COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2618-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY RANIEWICZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Dismissed*.

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

¶1 PER CURIAM. Jeffrey Raniewicz appeals from a judgment entered after a jury convicted him of one count of possession of a controlled substance (cocaine), with intent to deliver, while possessing a dangerous weapon, and one count of felon in possession of a firearm, contrary to WIS. STAT. §§ 161.41(1m)(cm), 939.63 and 941.29(2) (1989-90). Raniewicz argues that:

(1) the trial court committed error by failing to give one jury instruction and *sua sponte* adding a phrase to another instruction; (2) his trial counsel provided ineffective assistance; and (3) he is entitled to a new trial because his appellate rights cannot be fully exercised because the exhibits were destroyed prior to this appeal. Because Raniewicz's eight-year fugitive status permits dismissal of this appeal as a sanction, we reject his arguments.

I. BACKGROUND

¶2 On February 2, 1990, Milwaukee Police Detective Alan Wisch, together with other police officers, executed a search warrant at a residence located at 4602 South 20th Street, Apartment #4. When the police entered the apartment, Wisch observed Raniewicz and a woman. There were two bedrooms in the apartment—one contained men's clothing, and the other contained women's clothing. The man's bedroom also contained two ounces of cocaine, a triple-beam scale, materials for packaging cocaine, and a loaded shotgun. Police Officer David Spakowicz interviewed Raniewicz, who admitted that the cocaine was his, that he was an "ounce dealer," and that he was currently on parole for a previous drug conviction.

¶3 Raniewicz was charged with possession of cocaine with intent to deliver, while possessing a dangerous weapon, and felon in possession of a firearm. A jury trial began on January 22, 1991. The jury was sworn, opening statements were presented, and the State began its case. On the morning of January 23, 1991, defense counsel informed the court that Raniewicz called him at 7:55 a.m., and said that he was having car trouble. No further communication from Raniewicz occurred during the trial, and Raniewicz did not return to court.

The trial court made a finding that Raniewicz voluntarily chose not to come to court, and the trial continued in his absence.

¶4 After the State rested, the trial court passed the case to allow Raniewicz some additional time to appear. He did not. During discussions about jury instructions, defense counsel indicated that he would be requesting the standard instruction regarding the defendant not testifying. The trial court did not give the instruction. The trial court did instruct the jury that the weight of the evidence is not dependent upon the number of witnesses that a party may call and, in fact, "the defendant presented no witnesses."

¶5 The jury returned a verdict of guilty on both counts. The trial court entered judgment on the verdicts and issued a bench warrant for Raniewicz's arrest. Sometime in early 1999, Raniewicz was arrested in Florida, where he had been living since fleeing Wisconsin. Raniewicz returned to court on May 26, 1999, asking that the jury verdict be vacated. The trial court denied his request, and Raniewicz was sentenced. He now appeals.

II. DISCUSSION

¶6 Raniewicz presents three arguments: (1) that the trial court's failure to give the jury instruction regarding the defendant's decision not to testify, coupled with the court's remark that, in fact, Raniewicz did not present any witnesses, was erroneous and requires reversal; (2) that his trial counsel was ineffective for allowing the instructional errors to occur, for failing to object to improper prosecutorial remarks during closing argument, and for failing to request that the closing arguments be recorded; and (3) that destruction of the trial exhibits before he could appeal his case makes it impossible for him to fully exercise his appellate rights. We reject his arguments.

¶7 On January 23, 1991, Raniewicz did not appear for trial. Instead, he absconded to Florida, where he lived for over eight years. The State requests that we decide this case by applying the "fugitive dismissal" rule, which permits an appellate court to dismiss the appeal of a defendant who becomes a fugitive from justice while an appeal is pending. ***Ortega-Rodriguez v. United States***, 507 U.S. 234, 239 (1993). Raniewicz argues that because his fugitive status occurred before sentencing, and before an appeal could be taken, the fugitive dismissal rule does not apply.

¶8 ***Ortega-Rodriguez*** addressed the distinction between flight and recapture during the pre-appeal time period as contrasted to the post-appeal time period. The fugitive dismissal rule is routinely applied during the post-appeal time period—that is, after the appellate proceedings have been commenced. The reasons for the rule include: (1) if the appellant is a fugitive, he or she cannot be found, and any judgment could not be enforced, ***Degen v. United States***, 517 U.S. 820, 824 (1996); (2) an appellant's escape "disentitles" him "to call upon the resources of the Court for determination of his claims;" ***id.***; and (3) disentitlement "discourages the felony of escape and encourages voluntary surrenders," and "promotes the efficient, dignified operation" of the courts. ***Id.*** (citations omitted).

¶9 However, in pre-appeal cases—that is, situations where no appellate proceedings have begun, the same rationale does not necessarily apply. When a fugitive is recaptured before the appeal is filed, the judgment of the court of appeals would be enforceable against the appellant, and his or her earlier absence would not threaten the dignity of the court imposing the sanction. ***Ortega-Rodriguez***, 507 U.S. at 244-46. Here, Raniewicz became a fugitive before any appellate proceedings had begun. Thus, an automatic dismissal of his appeal is not necessarily warranted.

¶10 Nevertheless, the Supreme Court did not rule out the possibility of appeal disentitlement where it is necessary to prevent actual prejudice to the state from a fugitive's extended absence. ***Id.*** at 249. The Court advised that dismissal pre-appeal may be appropriate where a lengthy escape prejudices the prosecution in "locating witnesses and presenting evidence at a retrial following a successful appeal," or where a defendant's flight during the trial might make "meaningful appeal impossible," or otherwise "disrupt the appellate process so that an appellate sanction is reasonably imposed." ***Id.***

¶11 We conclude that the instant case presents such a situation. Some of the claims raised here are directly linked to the fact that Raniewicz chose to flee the state before the completion of the trial, and before a decision could be made as to whether he should testify in his own defense. Other claims are linked to the lengthy amount of time that Raniewicz was a fugitive, such as recollections of witnesses, and the destruction of exhibits. If Raniewicz prevailed on appeal, the state would be at a great disadvantage because any re-trial would take place over a decade after the events occurred in this case. Even if the witnesses could recall the events that occurred, the physical evidence no longer exists. Accordingly, Raniewicz's flight and lengthy fugitive status disentitles him to an appeal. His flight at the trial court level makes a meaningful appeal impossible.

¶12 Even if we were to address the merits of Raniewicz's claims in this appeal, we would conclude that any error was harmless. The evidence against Raniewicz was compelling and unrefuted. Police officers testified that the cocaine and packaging materials were found in Raniewicz's bedroom, that Raniewicz admitted that the cocaine was his, that he was a "dealer" not a "user," and he acknowledged the presence of the shotgun. Further, Raniewicz admitted that he had a prior felony conviction. Based on this undisputed testimony, all of the

alleged errors that Raniewicz raises in this appeal are harmless. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

By the Court.—Appeal dismissed.

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