COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1245

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

RICHARD C. WOS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

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

¶1 PER CURIAM. The State appeals an order granting postconviction relief and vacating a judgment of conviction. Richard Wos was convicted of uttering a forged check at a bank. At the postconviction hearing, the trial court ruled that Wos was denied his right to testify at his jury trial and, had he testified,

there was a reasonable probability that the outcome would have been different. The State argues that (1) the trial court erred by ruling that Wos had not voluntarily waived his right to testify; (2) Wos was not denied his right to testify; and, (3) even if his right to testify had been denied, Wos was not prejudiced. We affirm the postconviction order.

BACKGROUND

¶2 After the jury was selected but before it was sworn, Wos's defense counsel advised the court that she understood her client had "an absolute right to testify," but that he had not yet made up his mind whether he intended to do so. Nonetheless, his counsel explained that in the event Wos chose to testify, "I would have a hard time taking testimony from him."

¶3 The court interpreted her statement as a concern that Wos may commit perjury if he testified on his own behalf.[1] The court ruled that unless it heard a motion to withdraw, trial would proceed. Wos responded: "Okay. Let's go forward." Defense counsel replied that in the event Wos requested to take the stand, "then I make a motion to – to withdraw at that time." The court asked if she was "comfortable now" to represent Wos, and she answered affirmatively.

¶4 The trial proceeded. The State called several witnesses to testify that Wos presented a forged check at a bank. When the prosecution rested, the court excused the jury and advised defense counsel: "I did locate in the rules of professional responsibility whatever law I can find on the difficulties you find yourself in, or you mention, and if you want to take a look at that, that's fine."

[1] The transcript suggests that this discussion followed an off-the-record conference in chambers.

After a recess, the court inquired of defense counsel, "[a]nything to take up before we bring the jury back?" Defense counsel replied "[n]o" and re-called a bank employee as its only witness. After taking testimony to challenge the complaining witness's credibility, the defense rested. The court inquired, "That's all the evidence?" and defense counsel responded: "That's all the evidence we have, Your Honor." The jury returned a verdict finding Wos guilty as charged.

¶5 Wos brought a postconviction motion claiming ineffective assistance of counsel.[2] At the postconviction hearing, his trial counsel testified that all the witnesses she investigated advised that Wos knew the check was forged, "[s]o my concern was I didn't know how I could put him on the stand and take testimony from him that was going to be untruthful …." Also, the district attorney's office had information involving Wos in another "stolen account that happened previous to this charged event," and planned to impeach Wos with that information. The court and defense counsel had the following discussion:

> [DEFENSE COUNSEL]: Now, Mr. Wos at any time in the trial, did he ask … to testify? … But I had concerns from the beginning, but he never at one point asked to testify.
>
> THE COURT: [W]hen it came your turn to present a defense, did you offer or ask Mr. Wos if he wished to testify?
>
> [DEFENSE COUNSEL]: Yeah. I said, "What do you want to do at this point," after we were all done, and he said, "Well, let's let it go."
>
> THE COURT: So he chose not to testify?
>
> [DEFENSE COUNSEL]: Right, when it was all – when the State was all done presenting their side.

[2] Wos appeared pro se. The court appointed standby counsel and reset the matter for further hearing. When Wos again appeared pro se on his continued motion for postconviction relief, the court specifically found that Wos elected to proceed without standby counsel.

> MR. WOS: Objection, You Honor. … I was held to—a gun to my head.

Later, in response to Wos's questioning, counsel stated:

> You didn't ask to be put on the stand, but had you, I would have had a hard time putting you on. … I had evidence to show that the District Attorney had evidence to impeach you and because of the fact of all the problems with my tactics and stories come up blank. And then when you gave me that person's last name that clearly wasn't involved in any of this, and if anyone was going to be for your side, would have said, no, no, no, this didn't happen, but once again backed up what everyone was saying that you knew what was going on. So I would have had a hard time getting up there to ask you questions, and I don't know what I would have asked you, and I don't know what version I would have asked you, and that's why I said if you had asked to go on, I would have made a motion to withdraw. You never asked to go on.

Counsel stated that she had reviewed all the statements Wos made and that Wos kept changing his story.

¶6 The matter was continued and, at the next hearing, Wos argued to the court:

> [T]here is no intent to go in there and cash—I went into the bank in good faith with knowing nothing other than that check to be genuine, and I received the check directly from [the complaining witness], it had his name on it. I told Officer Klika that.

After this hearing, the court denied Wos's postconviction motion, finding that he had waived his right to testify and that the record failed to support a finding of ineffective assistance of counsel.

¶7 Wos filed a second motion to vacate his conviction, this time with court-appointed counsel. Wos again alleged ineffective assistance of counsel on

the ground that trial counsel advised the court of her "fears that Mr. Wos would commit perjury if he were to testify at trial and refusing to allow him to testify at his own trial while remaining as his counsel rather than withdrawing as required by SCR 20:1.16."

