COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3446-CR **Cir. Ct. No. 00CF003248**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE S. SOTO, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and JOHN A. FRANKE, Judges. *Judgment modified and, as modified, judgment and order affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Jose S. Soto, Sr., appeals from a judgment of conviction for armed robbery, robbery, false imprisonment, and false

imprisonment while armed, all as party to a crime.[1] He also appeals from an order denying his petition for a new trial and postconviction discovery motion. He argues he is entitled to a new trial on two bases: newly discovered evidence and ineffective assistance of trial counsel. He also contends that he is entitled to postconviction discovery of four photographs. We reject his arguments and affirm the judgment and order.[2]

BACKGROUND

¶2 On June 2, 2000, Albertano Garcia and his girlfriend Elvia Garcia Teran[3] were next to their vehicle outside their employer's office shortly after 2:00 p.m. According to a description by two witnesses, two men exited what was described as a gray or silver vehicle and approached Garcia's vehicle. The men forcibly grabbed Garcia. He was shoved into the back seat of the gray car and held captive for two hours, during which he was beaten and threatened in

[1] The judgment of conviction erroneously indicates that all four counts were "while armed." The record shows that Count 2 was amended to robbery (not armed) and Count 4 was amended to false imprisonment (not armed). The verdicts and the sentencing transcript both reflect these changes. Handwritten notes were used to amend the Information. Upon remittitur, the court shall enter an amended judgment of conviction correctly setting forth that Count 2 was robbery, a violation of WIS. STAT. §§ 943.32(1)(a) and 939.05 (1999-2000), a Class C Felony, and that Count 4 was false imprisonment, a violation of WIS. STAT. §§ 940.30 and 939.05 (1999-2000), a Class E felony. *See* ***State v. Perry***, 136 Wis. 2d 92, 112-15, 401 N.W.2d 748 (1987) (an unambiguous oral pronouncement controls when a conflict exists between a court's oral pronouncement of sentence and a written judgment).

[2] The Honorable Daniel L. Konkol presided over the trial and sentencing. The case was later transferred to the Honorable John A. Franke, who presided over the postconviction proceedings.

[3] Although Albertano Garcia and Elvia are not married, throughout the trial Elvia was referred to as Elvia Garcia or Elvia Garcia Teran. For purposes of this opinion, we will identify Elvia by the last name Teran.

connection with his failure to pay damages for a recent car accident involving the defendant's son, Jose Soto, Jr., also known as "Popeye" (hereafter "Popeye").

¶3 The beating took place in the car, and also at two other locations. At trial Garcia testified that one of the men who hit Garcia with a gun was a man who sat in the back seat of the vehicle with Garcia. Garcia later identified that man as Soto, a man he had not met before the abduction. Garcia said that during the beating, the men looked through Garcia's wallet, copied down personal information and took about $200 from him. They told Garcia that if he told anyone about the kidnapping, they would kill him.

¶4 While the gray car drove away with Garcia, a man, later identified by Teran as Popeye, jumped into Teran's vehicle and demanded money; Teran gave him $200. Approximately twenty minutes later, Popeye exited the vehicle and a man Teran later identified as Hipolito Claudio entered Teran's vehicle and drove Teran to her residence, where Teran and Claudio searched for the title to Garcia's vehicle, which they did not find. Claudio then drove Teran to a location where she was reunited with Garcia. Garcia and Teran ultimately reported the incident to police.

¶5 When the kidnappings first began, two women waiting at a bus stop saw the men grab Garcia and drive off with him. The women went to a nearby police station and reported the incident, as well as a license plate number for the vehicle into which Garcia was placed. They reported that the vehicle was a light gray, four-door vehicle. The license plate number was registered to Suzanne Soto, the defendant's wife, who was the owner of a gray Ford Taurus.

