COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0849

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID S. FREDERICK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

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

PER CURIAM. David Frederick appeals the order denying his § 974.06, STATS., motion seeking relief from the judgment convicting him of battery to a prisoner. He argues that the trial court erroneously: (1) concluded that Frederick failed to establish sufficient reasons for not raising the issues in his initial appeal; (2) found that Frederick was competent at the time of trial and his

initial appeal; (3) concluded that Frederick was not denied effective assistance of trial counsel; (4) denied relief based on the trial court's error at his battery trial by failing to make a determination with respect to the voluntariness of his statement; and (5) determined that Frederick was not denied a fair trial. We reject his arguments and affirm the order.

The procedural background can be summarized as follows:

> Frederick was convicted in 1987 of battery to an inmate and sentenced to eight years in prison consecutive to other sentences unrelated to this action. His conviction was affirmed by this court in 1988, and a petition for review was denied. Frederick then filed a petition for a writ of habeas corpus in the supreme court challenging the effectiveness of his appellate counsel under ***State v. Knight***, 168 Wis.2d 509, 484 N.W.2d 540 (1992). The supreme court referred the matter to the court of appeals. This court denied the petition because, although the issues were stated in terms of ineffective assistance of appellate counsel, the underlying issues involved alleged ineffective assistance of trial counsel and prosecutorial misconduct. We concluded that these matters should be raised in the trial court by motion under § 974.06, STATS., because failure to raise issues that were not properly preserved did not constitute defective performance by appellate counsel, but rather by counsel appearing before the trial court.
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> For reasons Frederick has not made clear, he disregarded our direction to proceed under § 974.06, STATS., and instead filed a "***Knight*** petition" in the trial court.

See ***State ex rel. Frederick v. Morgan***, No. 94-2961 (Wis. App. May 16, 1995).

Frederick appealed the order denying his petition, arguing that the judge should have recused himself and that the petition stated grounds for relief. We rejected these arguments and affirmed the order. ***Id***. Thereafter, Frederick returned to the circuit court where he filed a § 974.06, STATS., motion on January 31, 1996. In a written decision on July 10, 1996, his motion was denied as

untimely and barred by ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994). ***Escalona-Naranjo*** applies "the plain language of subsection (4) which requires a *sufficient reason* to raise a constitutional issue in a sec. 974.06 motion that *could have been raised* on direct appeal or in a sec. 974.02 motion." ***Id.*** at 185, 517 N.W.2d at 164 (emphasis in original). Frederick appealed to this court, which remanded to the trial court with directions that the trial court make sufficient findings regarding his failure to raise the issues in his initial hearing or, alternatively, rule on the merits. *See* ***State v. Frederick***, No. 96-2642, slip op. at 3 (Wis. App. Mar. 11, 1997).

On remand, the circuit court held a hearing at which Frederick's trial counsel and appellate counsel testified. The former prosecutor also testified. The trial court found that Frederick did not receive ineffective assistance of appellate counsel and that there was not sufficient reason under ***Escalona-Naranjo*** for failing to raise the ineffective assistance of trial counsel in the previous appeal. The circuit court also found that the prosecutor did not, contrary to Frederick's allegation, withhold exculpatory evidence and that there was no evidence that Frederick was incompetent at the time of his trial and sentencing. The court denied postconviction relief. It is from that order Frederick now appeals.

Frederick first argues that the following reasons are sufficient for failing to raise all of his issues in the previous appeal: (1) He received ineffective assistance of appellate counsel; (2) he was incompetent, dyslexic, undergoing psychiatric treatment and incarcerated at the time of his appeal; (3) he is actually innocent; and (4) the evidence of prosecutorial misconduct was not discovered until after the direct appeal within the exception of subsec. (4). We are unpersuaded.

In the context of this appeal, we review the trial court's findings with respect to appellate counsel's conduct only to the extent that it establishes a basis for Frederick to raise the issue after his first appeal as required in ***Escalona-Naranjo***. Frederick contends that appellate counsel was ineffective because counsel: (1) proceeded without Frederick's input or knowledge; (2) failed to send Frederick a copy of the brief prior to filing it; (3) failed to visit him in prison to determine his level of competency; (4) failed to pursue a claim of ineffective assistance of trial counsel; (5) failed to secure competency proceedings; and (6) failed to raise the issue of prosecutorial misconduct.

To demonstrate ineffective assistance of counsel, Frederick must not only show counsel's errors unreasonable but also must affirmatively prove prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). A defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 698. Whether a defendant received ineffective assistance of counsel is a mixed question of fact and law. ***State v. Marty***, 137 Wis.2d 352, 356-57, 404 N.W.2d 120, 122 (Ct. App. 1987). We review the trial court's factual findings under a clearly erroneous standard, and we review de novo whether counsel's performance was deficient and prejudicial. ***Id***.

