COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2218-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALLEN TONY DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and JEFFREY A. WAGNER, Judges. *Affirmed.*

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

¶1 PER CURIAM. Allen Tony Davis appeals from a judgment of conviction and an order denying him postconviction relief. He claims that the trial court erred in concluding that he was not denied effective assistance of counsel

despite his claim that his trial lawyer did not attempt to impeach a witness. Davis also claims that the trial court violated his Sixth Amendment rights by denying his request to adjourn the trial and proceed *pro se*. We affirm.[1]

I. Background

¶2 Davis was convicted by a jury of battery to a law enforcement officer as the result of an altercation in the Milwaukee County Jail, in violation of WIS. STAT. § 940.20(2) (1997-98).[2] At the trial, one of the witnesses Davis wanted to call, Detective Travis King, was not there to testify and defense counsel did not have proof of service of a subpoena on King. Defense counsel claimed, however, that King's testimony was needed to rebut the "highly prejudicial" testimony of several of the State's witnesses. These witnesses were deputies working in the jail who were prepared to testify that Davis fought with and attempted to spit on them. Although Davis wanted an adjournment, defense counsel did not ask for one. Davis's lawyer told the trial court that she wanted to go to trial that day because she feared that an adjournment would risk the loss of other defense witnesses. Davis's lawyer moved the trial court to prevent the State from calling the deputies, thus making King's testimony unnecessary. The trial court denied the motion.

¶3 Davis then requested to proceed *pro se*, and informed the court that he was "canceling today's trial" because he wanted to call Detective King as a

[1] The Honorable Elsa C. Lamelas presided over the jury trial. The Honorable Jeffrey A. Wagner presided over the postconviction hearing.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

witness. The trial court considered Davis's adjournment request to be "a frivolous delay," denied his motion, and responded,

> If you want to represent yourself, I will consider it if you are prepared to proceed today. If you are not going to represent yourself today, I will not permit [defense counsel] to be removed from the case. I am not going to adjourn the case so you can represent yourself.

Davis indicated that he would be unable to represent himself at that time unless the court allowed him to "call[] the witnesses that [he] would like." Consequently, defense counsel remained on the case and the jury trial proceeded as scheduled.

¶4 At trial, Deputy Mark Metz testified that Davis, while an inmate at the Milwaukee County Jail, pushed him into a desk and that, as a result, he suffered a swollen finger, a small cut on his hand, and a back injury. Metz, however, did not mention the back injury in the narrative report he prepared on the incident. Defense counsel cross-examined Metz on this, and the deputy explained that he prepared the report on the day of the incident, but that his back did not hurt until the next day. During jury deliberations, the jurors asked: "Did Mark Metz put anything in a report on a back injury? And when did he put this in?" To answer this question, the trial court had Metz's testimony regarding the narrative report read back to the jury, but rejected defense counsel's request to submit to the jury a rules-violation report written by Metz that also failed to mention any back injury because counsel had not offered it into evidence.

¶5 In his postconviction motion, Davis claimed that his trial counsel was ineffective for failing to impeach Deputy Metz with the rules-violation report. The court rejected Davis's claim, concluding: "Although Davis claims that defense counsel's performance was deficient for missing an 'opportunity' to attack Deputy Metz's credibility in front of the jury, a review of the record shows…that

defense counsel did raise the inconsistency [between Metz's testimony and his report]." Davis also claimed that the trial court violated his Sixth Amendment rights by denying his request to adjourn the trial and proceed *pro se*. The postconviction court determined that the trial court properly denied Davis's request for either an adjournment or to proceed *pro se*, noting: "It was Davis himself who chose not to proceed pro se."

II. Discussion

A. Ineffective-Assistance-of-Counsel

¶6 A defendant claiming ineffective-assistance-of-counsel must prove both that his or her lawyer's representation was deficient and that prejudice resulted. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216–217, 395 N.W.2d 176, 181 (1986). To prove deficient performance by his or her lawyer, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. We "strongly presume" counsel has rendered adequate assistance. ***Id.*** To show prejudice, a defendant must demonstrate that the result of the proceeding was unreliable. *See* ***id.***, 466 U.S. at 687. If a defendant fails on either aspect—deficient performance or prejudice—the ineffective-assistance-of-counsel claim fails. *See* ***id.***, 466 U.S. at 697.[3]

[3] A trial court properly denies a defendant's postconviction motion alleging ineffective-assistance-of-counsel without a hearing if "the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Bentley***, 201 Wis. 2d 303, 309–310, 548 N.W.2d 50, 53 (1996).

¶7 Whether a lawyer's assistance is ineffective presents a mixed question of law and fact. *See* ***Johnson***, 133 Wis. 2d at 216, 395 N.W.2d at 181. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985). But whether the evidence satisfies either the deficiency or the prejudice prong is a question of law that this court reviews *de novo*. *See* ***id.***, 124 Wis. 2d at 634, 369 N.W.2d at 715.

¶8 Davis claims that his trial counsel's performance was deficient because she did not confront Metz with the rules-violation report and its failure to mention his claimed back injury. Davis has not shown, however, that the rules-violation report was written at a different time than the narrative report. This distinction is key to whether the failure of the rules-violation report to mention the back injury impeached the deputy's explanation as to why the narrative report did not mention the back injury. Indeed, both reports bore the same date. Accordingly, Davis has not shown that he was prejudiced by his lawyer's failure to impeach Metz with the rules-violation report.

B. Davis's Request to Represent Himself

¶9 "Although not stated in the [Sixth] Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment." ***Faretta v. California***, 422 U.S. 806, 819 (1975).[4] Relying on ***Faretta***, the Wisconsin Supreme Court has stated:

[4] The Sixth Amendment to the United States Constitution provides:

(continued)

> Both the right to secure other counsel and the right to proceed *pro se* are guaranteed by the Sixth Amendment and are intended to ensure the defendant's right to a full and fair trial, they are not intended to allow the defendant the opportunity to *avoid or delay* the trial for any unjustifiable reason.

Hamiel v. State, 92 Wis. 2d 656, 673, 285 N.W.2d 639, 649 (1979). "Where the request to proceed *pro se* is made on the day of trial…, the determinative question is whether the request is proffered merely to secure a delay or tactical advantage." ***Id.***, 92 Wis. 2d at 673, 285 N.W.2d at 649. Whether to deny a request to proceed *pro se* at the moment of trial is a discretionary decision. *See* ***id.***, 92 Wis. 2d at 674, 285 N.W.2d at 649. A trial court must balance the defendant's constitutional guarantee to a fair trial with the convenience of the witnesses, jurors, and the court's schedule. *See* ***id.***, 92 Wis. 2d at 673, 285 N.W.2d at 649. A trial court properly exercises its discretion if it makes a decision that a reasonable judge would make and applies a correct view of the law. *See* ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995).

¶10 Here, the trial court properly applied the correct legal principles in determining that Davis's request to proceed *pro se* and for an adjournment was a delay tactic. The trial court was prepared to consider Davis's request to proceed *pro se* if Davis was willing to proceed as scheduled. Davis, however, wanted an adjournment and asked to represent himself specifically so that he would be able

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> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

to obtain an adjournment to make further efforts to get King as a witness. Clearly, Davis's desire to proceed *pro se* was a subterfuge; once Davis was informed by the court that there would be no adjournment, Davis withdrew his request to proceed *pro se*. As was the case in ***Hamiel***, "it is apparent that the primary objective of [Davis's] motions was a further delay of the trial." ***Hamiel***, 92 Wis. 2d at 674, 285 N.W.2d at 649. The trial court properly exercised its discretion.

By the Court.—Judgment and order affirmed.

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