¶6 Two days later, several of the same men involved in the kidnapping allegedly shot a woman who had been staying at Garcia and Teran's home. Soto

was ultimately arrested and charged with two counts of armed kidnapping and two counts of armed robbery, all party to a crime, in connection with the abduction of Garcia and Teran. He was also charged with solicitation to commit intentional homicide, which the State alleged had led to the shooting of the woman at Garcia and Teran's home.[4]

¶7 Soto pled not guilty and a jury trial followed. Soto's defense to the kidnapping and robbery charges was an alibi to establish that he had not been involved in the incident. With the assistance of two trial attorneys, Soto presented witnesses who testified that Soto and his wife helped his friend move during the time that the kidnappings were taking place. He also presented evidence that the Sotos had the gray Taurus with them, and elicited testimony from one State's witness that no blood had been found in that vehicle. Finally, he presented evidence that the Taurus's license plates were missing, and argued in closing that someone must have stolen the plates and put them on another vehicle used in the kidnapping.

¶8 The State's key witnesses included Garcia, Teran, the two women at the bus stop and Claudio. Claudio acknowledged that he was offering his testimony as consideration for a reduced sentence. Claudio testified that he saw Soto in the gray Taurus with Garcia, and that he also spoke with Soto on the telephone about trying to find Garcia's car title. Claudio also testified that shortly after the kidnapping, he accompanied Soto to a barbershop, where Soto got a haircut to avoid being identified by witnesses.

[4] Soto was also charged with intimidating a witness in connection with the earlier incidents. This charge was not tried to the jury and was ultimately dismissed on the State's motion.

¶9 The jury found Soto guilty of robbery and kidnapping, but Soto was acquitted of the solicitation to commit first-degree intentional homicide charge. Soto filed two postconviction motions. First, Soto sought discovery of four Polaroid photos taken of him on the day he was arrested. Second, he sought a new trial on grounds of newly discovered evidence and ineffective assistance of counsel. The trial court ordered a ***Machner***[5] hearing with respect to ineffective assistance of counsel. Ultimately, the trial court denied both motions. This appeal followed.

DISCUSSION

I. Newly discovered evidence

¶10 Soto argues that he is entitled to a new trial based on newly discovered evidence. He alleges that a signed affidavit from Claudio recanting his testimony at trial entitles Soto to a new trial. In the affidavit, Claudio stated that he lied about Soto's involvement in the kidnappings because he wanted a lighter sentence for his own crimes and because he was angry with Soto and Soto's wife for not answering Claudio's calls from jail. He said he also lied because he was angry with Soto's family because Popeye was planning to join a different gang. Claudio's affidavit was accompanied by an affidavit from Popeye, in which Popeye stated that Soto had not been involved in the kidnappings.

¶11 A defendant who seeks a new trial based on newly discovered evidence must prove the following by clear and convincing evidence:

[5] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.

State v. Brunton, 203 Wis. 2d 195, 200, 552 N.W.2d 452 (Ct. App. 1996). In addition, when the new evidence presented in a motion for new trial is the recantation of a trial witness's testimony, the recantation must be corroborated by other newly discovered evidence. ***Nicholas v. State***, 49 Wis. 2d 683, 694, 183 N.W.2d 11 (1971). In ***State v. McCallum***, 208 Wis. 2d 463, 561 N.W.2d 707 (1997), our supreme court recognized that it can be difficult to corroborate the recantation evidence where there is only a single witness and held that "the corroboration requirement in a recantation case is met if: (1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 477-78.

¶12 A motion for a new trial "is addressed to the trial court's sound discretion and we will affirm the [trial] court's decision if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record." ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999).

¶13 Exercising its discretion, the trial court concluded that Soto was not entitled to a new trial because Popeye's corroboration of Claudio's recantation was not newly discovered evidence; it was merely unavailable at the time of Soto's trial because Popeye was not called as a witness. The trial court also implicitly found that Claudio's statement lacked any circumstantial guarantees of trustworthiness, stating that a co-defendant's "after-the-fact comments should be viewed with considerable suspicion. Co-defendants should not be able to pool

their post-conviction resources and decide which one of them ought to get a new trial."

