COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-1917-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRE D. MITCHELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LEE E. WELLS and JEFFREY A. KREMERS, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

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[1] The Honorable Lee E. Wells presided over the pretrial motion and entered the judgment of conviction; the Honorable Jeffrey A. Kremers presided over the ***Machner*** hearing and entered the order denying postconviction relief.

PER CURIAM. Andre D. Mitchell appeals from a judgment of conviction entered after he pleaded guilty to five counts of armed robbery, one count of attempt armed robbery, and one count of attempt first-degree intentional homicide while armed, all as party to a crime. He also appeals from an order denying his motion for postconviction relief. Mitchell argues that: (1) the trial court erred in denying his motion to suppress his confession, and (2) his trial counsel was ineffective for failing to subpoena Shulbert Williams, his co-assailant and fellow prisoner, to testify at the hearing on his suppression motion. Mitchell claims that Williams overheard the police employing improper tactics to coerce his confession. We affirm.

I. BACKGROUND

Milwaukee police arrested Mitchell on December 16, 1995, in connection with a series of armed robberies and the shooting of an off-duty police officer. At approximately 1:30 a.m. on December 17, 1995, Detectives William LaFleur and David Zibolsky questioned Mitchell regarding his role in the robberies. After being advised of his ***Miranda*** rights, Mitchell gave his first statement, admitting his participation in the robberies. Mitchell also gave two more statements relating to the crime spree, one on the evening of December 17, and another on December 19.

Following the denial of his motion to suppress, Mitchell entered into plea negotiations with the State, and pleaded guilty to amended charges. On July 12, 1996, Mitchell was sentenced to a total of 120 years in prison. Mitchell then filed a postconviction motion to withdraw his guilty plea on the grounds of ineffective assistance of counsel. Following a ***Machner*** hearing, the trial court denied his motion.

II. DISCUSSION

Mitchell argues that the trial court erred in denying his motion to suppress his statements. He claims that the incriminating statements he gave in the three interviews were not voluntary, but rather, were the products of police coercion, consisting of physical abuse and threats.

Whether a defendant knowingly, intelligently, and voluntarily waived his or her ***Miranda***[2] rights presents a mixed question of law and fact. *See* ***State v. Santiago***, 206 Wis.2d 3, 18, 556 N.W.2d 687, 692 (1996). While we review issues of constitutional law *de novo*, *see* ***State v. Lee***, 175 Wis.2d 348, 354, 499 N.W.2d 250, 252 (Ct. App. 1993), we review a trial court's findings of historical fact, which formed the basis for the ultimate finding of constitutional fact, under the clearly erroneous standard, *see* ***Santiago***, 206 Wis.2d at 17 n.10, 556 N.W.2d at 692 n.10.

As the supreme court has reiterated:

> When the State seeks to admit into evidence an accused's custodial statement, both the United States and Wisconsin constitutional protections against compelled self-incrimination require that it make two showings. First, the State must prove that the accused was adequately informed of the ***Miranda*** rights, understood them, and knowingly and intelligently waived them. "[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Second, the State must prove that the accused's statement was given voluntarily.

Santiago, 260 Wis.2d at 18-19, 556 N.W.2d at 692-93 (citations omitted). The State's burden of proof on these issues is by a preponderance of the evidence. *See*

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

id. at 19, 556 N.W.2d at 693. *Accord* ***State v. Williams***, No. 97-1276-CR, slip op. at 4-5 (Wis. Ct. App. June 9, 1998, ordered published July 29, 1998).

Under the ***Goodchild***[3] standard, "a prima facie case will be established 'when the state has established that the statement to be offered is, in fact, the statement of the defendant, that he was willing to give it, and that it was not the result of duress, threats, coercion or promises.'" ***State v. Mitchell***, 167 Wis.2d 672, 697-98, 482 N.W.2d 364, 374 (1992) (citation omitted). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986). The inquiry ends if the court determines that the law enforcement methods were not coercive. *See* ***State v. Clappes***, 136 Wis.2d 222, 239-40, 401 N.W.2d 759, 767 (1987).

At the suppression hearing, Mitchell testified that the detectives advised him of his ***Miranda*** rights prior to questioning. Mitchell also told the court that as soon as Detective LaFleur read him his rights, he asked to speak with a lawyer. He testified that after he asserted his right to counsel, the detectives told him that he could not leave the room until he started talking. Mitchell said that when he refused to answer the detectives' questions, Detective Zibolsky threatened him, both physically and verbally. He also stated that after giving him a sandwich and some cigarettes, Detective Zibolsky grabbed him by the neck and pushed him, and then tried to punch him. Mitchell claimed that when Detective Zibolsky tried to punch him, he (Mitchell) moved and the detective's fist landed on his neck, leaving a bruise. Mitchell said that he then hit Detective Zibolsky in the face and that, in return, Detective Zibolsky pushed him back into his chair.

[3] ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 133 N.W.2d 753 (1965).

Mitchell said that when he fell back into the chair, he cut his leg on the desk. Mitchell told the court that after this scuffle, he was very frightened and felt compelled to give a statement. He said this fear persisted throughout the next two interviews, resulting in his giving the additional statements.

