

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-1677-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PARISH D. PERKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Parish D. Perkins appeals from a judgment of conviction and an order denying his motion for postconviction relief. He argues on appeal that he is improperly being denied appellate counsel and that he was denied effective assistance of trial counsel. Because we conclude that he forfeited

his right to appellate counsel and that his trial counsel was not ineffective, we affirm.

¶2 Perkins was charged with one count each of first-degree intentional homicide and attempted first-degree intentional homicide. The complaint alleged that Perkins shot and killed Bernard Hargrove during a drug transaction in Racine. Perkins faced a potential maximum penalty of life plus forty years. As a result of plea negotiations, Perkins pled no contest to one count of first-degree reckless homicide. This reduced his potential maximum sentence to forty years. After conducting an extensive plea colloquy, the circuit court accepted his plea. The court sentenced Perkins to thirty-five years in prison.

¶3 During the trial proceedings, Perkins was represented by Attorney Eric Guttenberg. After he was sentenced, Perkins filed a pro se motion for postconviction relief alleging ineffective assistance of trial counsel. Subsequently, an attorney appointed to represent Perkins at the postconviction hearing filed a supplemental brief alleging additional claims of ineffective assistance of counsel.

¶4 The trial court held a hearing. Guttenberg and the investigator who worked for him, among other witnesses, testified. After hearing all the testimony, the trial court concluded that Perkins had not established either that his counsel had been deficient or that he had been prejudiced by his counsel's performance. Rather, the court found that Guttenberg had done a "truly extraordinary" job in reducing Perkins's potential maximum exposure from life plus forty years to forty years. The court denied the motion and Perkins appeals.

¶5 The first issue Perkins raises is whether he has been denied his right to appointed counsel on his direct appeal to this court. Perkins contends that he was denied his right to appellate counsel because this court directed him to

proceed pro se and he did not knowingly, willingly or intelligently waive his right to counsel. The record does not support this assertion.

¶6 The record establishes that Perkins filed a notice of appeal from his judgment of conviction which was docketed as No. 97-1389-CR. While the appeal was pending, Perkins dismissed his counsel and elected to proceed pro se because he disagreed with counsel about the issues he wished to pursue. Perkins subsequently asked this court to appoint counsel. The court refused, stating that Perkins had clearly expressed his desire to proceed pro se in his previous correspondence with the court. The court also stated that the State Public Defender had declined to appoint different counsel for Perkins. The court then offered Perkins the option of asking the court to reinstate his prior appellate counsel. *See State v. Perkins*, No. 97-1389-CR, order dated July 16, 1997.

¶7 Perkins then asked to have his former appellate counsel reinstated. His former counsel, however, declined. This court again referred the matter to the State Public Defender for a determination of whether counsel would be appointed to represent Perkins in this appeal, and, once again, the State Public Defender declined. The court issued another order which explained all of this to Perkins, concluding that counsel would not be appointed. *See id.*, order dated August 8, 1997.

¶8 As this court previously concluded, Perkins forfeited his right to appellate counsel by asking the court to discharge his counsel and electing to proceed pro se after he had been told by the State Public Defender on more than

one occasion that new counsel would not be appointed to represent him. We will not reconsider our previous decision.¹

¶9 Perkins next contends that he received ineffective assistance of trial counsel because: (1) his trial counsel failed to investigate his alibi defense; (2) trial counsel did not investigate a report that two police officers saw Perkins in Racine on the day of the shooting and did not move for a postponement of the trial when he learned of the witnesses; (3) trial counsel did not adequately investigate the prosecution's witnesses; (4) trial counsel failed to properly challenge the identification of Perkins at a pretrial suppression hearing; (5) trial counsel inadequately advised him of the rights he was waiving when he reviewed the plea questionnaire; (6) trial counsel failed to bring key evidence to the court's attention; and (7) trial counsel improperly conceded at sentencing that the shooting was connected to a failed drug transaction. Throughout, Perkins repeatedly asserts, both directly and by implication, that counsel was not prepared to go to trial and consequently advised Perkins to accept the plea agreement.

¶10 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. *See State v. Moats*, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

¹ We note that the State in its brief suggested that *State v. Karls*, No. 98-0695, unpublished slip op. (Wis. Ct. App. Mar. 25, 1999), might apply to this case. We commend the State for bringing this case to our attention. The case, however, was not published and therefore is not controlling on our decision in this matter.

¶11 We review the denial of an ineffective assistance claim as a mixed question of fact and law. *See Strickland*, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *See State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

¶12 There is a strong presumption that counsel rendered adequate assistance. *See Strickland*, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. An appellate court will not second-guess trial counsel's "considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." *State v. Felton*, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). To meet the prejudice test, Perkins must show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. *See State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). The trial court in this case concluded that Perkins had not met either prong of the *Strickland* test.

