COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3416

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARIUS K. JENNINGS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

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

¶1 WEDEMEYER, P.J. Darius K. Jennings appeals *pro se* from an order denying his § 974.06, STATS., postconviction motion. He claims: (1) he received ineffective assistance of both trial and appellate counsel; (2) the trial court erred when it admitted the testimony of the victim without requiring a

competency exam; (3) the trial court erred in failing to ensure a speedy trial; (4) the trial court erroneously exercised its discretion when it allowed the DNA result stipulation into evidence; (5) the trial court should have conducted an evidentiary hearing relative to the postconviction motion; and (6) we should reverse the conviction and order a new trial "in the interest of justice." We reject all of Jennings's claims and affirm.

I. BACKGROUND

¶2 On April 3, 1994, Jennings sexually assaulted victim Ethel S., who is the great-grandmother of his children. He was charged with five counts of sexual assault. DNA testing was conducted, but the sample was insufficient to yield sufficient DNA to determine a banding pattern. The testing could neither include nor exclude Jennings as the perpetrator. Trial counsel entered into a stipulation, which was read to the jury, stating that "results of the DNA testing were inconclusive because … the semen sample submitted was either not a sufficient quality to be tested or the condition of the semen was degraded." The jury trial occurred in early August 1994. Ethel was the State's primary witness; she testified that Jennings was the assailant. She identified him from the start. She was 100% positive that he was her assailant. He came to her home, high on drugs, looking for more money for drugs. When she refused to give him money, he assaulted her. She testified that afterwards, he was apologetic and blamed the drugs for his conduct.

¶3 Jennings's defense was mistaken identity. Trial counsel focused on the credibility of Ethel and the inconsistencies in her statements and testimony. The jury convicted on all five counts. Jennings was sentenced to six-year consecutive terms on each count. Jennings filed a postconviction motion, alleging

ineffective assistance of trial counsel. A ***Machner*** hearing[1] was conducted and the trial court concluded that Jennings received effective assistance of trial counsel. Jennings's postconviction counsel moved to withdraw, and Jennings filed a notice of appeal *pro se*. He later voluntarily dismissed the appeal.

¶4 In November 1998, Jennings filed a *pro se* motion for postconviction relief in the trial court, alleging ineffective assistance of trial counsel and appellate counsel.[2] The trial court denied the motion without conducting another evidentiary hearing, concluding that trial counsel was not ineffective and, therefore, postconviction counsel could not be ineffective. Jennings now appeals.

II. DISCUSSION

A. Ineffective Assistance Claims.

¶5 Jennings raises several claims of ineffective assistance: (1) trial counsel should not have entered into the DNA stipulation; (2) trial counsel should have pressed for a speedy trial; (3) trial counsel should have requested that Ethel submit to a competency exam, which might have excluded her as a witness; and (4) postconviction counsel should have raised in a direct appeal the issues that Jennings raises here. We reject his claims.

¶6 In order to establish that he did not receive effective assistance of counsel, the defendant must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense."

---

[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] As the State points out, Jennings proceeded on appeal *pro se*; therefore, we construe his claims of ineffective appellate counsel to actually refer to postconviction counsel.

Strickland v. Washington, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he "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. Even if a defendant can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76 (citation omitted).

¶7 In assessing the defendant's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37, 548 N.W.2d at 76.

¶8 Jennings first challenges trial counsel's decision to stipulate that the DNA evidence was "inconclusive." He points to a portion of the lab report, which provides:

> The DNA banding pattern obtained from the vaginal swabs is similar to the DNA banding pattern obtained from the

> cervical swabs. Neither the DNA banding pattern obtained from the vaginal swabs nor the DNA banding pattern obtained from the cervical swabs matches the DNA banding pattern obtained from the blood swatch label[]ed Jennings.

Jennings claims this paragraph excludes him as the perpetrator and, therefore, trial counsel was deficient for entering into a stipulation stating the test was "inconclusive." We are not persuaded.