Frederick argues that the trial court's finding that appellate counsel had numerous discussions with him regarding this appeal was unsupported by the record. He contends that appellate counsel discussed two other pending cases with him, but spent little time on this appeal. Frederick points to the trial court's finding that appellate counsel spent 4.5 hours in court and 144 hours out of court on Frederick's appeal. He argues that this finding is clearly erroneous because his appeal involved no court time.

We agree with Frederick's contention that the record fails to support the trial court's finding that appellate counsel spent 4.5 hours in court and 144 hours out of court solely on this appeal of the battery conviction. The trial court was apparently referring to an exhibit that included information involving other cases. Nonetheless, we are unpersuaded that the balance of Frederick's contentions have merit. Frederick's contentions essentially challenge the weight and credibility of appellate counsel's testimony. The trial court specifically found appellate counsel's testimony "to be credible in all respects." The trial court, not the appellate court, is the ultimate arbiter of weight and credibility of evidence. Section 805.17(2), STATS. Appellate court deference takes into consideration the trial court's superior opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. ***In re Estate of Dejmal***, 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980). We therefore defer to the trial court's assessment of weight and credibility and, based upon the appellate counsel's testimony, uphold the trial court's determination.

Appellate counsel testified that he had handled numerous criminal trials and appeals. He testified that Frederick was one of the two most active participants in the appellate process that he ever had. His notes indicate that he discussed the appeal of this case with Frederick, and Frederick even sent counsel a memorandum of law. Although he did not meet with Frederick in prison, he did meet with him in the county jail to discuss other cases and talked to Frederick about this case on the telephone. He discussed Frederick's mental health with him. He reviewed doctor's reports and was aware that two doctors found Frederick competent at the time of trial. With respect to Frederick's alleged reading limitations, counsel observed Frederick was able to cite appropriate cases and that his memoranda of law "actually weren't bad." Counsel observed nothing in his

communications with Frederick, telephone conversations, face-to-face meeting in jail in December of 1987, correspondence and legal memoranda that led him to believe Frederick was not competent at the time of the appellate process. Counsel testified that he did not send Frederick a copy of the appellate brief, but that he does not generally send copies of briefs to clients before filing due to time deadlines.

Frederick further contends that the issues appellate counsel failed to raise were of greater significance than those he did raise. This argument is without merit. Counsel may select particular arguments from available alternatives. ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 102 (Ct. App. 1992). Because counsel's decision had a rational basis, his strategy will be upheld.

Counsel discussed the effectiveness of trial counsel with Frederick's trial counsel, including his decision to call certain witnesses. He evaluated the ineffective assistance of counsel claim but did not see any merit to it because, ultimately, he would have to show prejudice. Counsel's strategic decisions do not amount to deficient performance unless they are not founded on rationality of fact and law. ***Id***. at 28, 25, 496 N.W.2d at 104. In view of the record at trial, which includes Frederick's admission and the testimony of eyewitnesses, we conclude that trial counsel's decisions had a rational basis.

The record also supports counsel's determination that there was no issue with respect to competency. Counsel had met with him in jail and observed no indications of incompetency. Frederick fails to show deficient performance or prejudice with respect to counsel's communications via telephone or correspondence rather than meetings in prison. The record also supports the trial court's decision that the direct appeal was taken with Frederick's input and

knowledge. We agree that the failure to forward a copy of the brief before filing was neither deficient performance nor prejudicial.

We also reject Frederick's claim that appellate counsel was ineffective for failing to raise the issue of prosecutorial misconduct. Frederick fails to point to any basis for the claim and indeed contends that "[e]vidence of prosecutorial misconduct was discovered *after* the direct appeal." (Emphasis added.) The record supports the trial court's ruling that Frederick was not denied effective assistance of appellate counsel.

The record also fails to support Frederick's claim that he was unable to raise all his issues in his previous appeal due to incompetency, mental illness, dyslexia, incarceration, or other limitations. To the contrary, counsel testified that Frederick actively participated in the appeal, was in fact one of the two most active participants in the appellate process that counsel ever had, and that counsel observed no basis to question his competency. The trial court's credibility assessment supports its ruling that Frederick failed to demonstrate incompetency at trial or during the appellate process.

