

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP780-CR

Cir. Ct. No. 2002CF436

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH BEAUCHAMP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Keith Beauchamp appeals a judgment, entered upon a jury's verdict, convicting him of first-degree sexual assault of a child, as a persistent repeater. Beauchamp also appeals the order denying his postconviction motion. Beauchamp argues trial counsel was ineffective by failing to present

important testimony. We reject Beauchamp's arguments and affirm the judgment and order.

BACKGROUND

¶2 In July 2002, the State charged Beauchamp with one count of first-degree sexual assault of a child, as a persistent repeater. At the time of the offense, Beauchamp was on probation for a prior sexual assault conviction and, as a condition of that probation, was not to have any contact with minor children. Beauchamp was ultimately convicted upon a jury's verdict of the crime charged. Due to Beauchamp's habitual criminal status, the court sentenced him to life in prison without the possibility of release to extended supervision. *See* WIS. STAT. § 939.62(2m)(c) (2001-02).

¶3 Following his conviction, appointed counsel filed a no-merit report concluding no grounds existed to challenge the conviction. In his response to the no-merit report, Beauchamp alleged ineffective assistance of trial counsel based upon counsel's failure to inquire about the victim's mother's threat to accuse Beauchamp of touching her children if he reported her uncle, Donnie Watts, for stealing checks. Appellate counsel submitted an affidavit from trial counsel stating that Beauchamp never told him of this incident. We remanded the matter to the trial court to resolve this dispute. After an evidentiary hearing, the trial court found that Beauchamp never informed his trial counsel of this incident.

¶4 Upon our review of the transcript and the exhibits received at the hearing, this court was unable to accept the trial court's finding. We consequently rejected the no-merit report, dismissed the appeal and directed counsel to file a postconviction motion alleging ineffective assistance of trial counsel. After a

*Machner*¹ hearing, the trial court denied Beauchamp's motion, and this appeal follows.

DISCUSSION

¶5 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. *Id.* However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. *Id.*

¶6 "The benchmark for judging whether counsel has acted ineffectively is stated in *Strickland v. Washington*, 466 U.S. 668 (1984)." *State v. Johnson*, 153 Wis. 2d 121, 126, 449, N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Beauchamp must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. *Strickland*, 466 U.S. at 694.

¶7 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *Johnson*, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the

¹ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. *Strickland*, 466 U.S. at 690. Because “[j]udicial scrutiny of counsel’s performance must be highly deferential ... the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.* at 689. Further, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Id.* at 690.

¶8 The prejudice prong of the *Strickland* test is satisfied where the attorney’s error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. *Id.* at 694. However, we need not address the prejudice prong if we conclude there is no deficient performance by counsel. *See id.* at 697.

¶9 Here, Beauchamp alleges counsel was ineffective for failing to “elicit certain important testimony” he claims would have bolstered his defense theory that the victim’s mother, Tracy M., threatened to accuse Beauchamp of touching her children if he did not provide her family with food, money, and rides. Specifically, Beauchamp claims counsel should have presented evidence that Tracy also threatened to accuse Beauchamp of touching her children if he reported Watts, her uncle, for stealing checks. The trial court, however, found that because Beauchamp never told trial counsel about the check incident, counsel was not deficient. Citing the notes of Brian Wright, one of his trial attorneys, Beauchamp challenges the trial court’s finding as clearly erroneous. We are not persuaded.

¶10 Counsel's notes include the following entry:

“Want to get in trouble” tone of voice. Rides, money – if you didn't give it to her – would say [illegible] he touched kids.

A) Uncle – Donnie Watts – Uncle

1) Mega card – food Altoona – kept [pay or paying]

B) If he reported – would report – touched kids.

The trial court acknowledged that this entry was the only evidence causing it to question whether the “check incident” was discussed with defense counsel before trial. At the *Machner* hearing, both of Beauchamp's trial attorneys testified they had no recollection of any discussion with Beauchamp about the check incident. Wright also testified that had Beauchamp indicated anything about the checks, Wright would have included it in his notes.

¶11 Wright also testified that his notes' reference to “Donnie Watts” likely signified that Beauchamp met Tracy through Watts at a group home in Altoona. According to counsel, Beauchamp indicated to him that at the time Beauchamp met Watts and Tracy, he started purchasing marijuana and was paying money to both of them. From the reconstruction of his notes, counsel further testified:

[I]t appears to me in my notes that we would have discussed the fact – that [Beauchamp] was having to do more than just pay for the marijuana, that [Beauchamp] was having to give them money, either Tracy directly or the kids or the uncle, and if he refused to give them the money, then if he reported that they were asking for this additional money, then they would report that he was touching the kids.

¶12 The trial court noted that although the worthless checks were issued at the Mega store, counsel's notes did not include a discussion of worthless checks

but, rather, list “Mega card” in conjunction with food. The court ultimately concluded that counsel’s notes were consistent with the defense theory that Beauchamp was extorted for food, money and rides.

¶13 Although Beauchamp testified that he told counsel about the check incident, the trial court is the ultimate arbiter of witness credibility, and of the weight to be given each witness’s testimony. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Based on the record, the trial court’s finding that Beauchamp never told trial counsel about the check incident is not clearly erroneous. Because counsel’s performance was, therefore, not deficient, the trial court properly denied Beauchamp’s postconviction motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