¶14 We conclude that the trial court did not erroneously exercise its discretion in denying Soto's motion for a new trial. We agree that Popeye's corroboration of Claudio's affidavit was not newly discovered evidence. There is undisputed evidence in the record that prior to trial, Popeye, who had fled to Texas and was apprehended there, was interviewed in Houston prior to Soto's trial.[6] According to that statement, Popeye indicated that his father, mother and sister had not been involved in the kidnapping of Garcia and Teran. At the ***Machner*** hearing,[7] trial counsel testified that he had received that statement prior to trial, but that he had not sought to have Popeye testify on Soto's behalf.[8] Thus, prior to the trial, trial counsel was aware that Popeye was asserting that Soto was not involved.

¶15 Moreover, even assuming that ***McCallum***'s rules with respect to recantations of victims apply to co-defendants,[9] the trial court's implicit findings that there was not a feasible motive for the initial false statements and that there

[6] Soto and Popeye were originally to have been tried together, but the State opted to proceed with separate trials because the State did not believe Popeye would be returned to the state of Wisconsin prior to the scheduled trial date.

[7] Although the trial court had not granted Soto a ***Machner*** hearing on this issue, the trial court allowed Soto considerable latitude in exploring issues at the hearing, including trial counsels' decision not to try to put Popeye on the stand.

[8] It is unknown whether Popeye would have actually testified on Soto's behalf, given that Popeye had charges pending for the same incident. If Popeye had claimed the Fifth Amendment privilege against self-incrimination, his post-trial affidavit still would not have been newly discovered evidence, but only newly available evidence. *See* ***State v. Jackson***, 188 Wis. 2d 187, 198-201, 525 N.W.2d 739 (Ct. App. 1994).

[9] The trial court expressed some doubt whether the same standard should apply to recantations of victims and co-defendants, stating, "A recantation by a turncoat accomplice should be viewed with even greater suspicion than the recantation of a victim…."

are not present circumstantial guarantees of trustworthiness of the recantation are not clearly erroneous. At the trial, Claudio offered unequivocal testimony that Soto was directly involved in the kidnapping. He provided details of Soto's involvement, including detailed information about Soto getting a haircut to make identification difficult. If Claudio's post-sentencing claim that he lied because he wanted a good sentence for his cooperation was sufficient explanation for his alleged false statements, every formerly cooperating defendant would have the power to provide fellow co-defendants with a new trial by simply claiming to have been untruthful. Claudio's contentions with respect to being mad at Soto are insufficiently developed and do not present a persuasive motive for perjuring himself at trial. We affirm the trial court's conclusion that Soto is not entitled to a new trial based on Claudio's recantation.

II. Ineffective assistance of counsel concerning evidence of Soto's weight

¶16 Soto argues that he was entitled to a hearing on his allegation that his trial counsel were ineffective for failing to sufficiently impeach the in-court identification of Soto by Garcia. A trial court must hold a ***Machner*** hearing if the defendant alleges facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996). If, however: "'the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Id.*** at 309-10 (citation omitted). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review *de novo*." ***Id.*** at 310 (italics supplied).

¶17 Soto's postconviction motion alleged:

> Trial counsel failed to investigate[,] discover and present evidence at trial that Jose Soto had not lost any significant weight between June 2, 2000 (abduction) and June 23, 2000 (Mr. Soto's arrest) in order, apparently, as the prosecution insinuated, to change his appearance. If this evidence had been presented, Mr. Garcia's identification of Mr. Soto from the photo array would have been impeached by the evidence that Mr. Soto had not lost any weight and so did not match the description of the principal assailant. Without this evidence, the defendant was unable to establish that it was Ricky Ortiz, rather than Jose Soto, who was in the backseat with Mr. Garcia and who was hitting him with the gun.

¶18 The trial court denied Soto's request for a hearing on this issue, concluding that Soto had not made a sufficient showing to warrant an evidentiary hearing. The trial court explained: "Garcia's strong identification of the defendant was just one of several difficult problems for the defense in this case, but the identification was challenged vigorously throughout the trial."

¶19 We agree with the trial court that Soto was not entitled to a hearing, because the record conclusively demonstrates that Soto is not entitled to relief. To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient, and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). We are unconvinced that Soto has sufficiently alleged that his trial counsel provided deficient performance.

