COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0667

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DA VANG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

Before Cane, C.J., Peterson and Fine, JJ.

¶1 PER CURIAM. Da Vang appeals from an order denying his motion for postconviction relief, pursuant to WIS. STAT. § 974.06.[1] Vang argues that: (1) jail officials violated his attorney-client privilege; (2) he was denied effective assistance of counsel; and (3) the real controversy has not been tried. We disagree and affirm the order.

BACKGROUND

¶2 Vang was charged with two counts of first-degree intentional homicide. The criminal complaint alleged that Vang shot and killed his wife and her friend. Shortly before trial, Vang informed the court that he would not participate in the trial. He stated that he did not want to be present during the trial and he instructed his attorney to stop working on his defense.

¶3 The circuit court held several hearings to ensure that Vang was fully aware of his right to participate in the trial with the assistance of his attorney and his right to be present during all court proceedings. Vang repeatedly expressed his desire to not participate in the trial in any way. The circuit court granted Vang's request to not participate and to not be present. However, the court directed Vang's court appointed attorney to be present during the trial as standby counsel.

¶4 During the course of the trial, Vang informed the court that he had changed his mind about participating. A two-day continuance was granted to allow Vang's attorney to prepare for the remainder of the trial.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶5 The jury found Vang guilty on both counts of first-degree intentional homicide. Vang moved for postconviction relief. The circuit court denied the motion. This appeal followed.

DISCUSSION

I. Attorney-Client Relationship

¶6 Vang argues that jail officials unlawfully interfered with his attorney-client privilege, thus violating his Sixth Amendment rights. He contends that conversations with his attorney were monitored and that jail officials read his mail. We disagree.

¶7 We review the circuit court's findings of fact under the clearly erroneous standard. WIS. STAT. § 805.17(2). However, the application of constitutional principles to the facts as found is a question of law this court decides independently. ***State v. Patricia A. P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995). The circuit court concluded that jail personnel did not intentionally interfere with the confidential relationship between Vang and his attorney. It further concluded that no information was communicated to the prosecution.

¶8 At the postconviction hearing, Vang's attorney testified that he was concerned about the possibility that his telephone conversations with Vang were being monitored. He was concerned because the jail had a recorded phone message that stated the call was being monitored. However, Vang's attorney conceded that he had no evidence to prove that his calls actually were monitored.

¶9 Every jail official who testified consistently stated that telephone conversations between lawyers and clients were not recorded despite the recorded

telephone warning. Jail officials were unaware of anyone monitoring or recording Vang's conversations with his attorney.

¶10 There was also testimony that jail personnel were able to activate an intercom in the interview room at the jail and listen to conversations. However, this testimony was based only on "rumors." There was no evidence to establish that jail officials monitored conversations.

¶11 Jail officials did testify that the interview room has a two-way intercom system. When activated, the intercom system could be used to monitor a conversation. However, the officials testified that to their knowledge no one had ever eavesdropped on confidential attorney-client conversations, including Vang's, and that no information was ever given to the prosecution.

¶12 The only incident that the circuit court found to have possibly intruded upon Vang's Sixth Amendment right was when a jail employee accidentally opened a letter from Vang's attorney. However, the circuit court noted that Vang did not establish that any jail official actually read the letter or that any confidential information was given to the prosecution.

¶13 Vang cites ***Black v. United States***, 385 U.S. 26 (1965), to argue that the government's intrusion "into his legal camp" should result in a per se finding of prejudice. Even if the required showing of prejudice is not met, Vang contends that the monitoring of his confidential communications had a "chilling effect" on his defense, thereby violating his Sixth Amendment right to counsel.

¶14 The Supreme Court in ***Weatherford v. Bursey***, 429 U.S. 545 (1977), expressly rejected the per se rule. In determining whether the requisite amount of prejudice is present, a court must consider whether: (1) the government's

intrusion was intentional; (2) the prosecution obtained confidential information pertaining to trial preparations and defense strategy as a result of the intrusion; and (3) the information produced, directly or indirectly, any evidence used at trial, or was used in some other way to the defendant's substantial detriment. ***United States v. Steele***, 727 F.2d 580, 585 (6th Cir. 1984).

¶15 In the present case, the circuit court properly concluded that even if the limited intrusions into Vang's attorney-client relationship occurred, the intrusions were unintentional and did not result in the transfer of any confidential information to any member of the prosecution. Jail officials testified that no information from any source inside the jail was ever communicated to the prosecution.

