COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2277 **Cir. Ct. No. 1994CF523**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SANDY PEGUES,

DEFENDANT-APPELLANT.

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

Before Brown, Nettesheim, Anderson, JJ.

¶1 PER CURIAM. Sandy Pegues appeals pro se from a circuit court order denying his WIS. STAT. § 974.06 (2003-04)[1] motion. We agree with the circuit court that postconviction counsel was not ineffective for failing to challenge trial counsel's performance in relation to a felony murder instruction. We affirm.

¶2 In 1994, a jury convicted Pegues of first-degree intentional homicide and armed robbery, both as party to the crime. We affirmed his conviction. In February 2004, Pegues filed a WIS. STAT. § 974.06 motion in the circuit court alleging that his WIS. STAT. RULE 809.30 postconviction counsel was ineffective[2] because counsel failed to raise issues relating to the felony murder[3] instruction which trial counsel initially requested and then withdrew. The circuit court declined to hold an evidentiary hearing,[4] heard argument and denied the motion. Pegues appeals.

¶3 We review whether the circuit court erred in denying Pegues' WIS. STAT. § 974.06 motion without an evidentiary hearing. Because the record conclusively demonstrates that Pegues was not entitled to relief, the circuit court

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

[2] Pegues employed the appropriate procedure to challenge postconviction counsel's effectiveness. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996).

[3] WISCONSIN STAT. § 940.03 (1993-94) defines felony murder as "caus[ing] the death of another human being while committing or attempting to commit a crime specified in … 943.32(2) [armed robbery]…."

[4] Generally, counsel's testimony must be preserved to pursue a claim of ineffective assistance. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

did not misuse its discretion in declining to hold an evidentiary hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶4 Pegues' WIS. STAT. § 974.06 motion alleged that the circuit court should have given the felony murder instruction and that postconviction counsel erred in not raising this issue. Because trial counsel withdrew his request for a felony murder instruction, the issue is whether postconviction counsel was ineffective for not challenging trial counsel's decision. If trial counsel did not perform deficiently in relation to the felony murder instruction, then postconviction counsel did not err by failing to challenge trial counsel's performance. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance."). Therefore, we focus on trial counsel's conduct with regard to the felony murder instruction.

¶5 The ineffective assistance standards are:

> 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. 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's inquiry is done.

State v. Kimbrough, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). If the facts are undisputed, whether counsel performed deficiently presents a question of law which we decide independently of the circuit court. ***State v. Love,*** 227 Wis. 2d 60, 67, 594 N.W.2d 806 (1999). We will not "second-guess a trial attorney'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.' A strategic trial decision rationally based on the facts and the law

will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted).

¶6 Although trial counsel's performance is usually the subject of fact-finding, the record relating to the felony murder instruction is clear and thorough and provides us with trial counsel's thinking and strategy. Because there were no facts to be found regarding trial counsel's conduct, there was no reason to hold an evidentiary hearing on Pegues' WIS. STAT. § 974.06 motion.

¶7 We now turn to the merits of Pegues' ineffective assistance of counsel claim to determine whether he was entitled to the relief he sought in his WIS. STAT. § 974.06 motion. Because the facts of trial counsel's conduct are undisputed, whether counsel's performance was deficient presents a question of law. ***Love***, 227 Wis. 2d at 67.

¶8 While walking along a road, Pegues and another confronted two men and demanded money. One of the victims was fatally shot during the confrontation. In his opening statement, Pegues' trial counsel informed the jury inter alia that Pegues was so intoxicated on the evening in question that he could not have formed the requisite intent for either first-degree intentional homicide or armed robbery.

¶9 At the jury instruction conference, Pegues' trial counsel initially requested an instruction on felony murder. After a lengthy conference, trial counsel conceded that the jury would be confused by a felony murder instruction, and the court declined to give the felony murder instruction. Although the court instructed the jury on lesser included offenses of first- and second-degree reckless homicide, the jury convicted Pegues of first-degree intentional homicide and armed robbery.

