COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP703 **Cir. Ct. No. 2005CF940**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH A. SUNDERMEYER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Joseph A. Sundermeyer, *pro se*, appeals from an order of the circuit court denying his WIS. STAT. § 974.06 (2009-10) motion. Sundermeyer contends the circuit court erred in denying two of his claims without a hearing and the third after a hearing. We affirm.

BACKGROUND

¶2 Sundermeyer was charged with burglary and armed robbery by the use or threat of force for events occurring on February 7-8, 2005. The victim of both crimes, Loretta Howard, was a childhood friend of Sundermeyer's. The pair had also been in a romantic relationship for a period of time, beginning in 2003 while Howard was still married and ending either in the summer of 2004 or early in 2005, depending on whether one believed Howard or Sundermeyer. Sundermeyer reportedly entered Howard's home without permission, stealing items and extensively vandalizing the home. A day prior, Sundermeyer was a passenger in Howard's car when he allegedly threatened her with a knife and directed her to withdraw money from an automated teller machine. A jury ultimately convicted Sundermeyer on both counts, and the trial court imposed a sentence of twenty-five years' initial confinement and ten years' extended supervision.[1]

¶3 Sundermeyer filed a postconviction motion, alleging the erroneous introduction of other-acts evidence. The trial court denied the motion after a hearing. Sundermeyer appealed, addressing only issues relating to the other-acts evidence.[2] We affirmed. *See* ***State v. Sundermeyer***, No. 2008AP541-CR, unpublished slip op. (WI App Apr. 14, 2009).

¶4 Subsequently, Sundermeyer filed a *pro se* WIS. STAT. § 974.06 motion with the circuit court, alleging three errors and seeking a new trial. First,

[1] The Honorable Elsa C. Lamelas presided over the trial and imposed sentence.

[2] The Honorable Dennis P. Moroney denied the postconviction motion.

he complained that trial counsel was ineffective for failing to seek suppression of DNA evidence. Second, he alleged that trial counsel was ineffective for failing to seek suppression of a blue duffle bag because of a broken chain of custody. Third, he complained that trial counsel was ineffective for failing to utilize certain records that would impeach Howard's testimony, essential because the matter ultimately came down to a credibility contest between her and Sundermeyer. Sundermeyer additionally alleged that postconviction counsel was ineffective for not raising these issues in the original postconviction proceedings.

¶5 The State asked the circuit court to apply the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), contending that Sundermeyer's issues could have been raised previously. The circuit court noted, however, that Sundermeyer indicated "that he asked his postconviction attorney to raise the arguments, but the attorney did not do so."[3] The circuit court explained that it would address the merits of the motion because "[t]he burden on the circuit court to investigate his explanation exceeds the burden on the court to address the merits of his belated claims," and rejected the DNA and duffle bag claims outright. Additional facts related to those claims will be discussed herein.

¶6 The circuit court then noted that Sundermeyer might have a viable issue with regard to the impeachment evidence, but noted that Sundermeyer had not attached any documents to support his claim. Thus, the circuit court denied

[3] That is, the circuit court evidently construed Sundermeyer's motion to be relying on ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (1996) (ineffective assistance of postconviction counsel may "in some circumstances" constitute sufficient reason for not raising an issue), to circumvent the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

the request for a new trial, but granted Sundermeyer leave to renew his motion if he obtained appropriate documentation.

¶7 Sundermeyer then provided the circuit court with "a large number of documents." The court noted that most were immaterial or provided no new information, but "one category of documents … raises questions that might require further consideration." Specifically, the circuit court noted that there were certain phone and work attendance records for Howard and her mother, for the period between December 24, 2004, and February 3, 2005, that might have put Sundermeyer in a stronger position to contest Howard's claim that he was not living with her during that time, further calling her credibility into question. However, the circuit court declined to undertake "time-consuming hunting" to find the entries that supported Sundermeyer's claim, but allowed Sundermeyer to prepare "a more streamlined submission" that highlighted the relevant entries.

