Flynn argued. Because this evidence was heard by the jury, there is not a reasonable probability that, had the jury heard the newly discovered evidence, it would have had a reasonable doubt about Flynn's guilt. Therefore, Flynn is not entitled to a new trial on the basis of newly discovered evidence.

¶6 Flynn next argues that he received ineffective assistance of postconviction/appellate counsel because his lawyer should have argued on direct appeal that he received ineffective assistance of trial counsel. Flynn contends this argument should have been raised because: (1) his trial counsel did not hire an

expert and did not adequately cross-examine the State's expert; (2) his trial counsel did not object to the State's closing argument; (3) his trial counsel ordered him not to testify at the suppression hearing; and (4) his trial counsel failed to argue on direct appeal that there was insufficient evidence to support the conviction of first-degree reckless homicide.

¶7 To prove a claim of ineffective assistance of counsel, a defendant must show both that his lawyer's performance was deficient and that the deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of this test if the defendant makes an insufficient showing on either one. *See* ***id.*** at 697. A lawyer does not perform deficiently by failing to raise an issue requested by a defendant, even if the issue is not frivolous. ***Jones v. Barnes***, 463 U.S. 745, 754 (1983). "[A]ppellate counsel … need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." ***Smith v. Robbins***, 528 U.S. 259, 288 (2000).

¶8 Kathleen Quinn, Flynn's postconviction/appellate lawyer, thoroughly reviewed the potential issues for appeal and did what a lawyer is supposed to do; she exercised her professional judgment to determine which issues would most likely be successful on appeal, and then explained her reasoning in a lengthy letter to Flynn dated August 5, 2006. The letter, which addresses the merits of each issue Flynn wanted to raise in detail, shows that Quinn made a reasonable strategic decision about how to best further Flynn's interests on appeal. Generally speaking, a lawyer who makes informed strategic choices about how to proceed at trial renders assistance that falls within the wide range of reasonable professional assistance. *See* ***Strickland***, 466 U.S. at 690-91.

¶9 Moreover, even if Quinn had raised the issues on appeal, they would not have been successful. Quinn did not perform deficiently by failing to hire a ballistics expert because the State's expert's testimony was consistent with Flynn's account of what happened when he shot the victim. Flynn's trial lawyer, Paul Ksicinski, skillfully cross-examined the expert to elicit this testimony at trial. As we explained above, the expert testimony that Flynn now wants to present would be cumulative to evidence that was adduced at trial.

¶10 As for Flynn's argument that Ksicinski should have objected to the State's closing argument, Flynn contends that the prosecutor stepped out of bounds by arguing that the victim was turning to run when Flynn shot him. This assertion was squarely based on the testimony of one of the witnesses, Obed L., and was therefore properly made. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979) ("The line between permissible and impermissible [closing] argument is … drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence."). As Quinn explained in her letter to Flynn, it was not prosecutorial misconduct for the State to discuss this testimony during closing argument *unless* the prosecutor *knew* the witness was lying. Even though Flynn contends Obed L. was lying, that does not make it prosecutorial misconduct for the prosecutor to argue based on the testimony at trial from Obed L. that the victim was turning to run away when he was shot.

¶11 Flynn next argues that Ksicinski provided him with ineffective assistance when he ordered him not to testify at the suppression hearing. During the postconviction hearing on Flynn's claim that he received ineffective assistance of counsel, Flynn testified that Ksicinski did not discuss strategies with him and simply ordered him not to testify. Ksicinski, on the other hand, testified that he

recommended to Flynn that he not testify and discussed his reasons for that strategy with Flynn, who agreed. The circuit court concluded that Ksicinski's testimony was more credible. We will sustain the circuit court's credibility determination unless it is clearly erroneous, which it is not here. *See* ***State v. Hoppe***, 2009 WI 41, ¶61, 317 Wis. 2d 161, 765 N.W.2d 794. Moreover, Ksicinski had sound strategic reasons for not having Flynn testify at the suppression hearing. Ksicinski explained that he did not want Flynn to testify because he did not want the prosecution to elicit testimony from Flynn that could be viewed as inconsistent and used against him at trial, especially because Flynn tended to volunteer too much information when he was attempting to explain himself. Because Flynn was not "ordered" by Ksicinski not to testify and Ksicinski had sound strategic reasons for recommending that Flynn not testify, Flynn's argument that Ksicinski performed deficiently in this respect is unavailing.

¶12 Flynn's last claim of ineffective assistance of counsel is premised on his assertion that Quinn should have argued that there was insufficient evidence to support the jury's verdict that he was guilty of first-degree reckless homicide. "[A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶13 Quinn did not perform deficiently by failing to raise this argument because, as we explained in our decision dated August 17, 2007, affirming Flynn's judgment of conviction on direct appeal, there was more than sufficient evidence against Flynn. Five witnesses testified that the victim had raised his hands into the air when Flynn pointed the gun at him and three witnesses who saw the shooting

itself, including Flynn's girlfriend, testified that when Flynn fired the shot, the victim still had his hands raised; Flynn was the only person who testified that the victim was reaching for something in his waistband when Flynn fired the shot. Given the other testimony and evidence, a claim that there was insufficient evidence to support the conviction would not have been successful. Therefore, we reject Flynn's argument that Quinn provided ineffective assistance of counsel.

¶14 Finally, Flynn argues that he is entitled to a new trial pursuant to WIS. STAT. § 752.35, which provides that we have the discretionary power to reverse a judgment where the real controversy was not fully tried or it is probable that justice has miscarried. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). Flynn contends that the real controversy was not fully tried because the jury did not hear evidence from his ballistics expert that he argues supports his claim that the victim was reaching for a weapon when Flynn shot him. Flynn contends that this evidence would also undermine the credibility of the State's witnesses who said the victim's arms were up in the air when he was shot. The problem with this argument is that the jury *did* hear this evidence on cross-examination of the State's expert witness, as we explained above. Therefore, we will not exercise our discretionary power to reverse the judgment of conviction.

By the Court.—Orders affirmed.

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