COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1510 **Cir. Ct. No. 91CF910060**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES DARIUS JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Darius Jones appeals *pro se* from an order denying his WIS. STAT. § 974.06 (2001-02)[1] motion. Jones claims he received

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

ineffective assistance of trial counsel, the trial court erred in allowing his counsel to testify telephonically at a ***Machner***[2] hearing, and his right to confrontation was violated. Because we resolve each issue in favor of upholding the order, we affirm.

I. BACKGROUND

¶2 In April 1991, after a jury trial, Jones was found guilty of robbery while armed and felon in possession of a firearm, contrary to WIS. STAT. §§ 943.32(1)(a)(2) and 941.29(2) (1991-92). Following the conviction, Jones filed a postconviction motion alleging that trial counsel, Robert Kuhnmuench, provided ineffective assistance for failing to call two alibi witnesses at trial. The motion was subsequently withdrawn because Jones was changing attorneys. Later, Jones filed a *pro se* motion to vacate the conviction based on ineffective assistance of counsel, but did not raise the issue of his attorney's failure to introduce alibi witnesses. A ***Machner*** hearing was held and Attorney Kuhnmuench testified in person. The trial court denied the postconviction motion and Jones appealed to this court. We affirmed the convictions in 1993.

¶3 In 1997, the federal district court ruled that Jones did not receive effective assistance of appellate counsel based on allegations that he was not properly informed of his no-merit rights. As a result, this court granted Jones's motion to reinstate his postconviction rights under WIS. STAT. § 809.30.

¶4 In 1998, Jones filed a WIS. STAT. § 809.30 postconviction motion alleging that Kuhnmuench provided ineffective assistance. The trial court

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

summarily denied the motion and Jones appealed to this court. We reversed the order and remanded for a ***Machner*** hearing. At this hearing, Kuhnmuench testified by telephone because he was in prison in Minnesota. Following the hearing, the trial court denied Jones's ineffective assistance claim and this court summarily affirmed that decision. The Wisconsin Supreme Court denied his petition for review.

¶5 In January 2003, Jones filed a petition for *writ of habeas corpus*, again raising ineffective assistance—this time asserting that postconviction and appellate counsel were deficient. We rejected Jones's assertions, but noted that Jones may have a right to challenge the trial court's decision to allow Kuhnmuench to appear telephonically rather than in person.

¶6 In May 2003, Jones filed a WIS. STAT. § 974.06 motion claiming that: (1) postconviction counsel was deficient for failing to raise the issue of Kuhnmuench appearing by phone rather than in person; (2) the trial court erroneously exercised its discretion in failing to produce Kuhnmuench for the hearing; and (3) his confrontation rights were violated. The trial court denied the motion by written order on May 19, 2003. Jones now appeals from that order.

II. DISCUSSION

A. Postconviction Counsel.

¶7 Jones first claims his postconviction counsel was ineffective for failing to preserve the issue relating to Kuhnmuench's appearing for the second ***Machner*** hearing by phone instead of in person. The State responds that postconviction counsel did preserve this issue during a status conference. The standards relating to ineffective assistance claims are well-known. In order to

prove his claim, Jones must satisfy a two-pronged test: (1) counsel's performance constituted deficient conduct; and (2) that conduct prejudiced the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶8 Jones has failed to satisfy either prong. The record reflects that postconviction counsel did raise the confrontation issue with the trial court. Postconviction counsel objected to Kuhnmuench's request to appear by phone. Counsel stated that he was concerned about confrontation rights and the trial court's ability to assess credibility issues. The trial court overruled the objection. Accordingly, Jones's contention that postconviction counsel was ineffective for failing to preserve this issue is without merit.

B. Appellate Counsel.

¶9 Jones includes in his ineffective assistance claim the argument that appellate counsel did not specifically raise the issue related to Kuhnmuench appearing by phone during the direct appeal. The State responds that the decision not to raise this issue was reasonable and therefore not deficient performance. We agree.