¶8 After Sundermeyer prepared that submission, the circuit court concluded that the record did "suggest a reasonable possibility" that Sundermeyer was living with Howard and not, as she testified, merely an occasional visitor. The circuit court therefore granted Sundermeyer a ***Machner***[4] evidentiary hearing on his ineffective-assistance claims on the impeachment-evidence issue only. After the ***Machner*** hearing, at which trial and postconviction counsel testified, the circuit court concluded that trial counsel had made an objectively reasonable strategic decision when he decided not to impeach Howard with the phone and attendance records, so there was no deficient performance by trial or

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

postconviction counsel. The circuit court then entered an order denying Sundermeyer's motion in its entirety. Sundermeyer appeals.

DISCUSSION

I. Postconviction Motion and Ineffective Assistance Pleading Standards

¶9 "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. The circuit court may deny a hearing if the facts, even assumed to be true, do not entitle the movant to relief. *See* ***id.***, ¶12. Sufficiency of the motion is a question of law we review *de novo*. *See* ***id.***, ¶9.

¶10 There are two components to an ineffective-assistance claim: a showing of deficient performance by counsel and a showing that such deficiency prejudiced the defendant. *See* ***State v. Oswald***, 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207. Deficient performance requires a showing of specific acts or omissions by counsel "that are 'outside the wide range of professionally competent assistance.'" *See* ***State v. Westmoreland***, 2008 WI App 15, ¶16, 307 Wis. 2d 429, 744 N.W.2d 919 (citing ***Strickland v. Washington***, 466 U.S. 668, 690 (1984)). Prejudice requires a showing that counsel's errors deprived the defendant of a fair proceeding or a reasonable outcome. ***Westmoreland***, 307 Wis. 2d 429, ¶17. We need not address both elements if the defendant fails to make a sufficient showing on either one. ***Id.***, ¶18. Whether counsel's performance was deficient and whether there was prejudice are questions of law we review *de novo*. ***Id.***

II. The DNA Issue

¶11 Police had recovered the knife Sundermeyer used to threaten Howard because he left it in her car. It was submitted for DNA testing, and the lab reported that the profile developed from a swab of the handle contained a mixture of DNA from at least three individuals, plus additional "minor/trace contributors." One of the major contributors was identified by his DNA already on file. No other identification was made from the databank. The technician's report indicated that "[n]o further interpretation" could be done on the evidence without a "standard" sample from a suspect. Police then obtained a warrant to collect a specimen from Sundermeyer for analysis. Sundermeyer was subsequently identified as a "possible minor contributor" to the DNA mixture on the knife.

¶12 Sundermeyer asserts that this specimen was illegally obtained because he had previously provided a sample and "has a DNA profile on file (since November-27-2001)."[5] He contends that the police necessarily lied by omission in swearing out the warrant application when they failed to mention his existing profile. He also points to the fact that the swab collection kit instructions indicate that if a subject has a specimen on file, a duplicate sample is not to be collected. Sundermeyer contends that this "illegally obtained second DNA sample" should have been suppressed.

[5] Sundermeyer received notification from the Department of Justice that his DNA profile had been entered into the Wisconsin DNA Databank on that date.

¶13 The circuit court rejected his challenge, noting:

> [The collection kit] is hardly legal authority [that] would prevent a court from allowing a jury to hear expert opinion regarding a potential DNA match with a defendant. The collection kit instructions are not derived from a statute or other authority [that] limits the court's authority to receive evidence based on the sample. (What's more, there is an obvious pragmatic reason for the collection kit instruction that has nothing to do with protecting any liberty interest or legal right of any person—duplicate samples, and the time needed to process them, take up space and resources at the State Crime Lab.)

We agree with this reasoning.[6]

¶14 Sundermeyer complains that the circuit court ruling ignores his complaint about the warrant. However, we see no reason why the result of the warrant application would be any different had the police disclosed that Sundermeyer had previously provided a sample for the database. For whatever reason, the results of the testing on the handle were not matched to Sundermeyer's file sample, but the technician indicated she could use a new sample to conduct further analysis. Those facts would be the same regardless of whether anyone knew that Sundermeyer had a sample on file. Though Sundermeyer expresses a degree of incredulity that he "mysteriously went from not being a possible contributor to the three DNA profile[s] developed from the knife … to being a

[6] Additionally, we note that the first lab report, while identifying a contributor by name, also states that the name "should be considered an investigate lead" and indicates that to confirm the named individual as a contributor, a "standard sample" should be submitted for analysis. In other words, even if Sundermeyer had been identified by name, it appears the lab would have recommended police obtain a new sample from Sundermeyer for validation.

