COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0314-CR **Cir. Ct. No. 01CF000298**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LANE P. CASKEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Lane Caskey appeals a judgment convicting him of possessing cocaine with intent to deliver as a party to a crime and an order denying his motion for a new trial. He argues that an unsupervised law student intern impermissibly represented the State at two pretrial hearings and that his trial

counsel was ineffective in numerous respects. We reject these arguments and affirm the judgment and order.

¶2 Acting on an informant's tip, the police investigated drug activities at a residence occupied by Jason Lindsley and Stephanie LaFlex. At an officer's request, Lindsley opened a double-locked safe that contained a large quantity of drugs, drug paraphernalia and a digital scale. LaFlex also gave officers a black plastic bag containing additional drug paraphernalia. LaFlex testified that Caskey gave her and Lindsley money and asked them to purchase the safe and store it in their residence. Caskey stored his drugs in the safe. LaFlex also admitted that she delivered drugs for Caskey while he was on vacation. The State also produced tape-recorded telephone conversations that suggested Caskey's involvement in the drug sales. Caskey elected not to testify at his trial. The only defense witness was his probation officer who testified that searches of Caskey's residence disclosed no drug activities and that his urinalysis indicated that he was not using drugs.

¶3 Caskey first argues that he is entitled to a new trial because an unsupervised law student intern appeared for the State at his continued initial appearance and bail hearing and at his arraignment. That argument fails for lack of factual support. Caskey testified at the postconviction hearing that he recalled the intern alone at the counsel table for one of his pretrial appearances. The trial court found the testimony not credible. *See* WIS. STAT. § 805.17(2) (2001-02. In addition, Caskey did not purport to know whether a supervising attorney was present in the courtroom. While the record indicates that an intern appeared for the State, it does not indicate whether a licensed attorney supervised his appearance. A presumption of regularity attaches to court proceedings and this court will not presume error from a silent record. *See* ***State ex rel. LaFollette v.***

Circuit Court, 37 Wis. 2d 329, 343-44, 155 N.W.2d 141 (1967). Because Caskey presented no credible evidence that the intern was not appropriately supervised, we reject his argument and we need not determine whether an intern's unsupervised appearance would constitute grounds for relief.

¶4 Caskey next argues that he was denied effective assistance of trial counsel in nine respects that individually or collectively denied him a fair trial. He argues that his counsel: (1) failed to object to the unsupervised intern's appearance; (2) failed to seek a reduction in bond; (3) persuaded him to waive his preliminary hearing; (4) failed to move to disclose the identity of the confidential informant; (5) failed to move to suppress an audiotape; (6) failed to move to suppress other physical evidence; (7) inadequately investigated the case; (8) failed to request a speedy trial; and (9) persuaded Caskey not to testify. To establish ineffective assistance of trial counsel, Caskey must show deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below an objective standard of reasonableness. ***Id.*** at 688. This court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. ***Id.*** at 690. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. ***Id.*** at 691. To establish prejudice, Caskey must show a reasonable probability that counsel's unprofessional errors affected the verdict. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** at 694.

¶5 Caskey's first argument that his trial attorney should have objected to the intern's unsupervised appearance fails for the reasons previously addressed.

He has not established a factual basis for the argument. He cannot fault his attorney for failing to object in the absence of credible evidence that there was a basis for the objection.

¶6 Caskey's second argument that his attorney failed to seek reduced bond does not establish deficient performance or prejudice. Even if Caskey's bond had been reduced, he would not have been released from custody because he was on a probation hold during the entire time of his incarceration. Caskey was not prejudiced by his counsel's failure to pursue a futile motion. ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). In addition, Caskey's argument that he could have better prepared his defense if he had not been incarcerated is conclusory and speculative.

¶7 Caskey's third argument that his counsel was ineffective for encouraging him to waive his preliminary hearing does not constitute deficient performance. The decision was Caskey's. His counsel appropriately determined that the State could easily prove probable cause. In return for Caskey waiving the preliminary hearing, the State agreed not to charge a penalty enhancer, reducing Caskey's potential sentence by forty-five years. Caskey complains that the waiver of the preliminary hearing denied him an opportunity to gauge the effectiveness of prosecution witnesses and it denied him discovery of the State's case. Discovery is not, however, the purpose of the preliminary hearing. Its purpose is only to determine the plausibility of the State's case. *See* ***State v. Dunn***, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984). Because the credibility of witnesses is not at issue, the magistrate would not allow substantial discovery of matters relating to credibility. The State also lost any opportunity to prepare its witnesses for trial and learn of any weaknesses in its case. Counsel's advice to waive the

preliminary hearing in return for a forty-five-year reduction in the maximum sentence constitutes a reasonable trial strategy.