¶13 We agree with the trial court's conclusion that Perkins has not established either that his trial counsel's performance was deficient or that he was prejudiced by counsel's performance. Three of the issues raised by Perkins concern trial counsel's failure to properly investigate different matters. Perkins first asserts that his counsel did not properly investigate his alibi witnesses. At the postconviction hearing, both counsel and his investigator testified concerning their

attempts to investigate the alibi witnesses. Further, trial counsel testified that he became aware that some of the witnesses were not able to corroborate Perkins's alibi and that other parts of the alibi could not be supported.² He stated that Perkins told him to forget about the alibi evidence. The alibi witnesses themselves offered conflicting testimony. When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony. *See Plesko v. Figgie Int'l*, 190 Wis.2d 764, 775, 528 N.W.2d 446, 450 (Ct. App. 1994). The trier of fact is in a far better position than an appellate court to make this determination because it has the opportunity to observe the witnesses and their demeanor on the witness stand. *See Pindel v. Czerniejewski*, 185 Wis.2d 892, 898-99, 519 N.W.2d 702, 705 (Ct. App. 1994). In this case, the court found Perkins's witnesses to be incredible and, by implication, counsel and the investigator to be credible. We see no reason to disturb this finding. There is nothing in the record to support Perkins's assertion that counsel was deficient in his investigation of the case.

¶14 Perkins also claims that his attorney failed to investigate the report that two Racine police officers had seen him in Racine on the day of the shooting. Perkins asserts that his counsel only learned about and informed him of this report on the morning of the trial. Counsel, however, testified that the information was in a police report which Perkins had seen months previously. Beyond this assertion, Perkins's argument is based on his speculation that an investigation

² Specifically, Perkins apparently had stated that he worked at a McDonald's and attended Malcolm X school on the day of the incident. The records from the McDonald's showed that he had worked there for one day weeks after the incident. Malcolm X did not have any record of him ever attending the school.

would have revealed some deficiency in the police report. There is nothing in the record to support this speculation.

¶15 Perkins also claims that trial counsel did not properly investigate certain prosecution witnesses. Specifically, Perkins asserts that his counsel did not investigate whether witness Brenda Porter could actually have seen the incident from where she stated she was standing. We agree with the State that the basis for this claim is also pure speculation. Perkins has not offered any evidence that had Guttenberg investigated this witness, he would have discovered something that would have overcome the evidence of Perkins's guilt. Further, underlying this assertion is the assumption that trial counsel was not prepared to cross-examine Porter if the case had gone to trial. Guttenberg testified, however, that he was fully prepared to go to trial. The record does not support Perkins's assertion that his counsel was deficient.

¶16 The next issue is whether trial counsel properly challenged the identification of Perkins at the suppression hearing. Perkins challenges trial counsel's performance at this hearing on the grounds that he did not adequately challenge the identifications made of him. Perkins asserts that there was a discrepancy in the testimony concerning a photograph that was said to have been shown to one of the prosecution's witnesses. As the State admits, there is some confusion in the testimony about Perkins's photograph. However, we also agree with the State that the photograph had to exist because it was introduced at the suppression hearing. Perkins appears to be arguing that this photograph was a fraud and the police witnesses lied in their testimony. There is nothing in the record to support this assertion.

¶17 Perkins also contends that trial counsel's performance was deficient because he did not properly challenge an in-court identification of him. Guttenberg testified at the postconviction hearing, however, that he made a tactical decision not to challenge the in-court identification. He believed that if he had requested an in-court lineup, the witnesses would have been able to identify Perkins because they had identified him from a photo array. He further believed that an identification by an in-court lineup would only have bolstered the identification made by the witnesses when it came to trial. This was a reasonable tactical decision by trial counsel. It was not deficient performance.

¶18 Perkins also asserts that trial counsel did not challenge the inconsistent physical descriptions the witnesses gave of the shooter. The inconsistencies, however, would affect the reliability of the evidence and not its admissibility. *See Powell v. State*, 86 Wis.2d 51, 67-68, 271 N.W.2d 610, 618 (1978). Therefore, counsel was not ineffective when he did not challenge the inconsistencies at the suppression hearing.

¶19 The last three issues raised by Perkins are that his counsel failed to adequately advise him of the rights he was waiving, counsel failed to bring key evidence to the court's attention, and counsel improperly conceded at sentencing that the incident involved a failed drug transaction. While we note that Perkins has not cited to any legal authority and hence has not adequately briefed these arguments, *see Post v. Schwall*, 157 Wis.2d 652, 657, 460 N.W.2d 794, 796 (Ct. App. 1990), we will nonetheless briefly address each one.

¶20 The transcript of the plea hearing establishes that Perkins was adequately and, in fact, fully advised of the rights he was waiving both by the court and by his counsel. Further, there is nothing in the record to support

Perkins's assertion that the evidence he refers to even existed, let alone was overlooked. Finally, counsel testified at the postconviction hearing that he conceded that the incident involved a failed drug transaction in the hope of mitigating the severity of the sentence. Counsel was attempting to show the court that this was not an intentional act of violence. Again, this was a reasonable trial tactic.

¶21 Based on our review of the record, we agree with the trial court that the evidence does not support a finding that Perkins's trial counsel's performance was deficient or that he was prejudiced by it. Therefore, we affirm the judgment and the order of the trial court.

By the Court.—Judgment and order affirmed.

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

