COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1414 **Cir. Ct. No. 1994CF942486**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD LAMON MCDANIEL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Reginald Lamon McDaniel appeals, *pro se*, from an order denying his WIS. STAT. § 974.06 (2003-04)[1] motion. McDaniel claims

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the trial court erred in summarily denying his motion alleging ineffective assistance of trial counsel. Because the record before us defeats McDaniel's claim of ineffective assistance of counsel, we affirm.

I. BACKGROUND

¶2 On July 11, 1994, McDaniel was charged with felony murder. During the course of the pretrial proceedings, the prosecutor communicated to Scott Anderson, McDaniel's trial counsel, that if McDaniel did not plead guilty to the felony murder charge by September 9, 1994, the State would file an amended information, charging him with first-degree intentional homicide while armed, false imprisonment, and armed robbery, all as party to a crime.

¶3 The record demonstrates that Anderson discussed with McDaniel whether to plead guilty or go to trial. On July 28, 1994, the court held a scheduling conference/arraignment. McDaniel was told that if he did not plead guilty to felony murder, the State would amend the charges against him to first-degree intentional homicide while armed, armed robbery, and false imprisonment. McDaniel entered a not guilty plea.

¶4 On September 9, 1994, the court held a hearing on the defense's motion to adjourn the trial date. The record indicates that as of the time of the hearing on September 9, 1994, Anderson had not discussed the *deadline* related to the plea agreement with McDaniel. Additional discussion occurred regarding the plea agreement amongst the parties. The trial court was concerned that Anderson had not discussed the deadline with McDaniel and wanted to give counsel an opportunity to address the deadline/increase in charges with his client. A colloquy ensued regarding how much time to afford the defense to discuss the plea agreement before conducting the arraignment. Specifically, the trial court stated:

> I just want to make a record here that somehow the defendant if he's charged with first degree intentional homicide and goes to trial and is convicted and says, God, if I would have known I could have pled guilty to felony murder, I would have done it, but I didn't discuss it with my attorney.

¶5 The trial court then decided to put off the arraignment to give Anderson and McDaniel the time to discuss the plea agreement and decide whether to accept it or to proceed to trial on increased charges:

> This is not to put pressure on him [to plead guilty], but I'm going to put the arraignment off at the request of Mr. Anderson to September 20. We'll have until that date to plead guilty to the felony murder charge. Either way we'll go ahead with the arraignment or he may be challenging the filing of the arraignment at this time.… He has the notice.

¶6 On September 20, 1994, arraignment occurred on the amended charges because McDaniel did not plead guilty to felony murder.[2] Trial counsel filed a motion seeking to dismiss the amended charges, but his motion was denied. The case was tried to a jury commencing October 3, 1994, after which McDaniel was found guilty on all charges. He was sentenced to life in prison on the homicide charge, and consecutive sentences of thirty years and two years in prison on the other counts. McDaniel filed a direct appeal. This court affirmed the judgment of conviction on July 23, 1996. McDaniel also sought relief from the judgment in the federal courts, without success.

¶7 On April 12, 2004, McDaniel filed a WIS. STAT. § 974.06 motion, alleging that his trial counsel was ineffective for failing to inform him about the

[2] According to the record, the arraignment actually was continued to September 22, 1994, to afford the trial court an opportunity to hear the defense motion to dismiss the amended information.

increase in charges unless he pled guilty. He argued that his motion was not procedurally barred because his appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness. The trial court summarily denied the motion based on the doctrine of laches. McDaniel now appeals.

II. DISCUSSION

¶8 The issue in this case is whether defense trial counsel, Anderson, provided ineffective assistance by failing to discuss with McDaniel the plea agreement, its deadline, and the fact that if McDaniel proceeded to trial, he would face the more severe charges.[3]

¶9 In order to succeed on an ineffective assistance claim, McDaniel must prove that counsel's performance constituted deficient conduct, and that such conduct prejudiced the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶10 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "'The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous.'" ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987) (citation omitted). The ultimate conclusion, however, of

[3] The State addresses the merits of McDaniel's case and assumes, without conceding, that the doctrine of laches does not apply to WIS. STAT. § 974.06 cases, *see* ***State v. Evans***, 2004 WI 84, ¶35, 273 Wis. 2d 192, 682 N.W.2d 784, and that his ineffective assistance of appellate counsel claim is sufficient reason to avoid the dictates of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We do the same.

whether the conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law for which no deference to the trial court need be given. ***Id.***

¶11 If an appellant wishes to have an evidentiary hearing on an ineffective assistance of counsel claim, he or she may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its finding that the record as a whole conclusively demonstrates that the defendant is not entitled to relief, our review of this determination is limited to whether the court erroneously exercised its discretion in making this determination. ***Id.*** at 318.

¶12 We conclude that McDaniel has failed to prove he received ineffective assistance of trial counsel. The record conclusively establishes that the trial court extended the deadline for McDaniel to plead guilty to felony murder until September 20, 1994. Therefore, McDaniel's claim that Anderson was ineffective for failing to discuss the September 9, 1994 deadline with him before that date was not prejudicial.

¶13 Moreover, the record demonstrates that at a hearing on July 28, 1994, McDaniel was informed of the State's intention to increase the severity of

the charges from felony murder to first-degree intentional homicide, armed robbery, and false imprisonment if McDaniel did not plead guilty. This was again discussed at the September 9, 1994 hearing. McDaniel was present at both court hearings. In fact, the September 9, 1994 hearing was adjourned specifically to afford McDaniel an opportunity to further discuss with counsel whether to accept the State's plea agreement and forego trial. The trial court ruled that McDaniel had until September 20 to decide whether to enter a guilty plea to felony murder or proceed to trial on the increased charges. Even if trial counsel did not adequately discuss the terms of the plea agreement and its consequences, McDaniel was not prejudiced because the trial court advised him of the circumstances surrounding the plea agreement and the increased charges.

¶14 McDaniel now claims that although he was present at both hearings when the plea terms, deadlines, and consequences were discussed, he was not paying attention. McDaniel's claim today—ten years after the event—that he did not listen to what the court and counsel were discussing at these hearings is disingenuous at best. These discussions were clearly and plainly directed to McDaniel, and did not involve complicated legal terminology. The prosecutor and the court clearly expressed the circumstances of McDaniel's plight—that if he did not plead guilty to felony murder, and insisted on going to trial, the prosecutor would increase the charges against him to homicide, armed robbery, and false imprisonment.

¶15 It is also clearly implicit in the record that the defense strategy was to plead not guilty and pursue a motion to dismiss the increased charges on the basis that the amended information was unlawful. That defense strategy was unsuccessful both at the trial and appellate court levels. Thus, McDaniel's assertion that had he known he faced increased charges for taking the case to trial,

he would have accepted the guilty plea agreement is nothing more than attempting to get a second kick at the cat. At the time of trial, McDaniel and his counsel believed that the motion to dismiss the more serious charges would prevail, and that McDaniel had a chance of outright acquittal at trial. It is the hindsight of this failed strategy, which forms the basis for McDaniel's claim now, that he certainly would have accepted the plea agreement.

¶16 Accordingly, we conclude that McDaniel has failed to establish that Anderson provided him with ineffective assistance. In turn, then, appellate counsel was not ineffective for failing to raise the issue of trial counsel's ineffective assistance. Thus, we affirm the order of the trial court denying McDaniel's WIS. STAT. § 974.06 motion.

By the Court.—Order affirmed.

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