Frederick claims that he is actually innocent and that this is a sufficient reason, in the interest of justice, for failing to raise issues in his initial appeal. He cites one case, ***Schlup v. Delo***, 115 S.Ct. 851 (1995), but does not explain how this case governs our inquiry here.[1] It is not this court's job to supply

[1] ***Schlup v. Delo***, 115 S.Ct. 851 (1995), holds that the standard, which requires a procedurally defaulted habeas petitioner to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent, rather than more stringent standard, governs the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to consideration of the merits of constitutional claims.

legal research and argument to an appellant. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992). Therefore, we do not develop Frederick's argument for him.

Next, Frederick argues that the trial court erroneously determined that the record fails to support his claims of incompetency. Frederick raises this as a separate issue, as well as for support for his argument that he did not waive his issues under ***Escalona-Naranjo***. He also argues that he was denied effective assistance of trial counsel and that the trial court in his battery trial erroneously failed to determine the voluntariness of his August 26, 1986, statement, leaving that issue for the jury. We conclude that Frederick fails to demonstrate any, let alone sufficient, reason for not raising these issues in his previous appeal. Therefore they are barred under ***Escalona-Naranjo***, and we do not address them.

Next, Frederick argues that the trial court erroneously determined that he received a fair trial. Frederick claims his trial was unfair because: (1) the prosecution failed to disclose a witness's favorable written statement; (2) the prosecution failed to disclose favorable photographs; (3) the prosecution "may" have made threats, promises or inducements in exchange for witness testimony; and (4) the prosecution informed the defense that a favorable witness was in prison when he was not. We conclude that these issues are without merit.

The prosecution's suppression of evidence favorable to the accused upon request violates due process when the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution. ***Brady v. Maryland***, 373 U.S. 83 (1963). Regardless of request, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***State v. Garrity***,

161 Wis.2d 842, 850, 469 N.W.2d 219, 222 (Ct. App. 1991) (quoting ***United States v. Bagley***, 473 U.S. 667, 682 (1985)). Because the basis of this issue was discovered after Frederick's direct appeal, he has demonstrated sufficient reason to raise the issue in his § 974.06, STATS., motion. We therefore address this assignment of error.

After a hearing at which the witness and the prosecutor testified, the trial court found that there was no credible evidence that the alleged written statement existed. The court based its finding on its credibility assessment of the prosecutor, who testified that she never wrote out statements for witnesses. The prosecutor searched the files and no statement has ever been found. The trial court also found that what the witness presently claims he would have said in 1986 about the battery is only speculation. As a result, the court found that there was no credible evidence of any favorable written or oral statement.

Appellate courts search the record for evidence to support findings reached by the trial court, not evidence to support findings the court could have reached but did not. ***Estate of Dejmal***, 95 Wis.2d 141, 154, 289 N.W.2d 813, 819 (1980). The court of appeals is not empowered to make findings of fact. ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980). Because we must defer to the trial court's determination of weight and credibility, *see* § 805.17(2), STATS., Frederick's argument must be rejected.

The trial court further concluded that the photographs in question were not highly probative for either the State or the defense because of their ambiguity. The record supports the trial court's findings. Some years after the trial, the prosecutor discovered photographs of the victim taken shortly after the battery. The photographs were not introduced at trial or disclosed to the defense.

Frederick contends that the photographs were favorable to him because they fail to show injuries. We disagree. Because of the poor quality of the photos, it is difficult to discern what they show. The photos show areas of discoloration about the neck, face and chest of the victim, but we agree with the trial court that they are ambiguous and, as a result, not helpful to the prosecution or the defense. Consequently, we are unpersuaded that had the evidence been disclosed, the result of the proceedings would have been different. *See* ***Garrity***, 161 Wis.2d at 850, 469 N.W.2d at 222.

In addition, Frederick contends that he was denied a fair trial because the prosecution made threats and inducements in exchange for testimony. He does not, however, provide sufficient reason for not raising this issue in his previous appeal, and therefore it is not properly before us under ***Escalona-Naranjo***. Nonetheless, he contends that the State gave the complaining witness "a sweetheart of a deal" with respect to a possession of marijuana charge, and asks, "Was this deal in exchange for his testimony?" We conclude that to merely state the supposition and ask the question is insufficient argument to support Frederick's allegation. Consequently, this argument is rejected.

Finally, Frederick argues that the prosecution erroneously informed the defense that a material witness was in prison and unavailable for testimony. Again, Frederick fails to provide sufficient reason for failing to raise this argument in his previous appeal. *See* ***Escalona-Naranjo***. In addition, Frederick fails to support this allegation with any evidence that the State provided him with misinformation. Because the facts have not been adequately developed to allow us to make a reasoned determination, we do not address his argument. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987).

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.21(1)(b)5, STATS.