Detective LaFleur also testified at the pretrial hearing. Detective LaFleur denied that either he or Detective Zibolsky told Mitchell that he would not be permitted to talk to a lawyer unless he gave a statement. He also denied that he or anyone else threatened Mitchell or physically abused him.

At the conclusion of the motion, the trial court found that Detective LaFleur was credible, and that Mitchell was not. The trial court also found that the detectives complied with ***Miranda*** in each of the interviews, and that Mitchell's statements were voluntary.

The trial court's findings that the detectives complied with ***Miranda*** and that they neither mistreated Mitchell nor ignored his alleged request for counsel are not only supported by the record, but also are within the ambit of the trial court's credibility determinations. Consequently, we are bound by them. *See* ***Clappes***, 136 Wis.2d at 235, 401 N.W.2d at 765 (reviewing court is bound by findings of fact that are not "contrary to the great weight and clear preponderance of the evidence"). We conclude, therefore, that the trial court correctly concluded that Mitchell's rights under ***Miranda*** were not violated and that his statements were voluntary.

Mitchell next argues that his trial counsel was ineffective because he did not subpoena Williams, his co-assailant, to testify at the ***Miranda/Goodchild*** hearing. We reject his arguments.

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing both that counsel's performance was deficient and that the deficient performance produced prejudice. *See* ***State v. Sanchez***, 201 Wis.2d 219, 232-36, 548 N.W.2d 69, 74-76 (1996). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). A defendant will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***id.*** We will strongly presume counsel to have rendered adequate assistance. *See* ***id.*** To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. Whether counsel's performance was deficient, and whether such deficiency was prejudicial, are questions of law, which we review *de novo*. *See* ***Sanchez***, 201 Wis.2d at 236-67, 548 N.W.2d at 76.

At the ***Machner*** hearing, trial counsel testified that shortly after Mitchell told him that he had received "improper treatment" from the police, he had an investigator photograph the bruises Mitchell identified as police-inflicted. Counsel also stated that he spoke with the attorneys for Mitchell's co-defendants, to inquire about the allegation of police brutality, but that they refused to permit him to speak with their clients. Mitchell's counsel specifically recalled speaking with Williams's attorney, and being refused permission to speak with Williams regarding the allegations of police misconduct.

Mitchell's counsel also testified that Mitchell never named Williams as a possible witness to the alleged abuse. Rather, Mitchell informed him that

although he had made noise during the alleged abuse, he did not know if anyone overheard him. In addition, counsel testified that he did not learn of Williams's proposed testimony and willingness to testify until he read Williams's affidavit at the postconviction hearing.

Williams also testified at the postconviction motion. He told the court that he had overheard the detective hollering in the interrogation room next to his. He testified that the detectives were saying, "[t]alk," "[s]peak up, talk," and "talk, tell us something."[4] He also stated that he had told Mitchell about what he had overheard around the time of their preliminary hearing.

Mitchell testified that he had told his attorney about Williams's knowledge of the abuse when counsel was first appointed, before the preliminary hearing. He claimed that defense counsel "never got around to getting Shubert [sic] Williams to talk to him." Mitchell also claimed that when he asked defense counsel why he never interviewed Williams, counsel allegedly told him that "he didn't think it was a good idea and that was that."

In denying Mitchell's postconvicition motion, the trial court found:

> that Mr. Williams's testimony here today is certainly questionable at best. In his first attempt to testify, he gave one version of what he claimed he heard from the other room. Then, when he's confronted with the statement he signed . . . he said, ["]Oh yeah, that's what I heard,["] which was different than what he testified to. But even aside from that, both versions are different from what Mr. Mitchell testified occurred in the room.
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> ….

[4] By contrast, in his affidavit, Williams stated, "[He] heard someone say to Andre, You're going to talk. We are going to make you talk."

> Mr. Mitchell never testified anybody said, "You're going to talk. We are going to make you talk." That was never Mr. Mitchell's testimony…. That wasn't Mr. Williams['s] testimony today either, until confronted with the statement. Then he adopted it.

The court also found defense counsel more credible than either Mitchell or Williams, and concluded:

> that [defense counsel] was not specifically made aware of Shubert [sic] Williams's knowledge of anything in connection with this and he had no ability to question Mr. Williams because Mr. Williams's attorney said, ["]No["]. . . .
>
> So, I don't find any basis for concluding that [defense counsel's] efforts in this case fell below the appropriate standard and even if they did, …, I don't believe there is any prejudice to Mr. Mitchell, because … I don't think there is any reasonable possibility or probability the [pretrial suppression] hearing would have been any different ….

These findings are supported by the record and, therefore, are entitled to deference. *See* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). Counsel made reasonable efforts to substantiate Mitchell's allegations of police misconduct, but was denied the opportunity to interview the most likely witnesses. Further, the court, in denying Mitchell's postconviction motion, reasonably concluded that even if Williams had testified at the suppression hearing, Mitchell's motion still would have been denied. We conclude, therefore, that Mitchell has failed to establish either that counsel's performance was deficient, or that any alleged deficiency was prejudicial.

By the Court.—Judgment and order affirmed.

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