¶8 Caskey's fourth argument that his counsel was ineffective for not seeking disclosure of the confidential informant's identity fails because there is no basis for believing the identity was relevant to the defense. *See* ***State v. Vanmanivong***, 2003 WI 41, ¶24, 261 Wis. 2d 202, 661 N.W.2d 76. His trial counsel testified at the postconviction hearing that he did not believe that any valuable information could have been learned from the informant. The informant apparently notified police of drug activity occurring at Lindsley's and LaFlex's residence. LaFlex admitted to selling drugs for Caskey. Caskey does not suggest what information the informant's testimony would have provided that was necessary to his defense. Counsel's performance is not deficient for failing to file motions that have no merit. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶9 Caskey's fifth argument that his counsel should have sought suppression of an audiotaped conversation between LaFlex and Hosie Wheeler, an alleged accomplice, does not establish deficient performance. Caskey relies on a recent decision of the Supreme Court, ***Crawford v. Washington***, 124 S. Ct. 1354, (2004), that expanded his right to confront witnesses. He argues that his attorney should have sought suppression of the conversation because Wheeler was not available for cross-examination regarding statements that inculpated Caskey. The ***Crawford*** rule was not the law at the time counsel would have been required to object to the audiotape. An attorney's failure to anticipate changes in the law does not rise to the level of constitutional ineffectiveness. *See* ***Lilly v. Gilmore***, 988 F.2d 783, 786 (7th Cir. 1993), *cert. denied*, 510 U.S. 852 (1993).

¶10 Caskey's sixth argument that other physical evidence should have been suppressed fails because he does not identify any ground for suppression. The materials found in Lindsley's and LaFlex's residence were obviously either theirs or were turned over to them under circumstances that gave them joint access and control. Therefore, Lindsley and LaFlex had authority to consent to the search. *See* ***State v. Knight***, 2000 WI App 16, ¶13, 232 Wis. 2d 305, 606 N.W.2d 291. Caskey suggests that a suppression motion should have been used to pin down the State's witnesses and create a potential basis for cross-examination by inconsistent statements. Counsel should not file a meritless motion to suppress physical evidence as a guise for creating an opportunity to examine the State's witnesses for other purposes. In addition, any claim that the witnesses might have provided inconsistent statements is entirely speculative.

¶11 Caskey's seventh argument that his trial counsel conducted an inadequate pretrial investigation fails because he does not establish that exculpatory information or additional defense witnesses could have been located, would have testified, and would have provided exculpatory information. *See* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. At the postconviction hearing, Caskey's trial attorney testified that he attempted to find any witnesses that Caskey proposed. He concluded that the witnesses were not relevant to proving the defense theory that Caskey was not involved in the drug dealing and that he was set up by Lindsley and LaFlex. In fact, some of the proposed witnesses would have been detrimental to that defense. Caskey did not produce the testimony of any of these witnesses at the postconviction hearing, resulting in an inability to establish that further investigation would have resulted in a credible defense.

¶12 Caskey suggests that witnesses could have challenged the State's assertion that he was on vacation from March 14 through April 20, 2001. He misinterprets the State's evidence. LaFlex testified that Caskey told her he was going to be gone for one week sometime between March 14 and April 20, during which time she was to take care of drug transactions in his absence. The proposed defense witnesses would not have been able to account for Caskey's whereabouts in a manner that would contradict LaFlex's testimony.

¶13 Caskey's eighth argument that his counsel was ineffective for failing to request a speedy trial establishes neither deficient performance nor prejudice. The trial court found that Caskey did not ask his attorney to request a speedy trial. Most of the delay in the trial was due to Caskey's change of counsel. Because of the likelihood that Caskey's probation would be revoked, counsel reasonably concluded that there was no urgency in commencing the trial. Finally, Caskey identifies no specific prejudice that arose from a five-month delay in commencing the trial after he retained new counsel. Because Caskey never requested his counsel to pursue a speedy trial and has established no prejudice from counsel's failure to request a speedy trial, he cannot fault his attorney for failing to pursue that motion.

¶14 Caskey's ninth argument that his counsel was ineffective for advising him not to testify fails for several reasons. First, the decision was Caskey's. Second, counsel reasonably advised that Caskey's seventeen prior convictions would have been made known to the jury and would have adversely affected his case. Third, counsel reasonably determined that he could present Caskey's defense through cross-examination and argument. Caskey faults his attorney for focusing on his seventeen prior convictions even though he called a probation officer as a witness, thus informing the jury of a prior conviction. The

jury was informed of one previous conviction for nonsupport. Counsel could reasonably conclude that seventeen prior convictions would have substantially more impact on the jury.

¶15 Caskey argues that his attorney could have rehabilitated his credibility by inquiring about the prosecutor's reliance on Caskey's testimony at a preliminary hearing in another case. That argument fails for several reasons. First, Caskey's testimony in the other case was the product of a deal with the prosecutor. Caskey's position on appeal would have been inconsistent with his trial strategy of questioning Lindsley's and LaFlex's credibility based on the deals they made with the prosecutor. Second, Caskey's testimony at the preliminary hearing in the other case does not establish his credibility. The credibility of witnesses is not at issue at a preliminary hearing. ***Dunn***, 121 Wis. 2d at 398. Third, presenting that testimony presented a legitimate risk that the prosecutor could introduce more damaging rebuttal evidence regarding Caskey's deals with the prosecution that would have disclosed the specifics of other criminal offenses. Counsel's advice not to testify constitutes reasonable professional judgment under these circumstances.

¶16 Caskey argues that the collective effect of counsel's decisions was to deny him an opportunity to present a defense. The record does not establish that Caskey had a viable defense other than the one pursued by his counsel, challenging the credibility of the State's witnesses. We conclude that Caskey's ineffective assistance arguments, individually or collectively, do not establish deficient performance and prejudice.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).