¶20 The issue of whether Soto had lost weight after the kidnapping was, at best, a collateral issue in the case. At trial, Garcia testified that Soto had "lost a lot of weight" since the abduction. He did not testify that Soto had lost weight between the abduction and the arrest. We agree with the State that any

impeachment on the alleged weight loss would have been of negligible value. Garcia positively and strenuously identified Soto as the man who hit him with a gun and held him hostage for over two hours. This identification was not premised on Soto being any particular weight. We fail to see how counsel provided ineffective assistance by not providing detailed evidence on Soto's weight. We conclude that Soto was not entitled to a hearing on this issue.

III. Ineffective assistance of counsel concerning the Taurus

¶21 Soto argues that his trial attorneys were ineffective for failing to investigate, discover and present at trial evidence that Soto and his wife were using their gray Oldsmobile sedan, rather than the Taurus, while helping their friend move on the day of the kidnappings. The trial court rejected this argument after the ***Machner*** hearing, stating: "I find that the defendant's factual claims are not credible and that the allegations of ineffectiveness are completely without merit and, therefore, the motion will be denied in all respects." The trial court found that: (1) Soto and his family initially adopted an alibi which was designed to help the entire family, including Popeye, by showing that the Taurus had not been involved in the kidnappings, and they used the stolen license plate defense to support this alibi; (2) Soto told trial counsel that he and his wife had driven the Taurus when they helped their friends move; and (3) contrary to Soto's assertion, he did not tell one of his trial counsel that he had instead been driving the Oldsmobile. The trial court concluded that Soto's trial attorneys had not provided ineffective assistance because they had no reason to believe that Soto had been driving the Oldsmobile.

¶22 We affirm the trial court's order. The trial court, and not this court, must resolve conflicting inferences and factual disputes and determine the weight

and credibility of witnesses. *See* ***Fidelity & Deposit Co. v. First Nat'l Bank***, 98 Wis. 2d 474, 485, 297 N.W.2d 46 (Ct. App. 1980). Here, the trial court specifically found the testimony of trial counsel was more credible than that of the defendant. The trial court's findings are not clearly erroneous and they support the trial court's conclusion that trial counsel did not provide deficient performance.

IV. Denial of postconviction discovery motion

¶23 Soto contends that the trial court erroneously denied his request for several photos that he believes "would have tended to impeach the only identification of the defendant made at trial." He argues that he would have used the police photographs, in combination with photos of Soto and his family taken during the week of the abduction, to prove that Soto's weight had not changed and that a man named Ricky Ortiz was the most likely assailant. In the postconviction context, this information would have been used to help Soto support his claim that trial counsel were ineffective. The trial court denied this motion "for the same reasons I found the showing on this issue of ineffectiveness to be insufficient to warrant a hearing or further relief including discovery."

¶24 A defendant has a right to postconviction discovery if the desired evidence is relevant to an issue of consequence. ***State v. O'Brien***, 223 Wis. 2d 303, 320-21, 588 N.W.2d 8 (1999). We have already affirmed the trial court's conclusion that Soto has failed to sufficiently allege that trial counsel provided deficient performance with respect to impeaching the identification of Soto. Soto argues that these photographs would have helped him establish that trial counsel were ineffective. We disagree. The extent of Soto's weight loss was, at best, a collateral issue in the case. We conclude that the trial court did not erroneously deny Soto's request for postconviction discovery.

V. Request for a new trial in the interest of justice

¶25 Soto seeks a new trial in the interest of justice on grounds that the real issues have not been fully tried and because "the totality of the lower court record establishes that [Soto] was unequivocally not at the abduction regardless whether he may or may not have wished for an alibi for his son." Pursuant to WIS. STAT. § 752.35 (2003-04), this court has the power to order a discretionary reversal in the interest of justice. We are convinced that the real controversy was fully tried, and that there is ample evidence in the record to support the jury's finding that Soto was the man who sat next to Garcia in the vehicle. Soto had ample opportunity to present his alibi evidence, which the jury rejected. Instead, the jury believed the testimony of Garcia, who testified he was with Soto for two hours and unequivocally identified him. There is no basis to grant Soto a discretionary reversal. We deny Soto's request for a new trial on this ground.

By the Court.—Judgment modified and, as modified, judgment and order affirmed.

Not recommended for publication in the official reports.