¶8 At the hearing on his second motion, Wos testified that he had come to court the morning of his trial with the intention to testify because "[t]he jury had to know. There was no way that I could have known[] … [t]hat that check was, if, indeed, it was forged." Wos also testified that there were corrections that needed to be made to officer Klika's testimony and, if he took the stand, he would have filled in the blanks in the officer's testimony. Wos maintained he did not take the stand to testify at his trial because, if he would have, defense counsel would have withdrawn, leaving him unrepresented for the remainder of the trial.

¶9 Wos further testified that at the close of the case, he told his trial counsel that "the jury had a right to hear it from me. They had to hear the story from me." He claimed that his attorney told him the prosecutor "was going to tear [him] apart." He also stated that his attorney told him that the reason that she did not call him to testify was because she feared he would perjure himself. When asked "Did you simply take her advice, or did you not testify because you thought she'd leave the trial if you did?" Wos responded "Both."

¶10 Wos's trial counsel testified that she chose not to withdraw "based on the fact that Mr. Wos wanted to proceed." She explained that on previous occasions, she had advised Wos that he must assure her that he was going to tell the truth, or she would move to withdraw. She testified that Wos did not indicate to her that he wanted to testify. She received three different versions of the case from Wos, and was not sure which one he would have testified to. She believed

that she could "punch some pretty good holes" in the State's case without his testimony.

¶11 The trial court concluded that Wos did not voluntarily waive his right to testify. It found that at the postconviction hearing, "Wos testified that he wanted to testify [at trial], but did not do so because his attorney would have withdrawn if he did." The court ruled that a "waiver of such a right is not freely given if made in response to such a threat." In addition, the court also found:

> [Defense counsel] did not know Wos would commit perjury if he took the stand. By her own admission, she had no idea what he would say. Unlike the defendant in *Nix*, Wos did not say that he intended to lie. Instead, [defense counsel] concluded that he would lie because he had told her several different versions of how he had received the check he was accused of uttering. Faced with the fact that her client had given her multiple explanations of what had occurred, [defense counsel] concluded that she could not trust whatever he would say in the event he testified at trial.

¶12 The court also found, based upon the series of hearings it had held with Wos, that he was "a person of limited intellectual capacity who has difficulty understanding and responding to even simple questions." The court concluded that "his attorney's threat to withdraw if he elected to exercise [his right to testify] was never withdrawn and that this threat operated to prevent him from making a free and voluntary decision on his own." The court granted Wos's motion and vacated his conviction.

STANDARD OF REVIEW

¶13 Our review of Wos's waiver of his right to testify involve historical and constitutional issues. We defer to the trial court's assessment of weight and credibility of testimony and uphold the trial court's findings of fact unless they are

clearly erroneous. WIS. STAT. § 805.17(2).[3] Applying those findings to a constitutional standard presents a question of law we review de novo. *See* ***State v. Williams***, 225 Wis. 2d 159, 168, 591 N.W.2d 823 (1999).

DISCUSSION

¶14 "'[T]he right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right." ***State v. Flynn*** 190 Wis. 2d 31, 49, 527 N.W.2d 343 (1994) (citation omitted). This right is personal to the defendant and may be waived only by the defendant. ***State v. Simpson***, 185 Wis. 2d 772, 778, 519 N.W.2d 662 (Ct. App. 1994). "[T]here can be no effective waiver of a fundamental constitutional right unless there is an 'intentional relinquishment or abandonment of a known right or privilege.'" ***United States v. Teague***, 953 F.2d 1525 (11th Cir. 1992). The standard is whether the totality of the record demonstrates that the defendant knowingly and voluntarily waived the right. ***Id.***

¶15 "The two-part ***Strickland*** test is 'the appropriate vehicle' to assess a defendant's contention that his or her 'right to testify was violated by defense counsel.'" ***Flynn***, 190 Wis. 2d at 50 (citations omitted). In order to establish ineffective assistance of counsel, Wos must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *See* ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). "[T]he first prong of the ***Strickland*** test would be met 'if defense counsel refused to accept the defendant's decision to testify and would not call him to the stand.'" ***Nichols v. Butler***, 953 F.2d. 1550, 1553 (11th Cir. 1992) (citation omitted).

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

¶16 The State first argues that there can be no ineffective assistance of counsel because Wos voluntarily waived his right to testify. It points to the instruction conference, where Wos did not complain about not testifying.[4] It also notes Wos's replies, "[l]et's go forward" and "let it go" when asked about testifying. It further argues that defense counsel never formally moved to withdraw from the case and Wos's testimony that he wanted to testify is inconsistent with defense counsel's testimony that Wos never asked to testify.

¶17 Here, the trial court found as a factual matter that Wos relinquished his right to testify because defense counsel threatened to withdraw in light of her impression Wos would commit perjury if he took the stand. The court implicitly found as credible Wos's claim that he did not testify because his trial counsel threatened to withdraw from the case if he insisted on taking the witness stand.

