COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1754

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAVIER SALGADO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Javier Salgado appeals *pro se* from an order denying his WIS. STAT. § 974.06 (1997-98)[1] motion. He claims: (1) that the

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

photo array was impermissibly suggestive; and (2) that he received ineffective assistance of trial counsel. Because the photo array was not impermissibly suggestive, and because Salgado received effective assistance of trial counsel, we affirm.[2]

I. BACKGROUND

¶2 On May 14, 1997, a jury found Salgado guilty of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02. Salgado was sentenced to twenty years in prison. Salgado's appointed postconviction counsel saw no merit to moving for postconviction relief or filing a direct appeal. Salgado proceeded *pro se* with postconviction motions. He moved for a new trial and evidentiary hearing on the allegation that he was denied effective assistance of trial counsel. He also alleged that the photo identification was impermissibly suggestive. However, the trial court denied the motions because they were not timely filed in compliance with WIS. STAT. § 809.30. Salgado appealed that decision to this court, and we held that the trial court should have treated Salgado's motions as WIS. STAT. § 974.06 motions. We remanded the matter to the trial court with directions to do so.

¶3 On February 22, 2000, the trial court held an evidentiary hearing. The trial court found that the photo identification was not impermissibly

[2] Salgado also argues that he received ineffective assistance of postconviction and appellate counsel, and that the sentence imposed was unduly harsh. The ineffective assistance claims, however, were not raised below and, therefore, are not properly before us for consideration. ***State v. Divanovic***, 200 Wis. 2d 210, 226, 546 N.W.2d 501 (Ct. App. 1996). Moreover, these issues can only be raised in a habeas corpus action. ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). In addition, the sentencing claim cannot be raised under WIS. STAT. § 974.06 and, therefore, will not be considered by this court. ***Smith v. State***, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978).

suggestive and that Salgado received effective assistance of trial counsel. The trial court entered an order denying Salgado's postconviction motions. Salgado now appeals.

II. DISCUSSION

A. Photo Identification.

¶4 Salgado contends the trial court erred in finding that the photo identification was not impermissibly suggestive. Specifically, Salgado argues that because the victim stated that one of her attackers had a tattoo under one eye, and because he was the only man in the five photos who had a tattoo under an eye, the photo array was clearly impermissibly suggestive. The trial court found that the tattoo was not clearly visible in the picture used, although Salgado's picture did seem to depict some kind of mark under his left eye. The trial court also noted that another photo seemed to have something under the subject's left eye. The trial court ruled: "As I look at these photographs, I don't think that that jumps out so significantly as to make the photo array impermissibly suggestive." The trial court also ruled that even if the photo array was impermissibly suggestive, the identification was reliable under the totality of the circumstances. We agree.

¶5 In order to suppress an eyewitness identification, a defendant must first prove that the identification procedure was impermissibly suggestive. ***Powell v. State***, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). Unnecessary suggestiveness may result from some feature of the person, which tends to unduly emphasize a suspect. ***Id.*** at 63. If the defendant fails to meet this burden, the inquiry ends, but if the defendant satisfies it, the burden shifts to the state to prove under the totality of the circumstances, that the out-of-court identification was reliable. ***Id.*** at 65-66.

¶6 We have reviewed the photo array and agree with the trial court's determinations. The unidentifiable mark under Salgado's left eye does not unduly emphasize him. The mark cannot be identified as a tattoo on the photograph. Further, Salgado failed to present evidence that the victim relied solely on the mark under Salgado's left eye in order to make the identification. In ***State v. Mosley***, 102 Wis. 2d 636, 307 N.W.2d 200 (1981), Mosley was the only person depicted in a photo array with an arm tattoo. ***Id.*** at 653. There was testimony from the witness that the tattoo depicted on the subject's arm in the photo played a significant part in making the identification. ***Id.*** Despite the eyewitness testimony to that effect, the supreme court held that "a unique identifying feature ipso facto is [not] unduly suggestive, without more persuasive proof." ***Id.*** at 654.

¶7 Here, Salgado relied solely on the fact that he was the only person in the photo array with a tattoo under his eye. This is insufficient, both because the tattoo cannot be seen on the picture and because, even if we classify the unidentifiable mark as a "unique identifying feature," Salgado failed to proffer "more persuasive proof," as required under ***Mosley***. Accordingly, the unidentifiable mark under Salgado's left eye in the picture, without more, is insufficient to establish impermissible suggestiveness.

