COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0280-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TDURADO JACQUES HEAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., Myse and Hoover, JJ.

MYSE, J. Tduardo Head appeals a judgment of conviction for possession of cocaine and heroin with intent to deliver, contrary to §§ 961.41(1m)(cm)(1) and 961.41(1m)(d)(1), STATS., and an order denying postconviction relief. Head contends that he was denied the effective assistance of

counsel because his attorney was unaware of his statutory right to an extra peremptory challenge.[1] We first conclude that Head's attorney's lack of awareness of the statutory provision allowing an extra peremptory challenge was deficient performance. We further conclude that this deficiency is per se prejudicial under ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997). The judgment and order are reversed, and the cause is remanded for a new trial.

Head was arrested after a lawful search of the vehicle in which he was a passenger revealed drug paraphernalia. A strip search performed at the station house revealed drugs on Head's person.

When Head's trial began, the trial court impaneled twenty-one persons. After examining the potential jurors, the court noted that it was going to narrow the jury panel to thirteen because "Each attorney is permitted four strikes." At no time did Head's attorney, Carol Law, object or bring to the court's attention Head's right to have five peremptory challenges as permitted under §§ 972.03 and 972.04, STATS. Head had the right to five challenges, one more than § 972.03, STATS., generally allows, because the court was impaneling thirteen jurors.

Head was ultimately convicted, and brought a postconviction motion challenging the denial of his fifth peremptory challenge. At the postconviction hearing, Law testified to her state of mind as follows:

> Q Carol, are you familiar with Sections 972.03 and 04 of the statutes providing an additional peremptory challenge and additional jurors impaneled?
>
> A Yes, I am.

[1] Head also contends that the failure to insure he received all five peremptory challenges violates due process. Because we reverse on ineffective assistance of counsel grounds, we do not address this argument.

> Q Okay. Did you discuss, prior to trial in this case, the number of available peremptories with the Defendant?
>
> A. No, I did not.
>
> Q Is it correct that this matter was not raised with the trial court?
>
> A That's correct.
>
> Q Is there any reason that this matter was not raised with the trial court?
>
> A It didn't occur to me to do that.

After this case was remanded, Law elaborated on her understanding of the statutes and her state of mind as follows:

> A Well, I knew that those sections – that – I'm not sure which one, one of them first gives the defendant four peremptory challenges, and then another, I think it's 04, perhaps, says that where additional jurors are impaneled, the defendant gets additional peremptory challenges. And, frankly, I thought that that meant in a case where you have – I considered additional jurors to be, like, say you had to have 18 or 20 impaneled sitting because, for example, the case would go on long enough that jurors might fall off and in order for there to be a 12 member panel. In Mr. Head's case, we had an alternate juror, and it did not occur to me at that time of that trial that that entitled him to additional peremptory challenges.
>
> Q So you're saying you understood the statutes at that time – you understood the statutes to mean that if you had 12 plus an alternate, you were only entitled to four peremptories?
>
> A That's what I thought, and that has also been my experience.
>
> ….
>
> Q Did you intend to waive Mr. Head's right to have five peremptory strikes in this case?
>
> A No, I did not.

Head contends that he was deprived of his right to effective assistance of counsel because Law was unaware of his statutory right to an extra

peremptory challenge. The right to counsel is guaranteed under both the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 7 of the Wisconsin Constitution. "The right to counsel is the right to the effective assistance of counsel." ***State v. Johnson***, 153 Wis.2d 121, 126, 449 N.W.2d 845, 847 (1990) (internal quotation marks omitted).

We follow a two-part test in reviewing claims of ineffective assistance of counsel. First, the trial counsel's performance must be deficient. ***Id***. This requires the defendant to overcome a strong presumption that his or her counsel acted reasonably within professional norms and demonstrate that counsel made errors so serious that the defendant was not truly afforded his or her constitutional right to counsel. ***Id***. at 127, 449 N.W.2d at 847-48. Second, the defendant must show that counsel's deficiencies were so prejudicial that they deprived the client of a fair trial, a trial whose result is reliable. ***Id***. at 127, 449 N.W.2d at 848.

The standard of review for claims of ineffective assistance of counsel is a mixed question of law and fact. ***Id***. The trial court's historical findings will not be overturned unless clearly erroneous. ***Id***. The ultimate determination of whether the historical facts amount to ineffective assistance of counsel is a question of law we review de novo. ***Id***. at 128, 449 N.W.2d at 848.