¶10 Deficient performance requires a "showing that counsel made errors so serious that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment." ***State v. Johnson***, 133 Wis. 2d 207, 216-17, 395 N.W.2d 176 (1986) (citation omitted). Stated another way, Jones must demonstrate that his appellate counsel's "representation fell below an objective standard of reasonableness," ***Strickland***, 466 U.S. at 688, or that appellate counsel's omission was "outside the wide range of professionally competent assistance," ***Johnson***, 133 Wis. 2d at 217.

¶11 Jones has failed to satisfy that burden. First, the right to confrontation is a "trial" right and does not apply to the situation in this case. ***Barber v. Page***, 390 U.S. 719, 725 (1968); ***California v. Green***, 399 U.S. 149, 157 (1970) ("It is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."). Second, Jones's reliance on ***State v. Vennemann***, 180 Wis. 2d 81, 508 N.W.2d 404 (1993), is misplaced. In ***Vennemann***, the court required the presence of the *defendant* at a postconviction hearing—not the presence of other witnesses. ***Id.*** at 95-96. Thus, ***Vennemann*** is distinguishable from the instant case.

¶12 Accordingly, appellate counsel's decision not to raise the Kuhnmuench issue in the direct appeal did not constitute deficient performance. Therefore, Jones's ineffective assistance claim fails.

C. Trial Court's Decision to Allow Telephonic Appearance.

¶13 Jones next contends that the trial court erroneously exercised its discretion in deciding to allow Kuhnmuench to appear by telephone rather than in person. We reject this contention.

¶14 WISCONSIN STAT. § 974.06 is limited to reviewing jurisdictional or constitutional issues. ***State v. Nicholson***, 148 Wis. 2d 353, 360, 435 N.W.2d 298 (Ct. App. 1988). The exercise of discretion here does not fall into either category. Likewise, we also decline Jones's invitation to exercise our discretionary reversal power under WIS. STAT. § 752.35. As the State points out, our statutory power applies only to direct appeals from judgments or orders and not to § 974.06 appeals. Even so, we see nothing in the record that would merit the exercise of discretionary reversal.

¶15 Moreover, even if Jones had raised this issue during the direct appeal, the record fails to demonstrate that the trial court erroneously exercised its discretion in allowing the telephonic appearance. This was the second ***Machner*** hearing in the case. During the first hearing, Kuhnmuench appeared in person. The reasons given by the trial court to allow the telephonic appearance set forth in the record were reasonable.[3]

D. Confrontation Rights.

¶16 Jones's last claim is that allowing Kuhnmuench to appear by phone violated his confrontation rights. We disagree.

¶17 Although the rights to confront adverse witnesses face-to-face is guaranteed both by the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution, this right applies during the time of the trial. ***Barber***, 390 U.S. at 721; ***Greene***, 399 U.S. at 157. The confrontation

[3] Jones also asserts that the trial court was biased because she recused herself from presiding over Kuhnmuench's criminal trial, but did not recuse herself from making the decision to allow Kuhnmuench to appear by telephone in this case. We are not convinced. The situations are substantially different. In addition, as set forth in the body of this opinion, Jones failed to set forth any meritorious reason to require Kuhnmuench to appear at the second ***Machner*** hearing in person. The telephonic appearance permitted Jones to cross-examine Kuhnmuench, to test the credibility of his recollections and answers, and to set forth any inconsistencies. The trial court's credibility decision, in essence, was made by comparing Jones's trial testimony with his ***Machner*** hearing testimony and reviewing the record. Jones's testimony at the trial was much different than his later testimony, suggesting to the trial court that Jones's version was less credible.

Further, Jones is barred from attempting to re-raise the two issues this court decided in our July 16, 2002 opinion—the failure of counsel to call witnesses to support his alibi and the failure of counsel to further investigate the black shoes issue. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 173, 517 N.W.2d 157 (1994).

right does not extend to the examination of former trial counsel during a ***Machner*** hearing.

By the Court.—Order affirmed.

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