COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1919-CR **Cir. Ct. No. 99-CF-2653**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC C. HILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

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

¶1 PER CURIAM. Eric Hilson appeals from a judgment convicting him, as a repeat offender, of burglary and battery, and from an order denying his postconviction motion. He claims he was denied effective assistance of counsel when his attorney failed to object to a line of questions which elicited testimony impermissibly referring to his silence following his arrest. Because we are

satisfied that counsel's decision not to object reflected a reasonable strategic decision within professional norms, we affirm.

BACKGROUND

¶2 The charges stemmed from allegations that a man caught Hilson in the act of burglarizing his home. The man alleged that he chased Hilson, briefly caught him and recovered some of his property, told onlookers to call police, then continued following Hilson until the police arrived and apprehended him. Hilson contended that he had knocked on the man's door to inquire about whether there was a room for rent, and that the man had then falsely accused him of stealing his roommate's moped a few days earlier and began chasing him. Hilson denied having entered the apartment, having taken any items, and having hit or kicked the man during the chase.

¶3 In response to questioning by the prosecutor, the arresting officer testified that Hilson did not complain at the time of his arrest that someone had chased and assaulted him. Defense counsel made no objection to the line of questioning because, as he had already informed the jury during opening argument, the defense position was that Hilson had cooperated fully with police and waived his Fifth Amendment rights shortly after his arrest. Instead, defense counsel brought out on cross-examination the fact that the officer had asked no questions of Hilson at the time of his arrest. The trial court noted that it would have excluded the testimony had an objection been made, but concluded that counsel's failure to object was a reasonable and nonprejudicial strategic decision that did not deprive the defendant of effective assistance.

STANDARD OF REVIEW

¶4 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the trial court's findings about counsel's actions and the reasons for them unless they are clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000)[1]; ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id***.

¶5 The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id***. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant usually must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.*** at 688.

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

ANALYSIS

¶6 The State does not dispute on appeal that the police officer's testimony was objectionable because it impermissibly encouraged the jury to draw an inference of Hilson's guilt from his silence. *See* ***Reichhoff v. State***, 76 Wis. 2d 375, 378, 251 N.W.2d 470 (1977). We agree with the State, however, that Hilson has failed to overcome the strong presumption that counsel's decision not to object fell within the range of reasonable professional judgment.

¶7 Counsel articulated a strategic reason for his decision—namely, that the defense emphasis on Hilson's cooperation with police might be undermined if the jury saw counsel attempting to block the officer's testimony about what Hilson said or did not say while being arrested. In addition, counsel limited the effect of the objectionable testimony by pointing out that the officer had not asked Hilson any questions. Thus, counsel recognized that the officer's testimony was problematic, and dealt with it in the manner that he deemed would best serve his client's interests. We are therefore satisfied that, regardless of whether hindsight shows counsel's decision to have been a wise one, it was not an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687.

By the Court.—Judgment and order affirmed.

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