The trial court found that Law did not know that the correct application of §§ 972.03 and 972.04, STATS., would provide her with an extra peremptory challenge. The court went on to conclude that Law's performance fell outside the range of professionally competent assistance, but that there was no prejudice.

We first conclude that the performance of Head's counsel was deficient. A reasonable attorney should be aware of his or her client's statutory right under § 972.03, STATS., to have additional peremptory challenges when a jury of greater than twelve is impaneled. While we do not address the situation where defense counsel knowingly waives this right for strategic reasons, it is deficient performance to waive a defendant's right to a full complement of peremptory challenges through inadvertence or ignorance of the law.

Next, we conclude that the Wisconsin supreme court decision of ***Ramos*** requires us to reverse the conviction because counsel's deficiency arbitrarily deprived Head of his statutory right to an additional peremptory challenge. In ***Ramos***, the issue before the court was whether the trial court's failure to remove a juror for cause constituted reversible error. ***Id***. at 14, 564 N.W.2d at 329. The supreme court first concluded that the trial court's failure to remove the juror deprived the defendant of his statutory right to the available amount of peremptory challenges. *See* ***id***. at 23, 564 N.W.2d at 333. Next, the supreme court held that the denial of the defendant's statutory right to all available peremptory challenges was not subject to a harmless error test. *See* ***id***. at 23-24, 564 N.W.2d at 333-34. Refusing to apply the harmless error test, the court stated, "We hold that the use of a peremptory challenge to correct a trial court error is adequate grounds for reversal because it arbitrarily deprives the defendant of a statutorily granted right." ***Id***. at 24-25, 564 N.W.2d at 334.

We conclude that ***Ramos*** created a standard of per se prejudice for arbitrary deprivations of the defendant's statutory right to all available peremptory challenges. As the ***Ramos*** court noted, the denial or impairment of the statutory right "is reversible error without a showing of prejudice." ***Id***. at 18, 564 N.W.2d at 331 (quoting ***Ross v. Oklahoma***, 487 U.S. 81, 89 (1988)). In part, the ***Ramos***

court was building on its language in ***State v. Wyss***, 124 Wis.2d 681, 724, 370 N.W.2d 745, 765 (1985), *overruled on other grounds in* ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990), where it opined that "There is little doubt that if the trial court or the prosecution deprived [the defendant] of his right to the effective exercise of his peremptory challenges it would have provided grounds for new trial." ***Ramos***, 211 Wis.2d at 23, 564 N.W.2d at 333.

In the present case, Law's unawareness of the law governing the applicable number of peremptory challenges acted as an arbitrary deprivation of Head's statutory rights to such challenges. Therefore, ***Ramos*** requires us to conclude that this deficiency is prejudicial per se, and provides grounds for a new trial.

The State argues that the holding in ***Ramos*** does not require us to reverse Head's conviction because, unlike ***Ramos***, the error did not disadvantage the defense. In ***Ramos***, the trial court's error effectively gave the defendant one less peremptory challenge than was available to the State. In the instant case, however, Law's failure to object did not have the same effect because both Head and the State were given the same number of peremptory challenges.

We do not read ***Ramos*** so narrowly. While the supreme court was clearly aware that Ramos was disadvantaged by the trial court's error,[2] it chose only to base its holding on the fact that Ramos was denied his right to exercise all of the peremptory challenges to which he was entitled. ***Id***. at 24, 564 N.W.2d at 333. The dispositive issue for the court was simply "whether Ramos' statutory

[2] The ***Ramos*** court remarked, "In the instant case, only the state received that to which it was entitled under state law." ***State v. Ramos***, 211 Wis.2d 12, 23, 564 N.W.2d 328, 333 (1997).

rights were violated." ***Id***. Here, as in ***Ramos***, Head was arbitrarily deprived of his statutory right to all available peremptory challenges. It is therefore irrelevant to our conclusion that Head was not comparably disadvantaged by Law's deficiency.

We hold that Head was denied the effective assistance of counsel and that his counsel's deficiency was per se prejudicial. We therefore reverse the conviction and remand this matter for a new trial. We wish to again emphasize, however, that our opinion is limited to the situation where defense counsel *deficiently* deprives the defendant of his or her right to the full complement of peremptory challenges available. We do not reach the situation where defense counsel knowingly waives the right to all available peremptory challenges, such as when counsel wishes to deprive the State of an additional challenge or is satisfied with the jury venire.

By the Court.—Judgment and order reversed and cause remanded for a new trial.

Recommended for publication in the official reports.