'possible' [and] 'minor' contributor," such disbelief has no bearing on the admissibility of the test results.[7]

¶15 There was no basis for suppressing evidence of Sundermeyer as a possible contributor of DNA on the knife based on the collection of his DNA notwithstanding his existing profile in the databank. Thus, trial counsel was not deficient for failing to seek that suppression, and postconviction counsel was not deficient for failing to challenge trial counsel's performance. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance.").

III. The Blue Duffel Bag Issue

¶16 Among the items missing from Howard's home was a blue duffel bag belonging to her mother. When police arrested Sundermeyer, he was a passenger in a stolen minivan. Police took him and the driver into custody, searched the vehicle, then released it to its owner. The next day, the owner advised police that he had found a blue duffel bag and some other small items in it, none of which were his, in the minivan. He turned the bag into police. At trial, Howard's mother identified the bag as hers. Sundermeyer contends his attorney should have sought to suppress the bag because of a broken chain of custody.

¶17 The circuit court rejected the claim, explaining that the State "is not required to trace the custody of a stolen item from its owner until it is offered at

[7] Sundermeyer apparently does not appreciate that the lack of an immediate match between the DNA collected and his profile of record does not necessarily indicate his exclusion as a possible contributor.

trial; the State is required only to offer evidence that the item is what the witness says it is." *See* WIS. STAT. § 909.01 (2011-12). In other words, a "chain of custody" merely must show in this case that the bag introduced at trial is the same one recovered from the minivan owner, regardless of when it was recovered from the minivan owner.

¶18 The circuit court, discerning Sundermeyer's true concern, noted:

> Whether the blue duffel bag collected by the police is the same blue duffel bag that Ms. Howard claims to have been stolen is a different matter. Its provenance was for the jury to decide, and the facts that (1) the duffel bag apparently did not draw the attention of the police when Mr. Sundermeyer was arrested, (2) that a whole day passed until a duffel bag was discovered, and (3) that the duffel bag could have been placed in the minivan by someone other than Mr. Sundermeyer are factors for the jury to consider in judging whether the bag tied Mr. Sundermeyer to the burglary….
>
> Whether it may be inferred from these facts that Mr. Sundermeyer took the bag during the [burglary] … was for the jury to decide, and [the] bag itself and how it was found were facts that [were] entirely proper for the jury to consider in making its decision.

Indeed, "[a]lleged gaps in a chain of custody 'go to the weight of the evidence rather than its admissibility.'" ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54 (citation omitted). There was no basis for trial counsel to seek suppression of the bag. Accordingly, the circuit court properly exercised its discretion in denying relief on this claim without a hearing.

IV. The Records Issue

¶19 Sundermeyer had maintained his innocence at trial. He testified that he was the one who decided to break off the romantic relationship with Howard because of her physical and verbal abuse. *See* ***Sundermeyer***, No. 2008AP541-CR,

unpublished slip op. at ¶8. He contended that their relationship continued through 2004 until he moved out of her home on February 3, 2005. *See* ***id.*** As noted, Howard contended she and Sundermeyer had split up in the summer of 2004. "This disagreement was pivotal to the jury's determining who was more credible[.]" ***Id.***, ¶23.

¶20 In his WIS. STAT. § 974.06 motion and supplemental submissions, Sundermeyer alleged that Howard's phone records, and her and her mother's work attendance records, show that on multiple days between January 1 and early February 2005, calls were placed from Howard's home landline to her work and cell phone numbers.[8] The attendance records show that Howard and her mother were at work at those times and, thus, could not have made the calls from the home.[9] Sundermeyer suggests the necessary inference is that he placed the calls, and that this indicates that he was still living with Howard, not just visiting. He asserts that trial counsel was ineffective for not utilizing these phone and attendance records to impeach Howard.

¶21 The circuit court granted a ***Machner*** hearing at which both trial and postconviction counsel testified. Trial counsel testified that he was aware of the records before trial but did not believe they would be useful for impeachment. He

[8] Sundermeyer submitted other documents as well, like records that Howard visited him in jail and put money into his inmate account, or records showing that Howard rented a hotel room in October 2004. The circuit court rejected—appropriately, we think—any arguments on these other documents. It explained, for example, that evidence of visits and gifts are not inconsistent with the parties staying friends after their separation. Also, though Sundermeyer contends the hotel room was rented so he and Howard could have sex, the hotel receipt did not indicate who was in the room with Howard. Other documents were merely cumulative of information already presented to the jury.