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[4] At the instruction conference, the court and Wos had the following discussion:

> THE COURT: … Let me read that for the record, Mr. Wos, because I want to make sure you understand this instruction is available. If you wish it, I will give it. If you do not want it given, then I would not give it. But your attorney, I think, also suggested that it be given, and I would.
>
> This is what it says: "A defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner."
>
> Do you wish to have that instruction given to the jury?
>
> MR. WOS: Yes, sir.
>
> THE COURT: It advises the jury that even thought you didn't testify, they shouldn't hold it that against you, that you don't have—it's not your obligation.
> ….
>
> … So you're asking that that instruction be given?
>
> MR. WOS: Please.

The court apparently believed Wos's contention that he agreed to go forward because there was a "gun to his head." The trial transcripts affirm that defense counsel stated that she would move the court to relieve her of her responsibility to represent Wos if he would have insisted on testifying.[5] As the trial court found, Wos's claim is consistent with defense counsel's statements at trial. Also, there is no indication that Wos was advised that substitute counsel would have been appointed if his trial attorney was permitted to withdraw.

¶18 "It is beyond question that an attorney cannot threaten to withdraw during a trial in order to coerce the defendant to relinquish his fundamental right to testify." ***Butler***, 953 F.2d at 1553. A choice of declining to testify and lose the opportunity to convey one's version of facts to the jury, or to take the stand and forgo the fundamental right to counsel is to be "'put to a Hobson's choice.'" ***United States ex rel. Wilcox v. Johnson***, 555 F.2d 115, 120 (1975). "When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted." ***Id.*** We are satisfied from the record that the trial court's determination that Wos did not knowingly and voluntarily waive his right to testify was not clearly erroneous.

¶19 The State, nonetheless, argues that Wos was not denied his right to testify because there is no right to present false testimony at trial, citing ***Nix v. Whiteside***, 475 U.S. 157, 166-71 (1986). The State asserts that trial counsel had a firm factual basis to believe Wos would commit perjury if he testified, because he kept changing his story every time she interviewed him. We reject this contention. "It is the role of the judge or jury to determine the facts, not that of the attorney."

[5] After voir dire, defense counsel stated that in the event Wos requested to take the stand, "then I make a motion to … withdraw at that time."

Wilcox, 555 F.2d at 122. Wos did not advise counsel that he intended to present false testimony. The record supports the trial court's finding that counsel acknowledged that she had no idea to what Wos would testify. Her private conjectures about Wos's protestations of innocence distinguish this case from ***Nix***, in which there was a finding that the defendant planned to testify falsely. *See* ***id.*** at 166.

¶20 Finally, the State argues that even if Wos was denied his right to testify, he suffered no prejudice.[6] The State details its strong case against Wos and notes that the jury deliberated for just a little over an hour. It contends that had Wos testified, he would have been impeached by inconsistencies as well as his prior convictions and similar pending charges. The State further argues that Wos did not specify what he would have testified to had he taken the stand. We are unpersuaded.

¶21 The trial court found that Wos claimed that had he testified, he would have told the jury that he did not know the check was stolen and forged. Because he did not testify, the State's argument that Wos's knowledge and intent could be inferred from his conduct went largely unrebutted. The record supports the trial court's determination. At his postconviction hearing, Wos stated his defense: "That there is no intent to go in there and cash—I went into the bank in good faith with knowing nothing other than that check to be genuine, and I received the check directly from [the complaining witness], it had his name on it. I told Officer Klika that."

[6] Although "an analysis of prejudice under ***Strickland***'s second prong is not a harmless-beyond-a-reasonable doubt inquiry, the two inquiries are conceptually similar." ***State v. Flynn***, 190 Wis. 2d 31, 53, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted). We are satisfied under either standard our result would be the same.

¶22 The State agrees with the trial court's finding that the sole issue was whether Wos knew the check he presented was forged. The record discloses evidence to support Wos's defense. For example, Wos identified himself to the teller by his driver's license and provided his thumb print. He did not object and even remained at the bank when the teller made a call to the account holder, who Wos knew quite well. As the trial court pointed out, "[t]his is hardly the behavior of a person who knows that the check he is attempting to cash is forged." While Wos later left the bank before the employees had decided what action to take, this does not by itself prove that Wos knew that the check was stolen when he presented it. The trial court found that Wos claimed that had he testified, he would have told the jury that he did not know the check was stolen and forged.

¶23 We agree with the trial court's conclusion that because Wos did not testify, the State's claim that Wos's knowledge and intent could be inferred from his conduct was unrebutted by direct evidence. Under these circumstances, the trial court was entitled to conclude that there was a reasonable probability that the trial's outcome would have been different and, as a result, the denial of Wos's right to testify was prejudicial.

By the Court.—Order affirmed.

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