

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 17, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-2089-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 01CF001770

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANDRE L. LEE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Andre Lee appeals a judgment of conviction and an order denying his postconviction motion. The issues relate to newly discovered evidence and ineffective assistance of counsel. We affirm.

¶2 Lee was convicted of one count of second-degree reckless homicide by use of a dangerous weapon. The charge was for the gunshot killing of William Wright at a Milwaukee residence. Lee filed a postconviction motion seeking retrial due to newly discovered evidence in the form of two new witnesses. The circuit court denied this claim because it did not find the new testimony credible.

¶3 On appeal, the parties agree that one element in the analysis of newly discovered evidence is whether it is reasonably probable that a different result would be reached at a new trial. *State v. Carnemolla*, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). The motion is addressed to the circuit court's sound discretion and we will affirm the court's decision if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record. *Id.*

¶4 The first new evidence was from Derrick Singleton. There had been testimony by LaShawnda Shumpert at trial that Singleton was part of a conspiracy, also including herself and defendant Lee, to rob the victim Wright, and that she had been able to hear that Singleton was present with defendant Lee when Wright was shot. In support of Lee's postconviction motion, Singleton testified that when Wright was killed, Singleton was present at the scene, but he was with Hershel Chambers, not Lee, and it was Chambers who shot Wright. On cross-examination, the State brought out that Singleton was arrested and gave a statement to police many months before that hearing, at a time that was after Lee's conviction at trial but before his sentencing. In that statement Singleton said it was Lee he was with, and Lee shot Wright. Singleton further testified that he did not know at the time of that statement whether Lee had been tried, but he did know that Lee had been charged, and he incriminated Lee to give the police the statement he thought they wanted to hear, in hopes of getting a good plea offer. Singleton also testified that he knew Chambers had died since the Wright killing.

¶5 The second new evidence was testimony by Kevin Kelly. He testified at the postconviction hearing that he saw Singleton and a person he knew only as “Lil Dirty” entering the building where Wright was shot, on that day. Singleton testified that “Lil Dirty” was a name Chambers was known by.

¶6 The circuit court stated that, after having the opportunity to observe the testimony by Singleton and Kelly, the court did not find it credible “to the degree that it would support this Court on that determination in making a finding that a different result would come about at trial.”

¶7 On appeal, the parties appear to agree that in deciding the likelihood of a different result on retrial, the circuit court is permitted to rely on its assessment of the credibility of a witness presenting new evidence. *See Carnemolla*, 229 Wis. 2d at 659-61. Lee argues that the court’s conclusion as to likelihood of a different result was erroneous. We disagree. Singleton’s credibility at the postconviction hearing was questionable, in light of his original statement to police and the fact that he knew Chambers was by then dead, and therefore in no position to dispute Singleton’s and Kelly’s claims about his presence at the crime scene. Furthermore, this new evidence would not affect the testimony from trial that only Lee’s fingerprints were found on the gun that killed Wright. In addition, Singleton’s original statement was generally consistent with Shumpert’s testimony at trial. We conclude the court’s decision had a reasonable basis.

¶8 The second ground for Lee’s postconviction motion was ineffective assistance of counsel. To establish ineffective assistance of counsel a defendant must show that counsel’s performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To

demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* We need not address both components of the analysis if defendant makes an inadequate showing on one. *Id.* at 697. We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶9 Lee argues that his counsel was ineffective by not properly litigating the question of whether he was known as "Lil Dirty." The significance of the nickname, according to Lee, was that in statements made before trial Shumpert identified "Lil Dirty," not Lee, as her co-conspirator along with Singleton. In other words, establishing that Lee was not known as "Lil Dirty" would have helped give the jury reasonable doubt as to whether Shumpert's original accounts, rather than her trial testimony implicating Lee, were true. To litigate the issue properly, according to Lee, counsel should have presented testimony by Kelly, discussed above, and three other witnesses who would have testified that they knew Lee, but had never heard this nickname.

¶10 At the postconviction hearing, trial counsel testified that her investigator attempted to locate Kelly because his name appeared in police reports, but his phone was disconnected. She testified that Lee did not give her the names of the other three witnesses, although Lee testified to the contrary. She also testified that after having seen the testimony of two of them at the hearing, she did not regard them as credible witnesses. The trial court also did not regard them as credible, but does not appear to have made a finding as to whether Lee did or did

not tell his attorney about them. On appeal, Lee argues that their testimony was credible. However, there is nothing in the transcript of their testimony that provides a basis to conclude that the trial court's finding as to their credibility was clearly erroneous.

¶11 Lee also argues that his counsel was ineffective by allowing a trial witness for Lee, named Kizzy Jones, to appear in jail clothes. Counsel acknowledged that this was an oversight. However, we conclude there was no prejudice. Jones admitted that she had been convicted of crimes five times. In light of that information, the jury would not be surprised to learn that she was currently in jail.

*By the Court.*—Judgment and order affirmed.

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