¶10 After hearing argument on Pegues' ineffective assistance of counsel motion, the circuit court concluded that trial counsel made a strategic decision to assert an intoxication defense[5] in an attempt to negate the intent elements of first-degree intentional homicide and armed robbery. Therefore, postconviction counsel did not have grounds to challenge trial counsel's decision regarding the felony murder instruction.

¶11 We agree with the circuit court. A felony murder instruction would have required proof that Pegues committed the underlying armed robbery. WIS JI—CRIMINAL 1030. Intent to steal is an element of armed robbery. WIS. STAT. § 943.32(1). Instructing the jury regarding felony murder would have been at odds with a defense which posited that Pegues was too intoxicated to form the intent required for either first-degree intentional homicide or armed robbery.[6]

¶12 The incompatibility of the intoxication defense and a felony murder instruction is illustrated by the following scenarios. If the jury accepted that Pegues was too intoxicated to form the requisite intent for first-degree intentional homicide, it would also have had to accept that Pegues was too intoxicated to form the requisite intent for armed robbery, the underlying crime for a felony murder conviction. And, if the jury acquitted Pegues of armed robbery, it could not have convicted him of felony murder which requires a finding that the death occurred while the defendant committed armed robbery. WIS. STAT. § 940.03 (1993-94).

[5] Pegues does not criticize counsel for offering an intoxication defense.

[6] Intoxication to the degree required negates intent for first-degree intentional homicide. *See* ***State v. Brown***, 118 Wis. 2d 377, 382, 348 N.W.2d 593 (Ct. App. 1984).

¶13 Citing ***State v. Krawczyk***, 2003 WI App 6, 259 Wis. 2d 843, 657 N.W.2d 77, Pegues argues that intent is not a required element of felony murder. Pegues misreads ***Krawczyk***. In ***Krawczyk***, we reaffirmed our holding in ***State v. Chambers***, 183 Wis. 2d 316, 323, 515 N.W.2d 531 (Ct. App. 1994), that for a felony murder conviction, a defendant need not have the intent to kill; rather, the defendant must have committed one of the crimes enumerated in the felony murder statute. ***Krawczyk***, 259 Wis. 2d 843, ¶21. In this case, the enumerated crime was armed robbery, which has an intent element. ***Krawczyk*** does not assist Pegues in his argument that a felony murder instruction would have been appropriate in the presence of his intoxication defense.

¶14 We conclude that a felony murder instruction would have confused the jury because it would have undermined Pegues' intoxication defense. ***State v. Dodson***, 219 Wis. 2d 65, 88, 580 N.W.2d 181 (1998) (an instruction which confuses the jury can be error). Trial counsel made a strategic decision rationally based on the facts and the law and did not perform deficiently. Postconviction counsel was not deficient for failing to challenge trial counsel's performance. Pegues was not entitled to relief, and the circuit court did not err in declining to hold an evidentiary hearing on his WIS. STAT. § 974.06 motion.

¶15 Pegues also claims that his trial counsel decided to withdraw his request for the felony murder instruction without consulting with him. The record is clear that Pegues was present for the entire jury instruction conference at which the merits of the felony murder instruction were discussed. We have already held that counsel's strategic decision was appropriate and did not constitute deficient performance.

¶16 Finally, Pegues seeks a new trial because the real controversy was not fully tried and justice has miscarried. As grounds, he reiterates his claim that the jury should have been instructed on felony murder. We have already rejected this claim. *See* ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989) ("Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing.").[7]

By the Court.—Order affirmed.

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

[7] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."). Among these arguments is Pegues' claim in his reply brief that the circuit court erred in instructing the jury on first-degree reckless homicide. The State's respondent's brief cites the first-degree reckless homicide instruction as support for its argument that the court did not err in refusing the felony murder instruction. This argument does not open the door for Pegues to argue that the first-degree reckless homicide instruction was error in the first instance. That argument should have been made in Pegues' appellant's brief. Because it was not, we do not consider it. ***State v. Grade***, 165 Wis. 2d 143, 151 n.2, 477 N.W.2d 315 (Ct. App. 1991).