[9] The parties assume that Howard's children were in school at those times.

explained that he did not think the records made it clear enough just who was placing the calls from Howard's landline. Trial counsel also explained that other evidence, like that of Sundermeyer answering the door to admit a repairman during the period Sundermeyer claimed he still lived with Howard, was more in line with their defense theory.

¶22 Postconviction counsel testified that he was also aware of the records but thought it would be difficult to show trial counsel had been ineffective, because it would be difficult to show who actually placed the calls from Howard's home. Further, the jury had been presented with other impeachment evidence but, based on the verdict, had evidently rejected it.

¶23 The circuit court determined that trial counsel had made an objectively reasonable strategic choice. It described impeachment as "a strategic decision that we generally leave to counsel to decide" and explained that it "is not a given that counsel take advantage of every opportunity to impeach a witness." Here, the circuit court noted, "there was more than one avenue" for impeaching Howard; thus, which to travel was a strategic choice.

¶24 The circuit court additionally determined that the choice was objectively reasonable: at the time, neither the records nor the inferences to be drawn therefrom appeared particularly clear or powerful, likely because at the time, the "few parts that might seem clear now were buried in a mostly undifferentiated pile." In addition, even as refined, the records "do not prove straightway" that Howard lied about when her relationship with Sundermeyer ended, nor do the records fully exclude the possibility that Sundermeyer was only a guest, not a resident, of Howard's home. The circuit court further noted that evidence of the repairman's visit "must have seemed much more direct and

effective" than "threading through entry upon flat entry in multiple business records."

¶25 The circuit court is correct that the method of impeachment is a strategic choice, *see* ***State v. Goetsch***, 186 Wis. 2d 1, 17-18, 519 N.W.2d 634 (Ct. App. 1994), and that counsel need not use every impeachment option, *see* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992) (trial counsel may choose from available defenses). The circuit court is also correct that we evaluate counsel's performance as of the time of that performance. *See* ***State v. Balliette***, 2011 WI 79, ¶23, 336 Wis. 2d 358, 805 N.W.2d 334. Sundermeyer notes, however, that trial counsel "did not articulate all of the reasons" the circuit court relied on in ratifying trial counsel's decisions, and he complains about the circuit court's "invent-a-strategy" approach.

¶26 The "invent-a-strategy" reference derives from ***State v. Kimbrough***, 2001 WI App 138, 246 Wis. 2d 648, 630 N.W.2d 752, and its discussion of ***Harris v. Reed***, 894 F.2d 871 (7th Cir. 1990). Harris had challenged his trial counsel's choice to avoid putting on any defense at all to a murder charge, notwithstanding the availability of witnesses who would identify another person as the assailant. The Seventh Circuit was critical of the district court's "construct[ion of] a trial strategy supporting counsel's decision," explaining that "[j]ust as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." ***Id.*** at 878.

¶27 However, in ***Kimbrough***, we commented that the Seventh Circuit "[did] not require a reviewing court to view defense counsel's subjective testimony as dispositive of an ineffective assistance claim." ***Id.***, 246 Wis. 2d 648,

¶35. As the circuit court here noted, our review is whether trial counsel's performance was objectively reasonable. *See* ***id.***, ¶31. Thus, trial counsel's testimony "is simply evidence to be considered along with other evidence in the record that a court will examine in assessing counsel's performance." ***Id.***, ¶35.

¶28 Ultimately, we agree with the circuit court's conclusion that trial counsel made an objectively reasonable decision to forego utilizing complicated, dry documentary evidence over more direct and concise witness testimony as a means of impeaching Howard. If trial counsel's decision was objectively reasonable, he was not deficient, so there was no ineffective assistance. If trial counsel was not ineffective, then postconviction counsel was not ineffective for failing to challenge his performance. *See* ***Cummings***, 199 Wis. 2d at 747 n.10. Consequently, the circuit court did not err in denying Sundermeyer's motion for relief.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).