¶9 Cervical and vaginal swabs were obtained from the victim after the assaults. A pink pajama bottom worn by the victim at the time of the assaults was also retrieved; it contained a semen stain. These materials were sent to Cellmark Diagnostics for DNA testing. Trial counsel advised the trial court that Cellmark reported verbally that the semen sample was too degraded and therefore could not be banded. Consequently, the results of the DNA testing were inconclusive. This is confirmed by the written report: "No conclusion can be reached regarding the pink material cutting. The DNA obtained from the vaginal swabs and the DNA obtained from the cervical swabs did not originate from Jennings. However, since no standard was analyzed from [the victim], no conclusion can be reached."

¶10 Jennings claims that trial counsel should not have stipulated to "inconclusive results." He asserts that the report excludes him as the perpetrator. As indicated in the excerpt set forth above, however, Jennings is incorrect. The DNA testing did not exclude or include him as the perpetrator. The statement that the vaginal and cervical DNA did not come from Jennings does not exclude him because it could have come from the victim. Based on the information in the record and the written report, the stipulation of "inconclusive" test results was accurate. Trial counsel was not deficient for so stipulating. Moreover, Jennings has not shown what the report of the DNA test of the victim would have shown. Thus, Jennings has not shown "prejudice" to him under the second prong of

Strickland. *See* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 350 (Ct. App. 1994).

¶11 Jennings's reliance on ***State v. Glass***, 170 Wis.2d 146, 488 N.W.2d 432 (Ct. App. 1992) is misplaced. That case involved an allegation that the sexual assault victim had fabricated the event. *See* ***id.*** at 148-49, 488 N.W.2d at 433. The state crime lab found that the vaginal swabs taken after the alleged incident did not contain any semen. *See* ***id.*** at 149-52, 488 N.W.2d at 433-34. Defense counsel stipulated that the test for semen in the vagina of the victim was "inconclusive." *See* ***id.*** The stipulation in ***Glass***, therefore, created a false impression to the jury about the test results. The instant case is distinguishable from ***Glass***. Here, the stipulation was not false, the tests were inconclusive and did not exculpate Jennings as the perpetrator.

¶12 Jennings next claims that trial counsel was ineffective for failing to insist on a speedy trial. We are not convinced. The right to a speedy trial is guaranteed under the Sixth Amendment to the United States Constitution and under art. I, § 7, of the Wisconsin Constitution. Under the state and federal constitutions, "'the right to a speedy trial arises with the initial step of the criminal prosecution, i.e., the complaint and warrant.'" ***State v. Ziegenhagen***, 73 Wis.2d 656, 664, 245 N.W.2d 656, 660 (1976) (quoting ***State ex rel. Fredenberg v. Byrne***, 20 Wis.2d 504, 508, 123 N.W.2d 305, 307 (1963)). The remedy for the denial of a speedy trial is "to set aside [the] judgment, vacate the sentence, and dismiss the indictment." ***Strunk v. United States***, 412 U.S. 434, 439-40 (1973).

¶13 To determine whether trial counsel was ineffective for failing to ensure that Jennings received a speedy trial, we use the balancing test the United States Supreme Court established in ***Barker v. Wingo***, 407 U.S. 514 (1972). In

Day v. State, 61 Wis.2d 236, 244, 212 N.W.2d 489, 493 (1973), the Wisconsin Supreme Court adopted the ***Barker*** test. In ***Barker***, the Court identified four factors to be used in a speedy trial inquiry: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *See* ***Barker***, 407 U.S. at 530. ***Barker*** requires that we first determine whether the length of delay is presumptively prejudicial. If it is, then we must balance the four ***Barker*** factors under the totality of the circumstances. *See* ***id.*** If it is not presumptively prejudicial, there was no violation of the speedy trial right and we need not proceed to the balancing of the four factors. *See* ***id.***

¶14 The United States Supreme Court has noted, "Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." ***Doggett v. United States***, 505 U.S. 647, 652 n.1 (1992). Our Wisconsin Supreme Court has similarly determined that a twelve-month delay between a preliminary exam and trial was presumptively prejudicial. *See* ***Green v. State***, 75 Wis.2d 631, 636, 250 N.W.2d 305, 307 (1977).