¶16 Vang also asserts that the alleged government invasion into his defense prejudiced him because the intrusions forced him to discuss strategy only during face-to-face encounters with his attorney. However, Vang has failed to establish that jail officials actually monitored his telephone conversations or read his mail. Moreover, Vang's attorney testified that he thought the face-to-face meetings were very effective and that the only thing that hampered Vang's defense was his instruction to cease trial preparation.

¶17 We conclude that the evidence supports the circuit court's finding that jail officials did not intentionally interfere in Vang's confidential relationship with his attorney and that no information was communicated by jail officials to the prosecution.

II. Ineffective Assistance of Counsel

¶18 Vang argues that he was denied effective assistance of counsel prior to trial. He contends that a statement made to him by his attorney regarding the potential jury pool caused Vang to boycott his trial. Vang's attorney is alleged to have told him that "you are in the lion's country and the lion is going to eat you." Vang contends that this comment implied that the American criminal justice system was racist, which led him to insist that the Hmong community judge him. We are not persuaded.

¶19 A claim of ineffective assistance of counsel presents a mixed question of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court's findings of fact unless they are clearly erroneous. ***Id.*** at 634. Whether counsel's performance was deficient and prejudicial is a question of law the appellate court reviews without deference to the trial court. ***Id.***

¶20 A criminal defendant who claims the conviction should be reversed because he or she received ineffective assistance of counsel must demonstrate both that the attorney's performance was deficient and that any deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶21 Counsel is presumed to have acted properly, so that the defendant must demonstrate that his attorney made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment. ***Id.*** at 687-91. To demonstrate prejudice, the 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. ***Id.*** at 694. In applying this

principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***State v. Johnson***, 153 Wis. 2d 121, 129-30, 449 N.W.2d 845 (1990).

¶22 A review of the record establishes that the circuit court properly denied Vang's claim of ineffective assistance of counsel. The circuit court found that Vang voluntarily chose to boycott the trial and to instruct his attorney to cease pretrial preparation. When Vang advised the circuit court of his decision to boycott the trial, the court held numerous hearings to ensure that Vang knowingly and voluntarily waived his right to be present and to present a defense.

¶23 In each of these hearings, Vang stressed that his decision to boycott the trial was due to his belief that the court could not exercise jurisdiction over him. He expressed his desire to be judged under Hmong law. The record establishes that throughout these hearings Vang never suggested he was going to boycott the trial because of his lawyer's comments about the prospective jury panel.

¶24 In ***State v. Divanovic***, 200 Wis. 2d 210, 224, 546 N.W.2d 501 (Ct. App. 1996), we held that because the relationship of an attorney with his client is that of agent to principal, an attorney directed not to present a defense or participate in a trial must accede to his client's instructions. "A defendant who insists on making a decision which is his or hers alone to make in a manner contrary to the advice given by the attorney cannot subsequently complain that the attorney was ineffective for complying with the ethical obligation to follow his or her undelegated decision." ***Id.*** at 225.

¶25 Even if Vang had relied on his attorney's comment when he decided to boycott the trial, we conclude that the comment does not constitute deficient

performance. Vang's attorney testified that the comment was an explanation for his desire to draw a jury from outside the county. Taken in context, the comment was not an attack on the criminal justice system, but rather was related to a reasonable trial strategy.

¶26 Vang has failed to establish that his trial counsel was deficient or that any deficiency was prejudicial to his defense. Accordingly, we reject his argument that he received ineffective assistance of counsel.

III. New Trial in the Interests of Justice

¶27 Last, Vang argues that we should grant him a new trial pursuant to WIS. STAT. § 752.35[2] because the real controversy in this case has not been tried. He argues that his appeal is a direct appeal. We disagree.

¶28 In an order dated April, 18, 2000, we decided that this appeal was from an order denying a postconviction motion pursuant to WIS. STAT. § 974.06. Our power of discretionary reversal pursuant to WIS. STAT. § 752.35 may be exercised only in direct appeals from judgments or orders. ***State v. Allen***, 159 Wis. 2d 53, 55, 464 N.W.2d 426 (Ct. App. 1990). Because this is a collateral appeal, we conclude that Vang's argument is not properly before us.

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[2] WISCONSIN STAT. § 752.35 reads as follows:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

¶29 Even if this were a direct appeal, we conclude that the circuit court went to great lengths to ensure that the real controversy was tried and that Vang understood his rights. The manner in which the trial proceeded was a direct result of Vang's voluntary decision to boycott the trial and to stop his lawyer from providing a defense. Vang deliberately eschewed participation in the trial until it was almost over. He cannot now claim that he did not have his day in court as a consequence of his boycott. A party may not advance inconsistent positions with the intent to manipulate the judicial system. ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996).

By the Court.—Order affirmed.

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