B. Ineffective Assistance.

¶8 Salgado also claims that the trial court erred in rejecting his ineffective assistance claim. Salgado contends that trial counsel was ineffective for: (1) failing to move to sever his case from that of his co-defendant, Gustavo Hinojosa; and (2) preventing him from testifying in his own defense. The trial court found that neither allegation constituted deficient performance. We agree.

¶9 Salgado has a Sixth Amendment right to the effective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). In order to prove that he has not received effective assistance, Salgado must show two things: (1) that his lawyer's performance was deficient; and, if so, (2) that "the deficient performance prejudiced the defense." ***Id.*** at 687. A lawyer's performance is not deficient unless he or she has committed errors so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. ***Id.*** In order to show that counsel's performance was prejudicial, Salgado must prove that the errors committed by counsel were so serious that they deprived him of a fair trial, a trial whose result is reliable. *See* ***id.*** In other words, in order to prove prejudice, Salgado 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.

¶10 In assessing Salgado's claim that his counsel was ineffective, we need not address both the deficient performance and prejudice components if Salgado cannot make a sufficient showing on one. ***Id.*** at 697. The issues of performance and prejudice present mixed questions of fact and law. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, ***id.***, and the questions of whether counsel's performance was deficient and, if so, whether it was prejudicial, are legal issues we review *de novo*, ***id.***

¶11 First, Salgado complains about his counsel's failure to sever the case from that of Hinojosa's. At the evidentiary hearing, Salgado's trial counsel, Peter Vetter, testified regarding this claim. Vetter explained that he made a strategic

decision not to move to sever the cases because he felt it was in Salgado's best interest to keep the cases together. The reason for this was because the State had a much stronger case against Hinojosa. There were witnesses who would testify that Hinojosa was with the victim, and there was DNA evidence linking Hinojosa with the crime. In contrast, there was no DNA evidence linking Salgado to the crime. The only evidence against Salgado was the victim's identification, which was subject to impeachment because the victim was intoxicated at the time of the incident. Vetter explained that it would help Salgado to keep the cases together, because the jury would see "what a slam dunk looks like" [referring to the evidence against Hinojosa], and what a reasonable doubt looks like [referring to the lack of evidence against Salgado]. In addition, Vetter testified that if the cases were tried together, the victim could be cross-examined twice, increasing the chances that her ability to perceive and recollect things would be impeached.

¶12 We agree with the trial court that Vetter's strategic decision to keep the cases together was a reasonable one and, therefore, cannot constitute deficient performance. Because we have concluded that counsel's conduct was not deficient, we need not address the prejudice prong of the ***Strickland*** test. ***Strickland***, 466 U.S. at 697.[3]

¶13 Salgado's second allegation of ineffective assistance relates to trial counsel's advice that he not testify in his own defense. Salgado claims that Vetter

[3] In a related argument, Salgado contends his trial counsel should have requested a jury instruction cautioning the jury to use the DNA evidence only against Hinojosa, and not against Salgado. This contention is without merit. As noted by the trial court, it was clear that there was no DNA evidence against Salgado. There was no need for an instruction to that effect and, therefore, Salgado's claim that his counsel's failure to request an instruction is without merit.

prevented Salgado from taking the stand, and that he did not know he had a constitutional right to testify. The record belies this claim.

¶14 The trial court engaged Salgado in the following colloquy:

> THE COURT: Mr. Salgado, do you understand you have a constitutional right to testify and a constitutional right not to testify in this case? Do you understand that, sir?
>
> DEFENDANT SALGADO: Yes.
>
> THE COURT: And while I would certainly hope you'd talk to your lawyer and listen to his advice, that doesn't mean follow it necessarily, but listen to what he has to say. Bottom line, it's your decision whether to testify or not. Do you understand?
>
> DEFENDANT SALGADO: Yes.
>
> THE COURT: No matter what your lawyer says. Understand that?
>
> DEFENDANT SALGADO: Yes
>
> THE COURT: And it's my understanding that you've made a decision not to testify in this case. Is that correct?
>
> DEFENDANT SALGADO: Yes.
>
> THE COURT: Has anybody promised you anything or threatened you in any way to get you to not testify in this case?
>
> DEFENDANT SALGADO: No.
>
> THE COURT: Is this your own decision not to testify?
>
> DEFENDANT SALGADO: Yes.

Based on this interaction, Salgado's claim falls. Moreover, Vetter testified that he advised Salgado not to take the stand because Salgado had given several contradictory statements, which would hurt him on cross-examination. This, too, was a reasonable stratagem. Nevertheless, the ultimate choice was Salgado's and

he told the trial court he understood it was his choice, and he was choosing not to testify. There was no deficient performance here.

By the Court.—Order affirmed.

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