¶15 Applying these principles to the instant case, we must first examine the length of delay. The offenses occurred on April 3, 1994. Jennings was arraigned on April 14, 1994. A trial was set to occur on June 27, 1994. In May 1994, the trial court was advised that DNA testing was going to be performed as it was recently discovered that a semen sample existed. Trial counsel and the State entered into a stipulation that Jennings "waives his right to a speedy trial if [he] can obtain funding for the DNA test and if the samples submitted are suitable for testing." Test results were expected July 6th or 7th. The jury trial was reset for July 20th. This date was changed to August 8th because the defense investigator was going to be on a honeymoon the week of July 20th and the main detective was

going to be on vacation the following week. Trial commenced on August 8, 1994. Therefore, we are looking at the length of time between April 14 and August 8, 1994. This length is less than four months, not even close to the twelve-month presumptive delay mark discussed above. We conclude, therefore, that the four-month delay was not presumptively prejudicial. Accordingly, we need not balance the remaining ***Barker*** factors. Jennings's speedy trial right was not violated. It logically follows that trial counsel cannot be found to be ineffective on this ground.

¶16 Jennings next claims that trial counsel was ineffective for failing to insist that Ethel undergo a competency exam. He claims that she suffered from Alzheimer's disease, which affected her memory and identification. He argues that Ethel should have had a competency exam before being allowed to testify. He cites two statutes to support this claim: §§ 971.16 and 804.10, STATS. We reject his contention.

¶17 First, neither statute he cites applies. Section 971.16, STATS., governs examination of the defendant, not a witness, and § 804.10, STATS., applies to parties. Second, the record demonstrates that trial counsel zealously challenged the credibility of Ethel. There was no ineffective assistance on this basis.

¶18 Finally, Jennings contends postconviction counsel was ineffective for failing to raise the issues raised in this appeal. We do not agree. As set forth above and as set forth in the remainder of this opinion, Jennings's issues are without merit. Accordingly, postconviction counsel cannot be found ineffective for failing to pursue meritless claims.

B. Witness Competency Exam.

¶19 Jennings contends that the trial court erred when it allowed Ethel to testify without first ordering her to submit to a competency exam. We are not persuaded.

¶20 "Every person is competent to be a witness except … as provided in these rules." Section 906.01, STATS. As noted above, Jennings fails to provide us with any rule prohibiting Ethel from testifying. Further, a witness's competence, as challenged by Jennings here, is an issue for the jury. *See* ***State v. Dwyer***, 143 Wis.2d 448, 461-62, 422 N.W.2d 121, 125-26 (Ct. App. 1988), *aff'd*, 149 Wis.2d 850, 440 N.W.2d 344 (1989). Instead of having the trial court address witness competency, the trier of fact considers competency as part of the credibility of a witness. *See* ***id.*** at 462, 422 N.W.2d at 126. Trial counsel zealously challenged Ethel's credibility. The jury decided against Jennings. There was no trial court error on this ground.

C. Speedy Trial Issue.

¶21 Jennings also raises the issue of his right to a speedy trial as an error on the part of the trial court. He claims that the trial court should have honored his speedy trial request and, by failing to do so, violated the constitutional right. We do not agree.

¶22 In reviewing constitutional questions, the trial court's findings of historical facts are subject to the clearly erroneous standard, but the application of those facts to constitutional standards and principles is determined without deference to the trial court's conclusion. *See* ***State v. Trammel***, 141 Wis.2d 74, 77, 413 N.W.2d 657, 658-59 (Ct. App. 1987).

¶23 We previously concluded that Jennings's right to a speedy trial was not violated. Accordingly, the trial court did not commit any error in this regard.

D. Trial Court Admission of DNA Stipulation.

¶24 Jennings also claims that the trial court erred when it knowingly allowed a false stipulation into evidence. He argues that the trial court had the Cellmark lab report before it and, therefore, should have refused to allow the DNA "inconclusive" stipulation to be read to the jury.

¶25 Our standard of review on the admission and exclusion of evidence is limited to whether the trial court erroneously exercised its discretion. *See* ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). If a trial court applies the proper law to the established facts, we will not find an erroneous exercise of discretion if there is any reasonable basis for the trial court's ruling. *See* ***id.*** Appellate courts generally look for reasons to sustain discretionary determinations. *See* ***Steinbach v. Gustafson***, 177 Wis.2d 178, 185-86, 502 N.W.2d 156, 159 (Ct. App. 1993).

