COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Nos. 00-3221-CR
00-3222-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRENCE A. HOOD,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Affirmed*.

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 PER CURIAM. Terrence Hood appeals from judgments convicting him on two armed robbery counts, three false imprisonment counts, and one count of auto theft. He also appeals from the order denying him postconviction relief. In exchange for certain concessions, Hood entered no contest pleas to the charges. The issue is whether the trial court erred in denying Hood's postconviction motion

to withdraw his pleas based on a claim of ineffective assistance of counsel. We affirm.

¶2 Three men robbed a Madison bank in January 1998. Two of the three later confessed and identified Hood as their accomplice. Both agreed to testify against him. After Hood's arrest, he was also charged with another armed robbery of a credit union in Madison, when police matched his fingerprint to one found on duct tape used to tie up a victim of the robbery.

¶3 During the investigation of the January 1998 robbery, police found a footprint in the area where Hood purportedly stood outside the bank just before the robbery occurred. However, the print did not match the shoes of either Hood or his accomplices. Additionally, an eyewitness to the getaway concluded Hood was not one of the two robbers she saw because he had a beard and she believed the robbers were clean-shaven. (The robbers wore masks during the robbery itself.)

¶4 In his postconviction motion, Hood testified that his attorney never informed him of the potentially exculpatory evidence described above. Had he known of it, he stated that he would have refused the State's plea bargain and taken the case to trial. He further testified that counsel did not tell him that the fingerprint found on the duct tape was on the outside, or non-sticky side. He testified that had he known this he would have gone to trial on the charges pertaining to that robbery as well, on the theory that he touched the tape at some time prior to the robbery.

¶5 Trial counsel testified that he could not recall discussing the evidence in either case with Hood, and discounted its importance. The trial court found no ineffectiveness and denied the motion, resulting in this appeal.

¶6 To prove ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by an objective standard of reasonably competent professional judgment. ***Id.*** at 636-37. To show prejudice, a defendant seeking to withdraw a plea must show a reasonable probability that, but for counsel's errors or omissions, the defendant would have gone to trial and likely mounted a successful defense. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985); ***State v. Armstrong***, 223 Wis. 2d 331, 369-71, 588 N.W.2d 606 (1999). Whether counsel's representation was deficient and whether it was prejudicial to the defendant are questions of law. ***Pitsch***, 124 Wis. 2d at 634.

¶7 Whether counsel failed to tell Hood about potentially helpful evidence was not clearly resolved by the testimony. However, there was no prejudice in any event. The testimony of Hood's accomplices, his fingerprint on the tape, and the similar nature of the robberies gave the State a strong if not an overwhelming case against Hood. On the other hand, the fact that the police found a non-matching footprint near where Hood supposedly stood is only minimally exculpatory, because there was no evidence excluding the possibility that other people had been in that area. The getaway eyewitness had only a fleeting glimpse of the two robbers and mistakenly thought one was a female neighbor of hers. She also failed to identify Hood's companion in a show-up only hours after the robbery, although he confessed he was one of the two robbers she saw. Additionally, her description of the robbers' clothing substantially differed from that given by three other eyewitnesses. Consequently, the exculpatory value of her testimony was substantially discounted by its unreliability, and would have

provided little help to Hood. He could not have mounted a successful defense under any reasonable view, based on this minimally exculpatory evidence.

¶8 As for the fingerprint evidence, we hold it implausible that Hood would have been willing to go to trial on the defense that his fingerprint somehow innocently appeared on the tape used in the robbery. Had he gone to trial, no reasonable jury could have believed that theory, with no evidence to support it beyond Hood's own testimony.

¶9 Hood also claims error in the trial court's decision to exclude evidence of numerous prior instances where trial counsel was found ineffective or disciplined for misconduct. Because we conclude that Hood was not prejudiced by counsel's representation whether it was deficient or not, we need not decide this issue.

By the Court.—Judgments and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).