COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1584

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TONY G. MERRIWEATHER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Frankel,[1] JJ.

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[1] Circuit Judge Mark A. Frankel is sitting by special assignment pursuant to the Judicial Exchange Program.

PER CURIAM. Tony Merriweather appeals from an order denying his postconviction motion to overturn his convictions for aggravated battery and sexual assault. Because we conclude that the bulk of Merriweather's claims are procedurally barred and the rest are without merit, we affirm the order.

In 1989, a jury found Merriweather guilty of one count of aggravated battery while armed and three counts of first-degree sexual assault (one as party to the crime) following the gang rape of a woman and the beating of her husband by a group of five men. Merriweather unsuccessfully appealed from his judgment of conviction in 1990, claiming: (1) he had been denied equal protection by the State's use of a peremptory challenge against a black panel member; (2) his right to confrontation had been infringed by the exclusion of evidence related to the victim's prior sexual conduct; (3) the trial court had erroneously exercised its discretion by admitting evidence that Merriweather was a gang member and allowing the jurors to see pictures of the husband's injuries; and (4) he was entitled to a new trial in the interests of justice.

In April 1997, Merriweather filed a motion for postconviction relief under § 974.06, STATS., alleging: (1) his right to confrontation had been infringed by the exclusion of evidence related to the victim's prior sexual conduct; (2) the trial court had erroneously exercised its discretion by admitting evidence that Merriweather was a gang member; (3) he was entitled to a new trial in the interests of justice; (4) the prosecutor acted vindictively by adding counts to the information after the preliminary hearing; (5) the prosecutor improperly vouched for the credibility of a State's witness; (6) Merriweather was denied due process because he was not charged by indictment; (7) the prosecutor improperly commented on his postarrest silence; (8) the prosecutor failed to disclose exculpatory evidence; (9) the trial court improperly relied upon information in the

presentence report of a codefendant to sentence Merriweather; (10) Merriweather was improperly denied the right to see his own presentence report; (11) the lesser included offense of battery should have been submitted to the jury; (12) certain hearsay evidence should have been admitted; (13) the jury instruction on battery with a dangerous weapon failed to require a nexus between the possession of the weapon and the crime; and (14) he was denied effective assistance of postconviction counsel in several regards. The circuit court denied the motion without a hearing on the grounds that the record conclusively established that Merriweather was entitled to no relief.

The law of the case precludes us from reviewing the first three issues on Merriweather's list, which were all raised and rejected on his prior appeal. ***State v. Brady***, 130 Wis.2d 443, 447, 388 N.W.2d 151, 153 (1986) ("'[A] decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.'") (quoted source omitted). Similarly, the next nine issues which Merriweather raises are procedurally barred under § 974.06(4), STATS., because Merriweather has failed to show a sufficient reason why they were not brought before this court on his direct appeal. ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 181, 517 N.W.2d 157, 162 (1994).

Merriweather's thirteenth claim is not barred by ***Escalona-Naranjo***, however, because the case upon which it is based was decided after his prior appeal. ***State v. Howard***, 199 Wis.2d 454, 459-60, 544 N.W.2d 626, 629 (Ct. App. 1996). In ***State v. Peete***, 185 Wis.2d 4, 517 N.W.2d 149 (1994), the supreme court held that the State must show that a weapon facilitated an underlying offense in order to enhance the penalty for the underlying charge under § 939.63(1)(a), STATS., even when the State proceeds on the theory that the defendant committed the crime while possessing, rather than using, the weapon.

Id. at 9, 517 N.W.2d at 150. Merriweather contends that he was entitled to a special facilitation instruction based upon ***Peete***. However, the ***Peete*** court also observed that a nexus is automatically established when a defendant uses or threatens to use a weapon during the commission of a crime. ***Id***. at 18, 517 N.W.2d at 154. Therefore, the trial court's instruction that the jury needed to satisfy itself that Merriweather had committed the crime of aggravated battery while using a dangerous weapon was sufficient to satisfy ***Peete***.

Merriweather's final claim, that counsel was ineffective, is also not barred because the same attorney represented Merriweather through all stages of the proceedings. *See* ***Page v. United States***, 884 F.2d 300, 301 (7th Cir. 1989) (holding that counsel should not be expected to attack his own competence). Merriweather alleges that counsel was ineffective in five ways: (1) for failing to object to an erroneous jury instruction; (2) for failing to move for dismissal following an untimely preliminary hearing; (3) for failing to object to what the defendant perceived as a conflict of interest when the victims apparently sought a legal consultation with one of counsel's partners; (4) for failing to question the victims on the defendant's theory of defense that the victims had proposed sex for money; and (5) for failing to investigate or call eyewitnesses who allegedly would have testified to having heard the victims propose money for sex, and having seen the defendants and victims together without signs of coercion.

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient; and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id***. at 698. The circuit court's findings of fact will not be reversed, unless they are clearly erroneous.

Section 805.17(2), STATS.; ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides *de novo*. ***Id***. at 634, 369 N.W.2d at 715.

To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). To satisfy the prejudice prong, the defendant usually must show that "counsel's errors were as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id***. at 688.

After reviewing the record, we conclude that: (1) counsel's failure to object to the jury instruction on his use of a weapon was not deficient performance because, as discussed above, the instruction was proper; (2) counsel's failure to object to the untimeliness of the preliminary hearing was not deficient performance because the hearing was continued at counsel's own request in order to have more time to prepare the case; and (3) counsel's failure to raise the issue of a conflict of interest was not deficient performance because there was no allegation that his partner ever actually represented the victims or that counsel's representation of the defendant was in any way impaired. *See* ***Cuyler v. Sullivan***, 446 U.S. 335, 348 (1980). In addition, counsel's choice of defense theory was a strategic decision, and we have in the past found the decision to avoid attacking the victim to be a reasonable one well within professional norms. *See* ***State v.***

DeLeon, 127 Wis.2d 74, 85, 377 N.W.2d 635, 641 (Ct. App. 1985) (impeachment of a sexual assault witness can be a "double-edged sword" that not only may cast doubt upon the victim's credibility but also may cast both the defendant and defense counsel in a negative light).

Finally, there is arguable merit to the defendant's allegation that counsel's failure to investigate or call certain eyewitnesses constituted deficient performance. The trial court nonetheless determined, without a hearing, that the record conclusively demonstrated that Merriweather was not entitled to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996). This court is unable to similarly evaluate whether the record might conclusively demonstrate that Merriweather was not prejudiced by counsel's decision not to call the witnesses recommended by the defendant because the trial transcripts were not included in the appellate record. It is the appellant's responsibility to ensure that the appellate record is complete. ***State v. Michels***, 141 Wis.2d 81, 90 n.3, 414 N.W.2d 311, 314 (Ct. App. 1987). We may decline to address any argument for which we lack the evidence needed for proper review, and we do so here. ***Id***.

By the Court.—Order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)5, STATS.