¶26 Here, there was no erroneous exercise of discretion. The DNA stipulation was not false. It accurately reflected the results of the testing. According, there was no basis for which the trial court should have excluded it.

E. Evidentiary Hearing.

¶27 Next, Jennings argues that the trial court erred when it denied his § 974.06, STATS., postconviction motion without conducting an evidentiary hearing. We do not agree.

¶28 A defendant is not automatically entitled to an evidentiary hearing. A trial court must hold an evidentiary hearing on the motion only if a defendant alleges sufficient facts which, if true, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 309, 548 N.W.2d 50, 53 (1996). If a defendant fails to allege sufficient facts, makes only conclusory allegations, or if the record conclusively demonstrates that he is not entitled to relief, the trial court may, in its discretion, deny the motion without holding a hearing. *See* ***id.*** at 309-10, 548 N.W.2d at 53. Whether a motion alleges sufficient facts to entitle a defendant to relief is a question of law that we review *de novo*. *See* ***id.*** at 310, 548 N.W.2d at 53.

¶29 Here, the record conclusively establishes that Jennings is not entitled to the relief sought in the motion. Accordingly, there was no need to conduct an evidentiary hearing.

F. Interest of Justice.

¶30 Finally, Jennings lards a catchall plea requesting that we reverse his conviction and remand for a new trial in the "interest of justice." We decline the invitation. As noted within this opinion, we have rejected each of Jennings's allegations of error. Accordingly, there is no reason to retry this case.

By the Court.—Order affirmed.

Not recommended for publication in the official reports

¶31 SCHUDSON, J. *(concurring).* Jennings argues that trial counsel was ineffective in: (1) ordering the laboratory to discontinue DNA testing without completing the analysis that could have been exculpatory; (2) doing so for lack of funding, rather than seeking additional financing or a court order to complete the testing; and (3) stipulating that the test results were inconclusive when, he maintains, the actual lab findings were favorable to his defense.

¶32 While a bit intricate, the essential facts seem to be:

(a) Semen on the victim's pajamas was too degraded to allow for DNA testing.

(b) Vaginal and cervical swab samples of the victim were tested; they matched each other.

(c) A blood sample of Jennings was tested.

(d) According to the lab report, "[n]either the DNA banding pattern obtained from the vaginal swabs nor the DNA banding pattern obtained from the cervical swabs matches the DNA banding pattern obtained from the blood swatch label[]ed Jennings."

(e) A blood sample of the victim was obtained.

(f) According to the lab report, "Testing on the blood swatch [of the victim] . . . was discontinued at the request of [Jennings' trial counsel]."

Thus, if the victim's blood sample had been tested, two apparent possibilities would have emerged:

(1) The DNA banding pattern obtained from the victim's vaginal and cervical samples would, of course, have matched the DNA banding pattern obtained from her blood sample *and would have contained no additional, non-matching DNA*. Therefore, the completed tests would have neither exculpated nor inculpated Jennings.

(2) The DNA banding pattern obtained from the victim's vaginal and cervical samples would, of course, have matched the DNA banding pattern obtained from her blood sample *and would have contained additional non-matching DNA*. Thus, the completed tests would have established that neither the victim nor Jennings was the source of the *additional, non-matching DNA* found in the vaginal and cervical samples. Therefore, the completed tests would have established that someone other than Jennings had had intercourse with the victim.

¶33 If, as Jennings contends, he always maintained his innocence, why would counsel request the discontinuation of the testing that could have exculpated him? We do not know. Presumably, the ***Machner*** hearing afforded trial counsel the opportunity to answer that question. Jennings, however, has not provided this court with the transcript of that hearing. He was responsible for doing so. *See* ***State Bank of Hartland v. Arndt***, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986). Under the circumstances, we must presume that the ***Machner*** hearing evidence supports the trial court's denial of Jennings' motion. *See* ***Suburban State Bank v. Squires***, 145 Wis.2d 445, 451, 427 N.W.2d 393, 395 (Ct. App. 1988).

¶34 Accordingly, although I do not join in the majority's analysis of this issue, I must respectfully concur.