COURT OF APPEALS DECISION DATED AND FILED

December 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 04-0964

Cir. Ct. No. 99CF000100

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEROLD A. HAUT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed*.

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

¶1 CANE, C.J. Gerold Haut appeals the order denying his motion, under WIS. STAT. § 974.06,[1] to vacate his underlying judgment of conviction for

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

first-degree intentional homicide or alternatively to hold an evidentiary hearing. Haut contends his trial counsel was ineffective because he advised Haut to plead guilty rather than go to trial with an adequate provocation defense. Noting that trial counsel was aware the prosecution would request a sentence of life imprisonment without parole, Haut concludes that "[a]ny reasonably prudent attorney would have pursued this theory of defense or would have at least apprised the defendant of the plausible defenses he would have been waiving with a guilty plea." Haut did not raise this issue in his first postconviction motion or the direct appeal that followed. He now claims, however, that appellate counsel's failure to make that argument constituted ineffective assistance.

¶2 Even when crimes are heinous and the consequences of conviction are enormous, it is not deficient performance for trial counsel, as here, to decline to present a defense that has no basis in law. Based on the record, we conclude that Haut's trial counsel did just that. We therefore reject Haut's argument that appellate counsel was ineffective for not raising the issue of trial counsel's effectiveness in Haut's first postconviction motion. We also reject Haut's argument that the circuit court erred in not granting an evidentiary hearing. The judgment and the order are affirmed.

Background

¶3 In 2000, Haut pled guilty to the attempted murder of Lisa Tucci, the woman he had been dating for six weeks, and to the murder of Lee Hesse, a male friend of Tucci's. After a hearing, the court sentenced him to life in prison without the possibility of parole for first-degree intentional homicide in Hesse's death and to forty years in prison for the attempted homicide of Tucci.

¶4 The crimes to which Haut pled guilty occurred soon after 3:15 a.m. on July 15, 1999, in Shawano, Wisconsin. Sometime around midnight, Haut came into the bar where Tucci worked, she broke off her relationship with him, and he left. After the bar closed, a friend telephoned Tucci to tell her that Haut was outside her house. Tucci waited at the bar until after 3 a.m., hoping to avoid Haut, and then started walking home. When she neared her house, she saw that Haut was still waiting for her so she decided to stop at Hesse's apartment. Minutes after Tucci entered Hesse's apartment, Haut knocked on the door and was let in. Tucci asked Haut to leave. Haut cut her throat and stabbed her a number of times before she ran to another room. Haut then stabbed Hesse over thirty times. When police arrived, Hesse was dead. Tucci, barely conscious, identified Haut as her attacker.

¶5 After his conviction and sentencing, Haut sought to withdraw his plea on the grounds it was without basis in the record. The circuit court denied his motion and this court affirmed the judgment. In February 2004, Haut filed a second postconviction motion, pro se, arguing ineffectiveness of appellate counsel. The circuit court denied his motion. Haut now appeals.

Discussion

Standard of Review

¶6 A defendant who wishes to withdraw a guilty plea must establish by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice. ***State v. Booth***, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). Ineffective assistance of counsel constitutes manifest injustice. ***State v. Washington***, 176 Wis. 2d 205, 213-14, 500 N.W.2d 331 (Ct. App. 1993). Whether counsel was ineffective is a mixed question of law and fact. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). The trial court's

determination of what counsel did or did not do and the basis for the challenged conduct are findings of fact, which we will uphold unless they are clearly erroneous. ***Id.*** Whether that conduct deprived defendant of the effective assistance of counsel is a question of law we review independently. ***Id.***

¶7 The test for ineffective assistance of counsel has two prongs. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show specific acts or omissions that are outside "the wide range of professionally competent assistance." ***Id.*** at 690. The defendant's claim will fail if counsel's conduct was reasonable based on the particular facts of the case and in light of the time counsel acted or failed to act. ***Id.*** The defendant must also prove that counsel's deficient performance was in fact prejudicial. ***Id.*** at 693. In this case, the defendant must establish that, but for counsel's errors, there was a reasonable probability he would not have pled guilty and would have insisted on going to trial. *See* ***Harvey***, 139 Wis. 2d at 378.

Haut's Adequate Provocation Defense

¶8 Whether appellate counsel's performance was deficient depends on whether Haut's trial counsel was ineffective when he declined to pursue an adequate provocation defense and advised Haut to plead guilty. We thus begin with Haut's claim that adequate provocation was "the only meaningful defense available to him."

¶9 Adequate provocation is an affirmative defense to first-degree intentional homicide, mitigating the offense to second-degree intentional homicide. *See* WIS. STAT. § 939.44. Adequate provocation has two elements. *See* ***State v. Williford***, 103 Wis. 2d 98, 113, 307 N.W.2d 277 (1981). Section 939.44(1)(a) defines the objective element of the defense, "adequate," as

"sufficient to cause complete lack of self-control in an ordinarily constituted person." Under 939.44(1)(b), the subjective element, "provocation," is "something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death."

¶10 Haut argues that trial counsel outlined a defense for adequate provocation at the preliminary hearing, but then abandoned that defense without explanation and advised Haut to plead guilty. He further argues that any reasonably prudent attorney would have either pursued that defense or have apprised the defendant of what plausible defenses he was waiving when he pled guilty.[2] Haut does not suggest what facts or evidence trial counsel might have discovered if he had prepared a provocation defense. We must thus assess Haut's claim that such a defense was available to him based on the facts in the record.

¶11 Nothing in the record indicates that Haut would have been able to establish "provocation." Tucci did break up with Haut, but the breakup happened two to three hours before the crimes. According to his own account, Haut went home, slept and talked with a friend before he went looking for Tucci. He had a knife with him. When he entered Hesse's apartment to talk to Tucci, he took that knife inside. He stabbed Tucci repeatedly. He then stabbed Hesse to death. He fled the scene. Nothing in that sequence of facts suggests the actions of a man who "lacked self-control completely." Worse for Haut's argument, it is almost

[2] Haut does not argue any facts that might support his claim that his voluntary waiver and plea were based on inaccurate information. He does not tell us how trial counsel kept him from knowing about a defense he discussed in open court, what counsel said about that defense later or what reasons he gave for advising Haut to take the plea.

impossible to establish provocation without close temporal proximity between the triggering event and the criminal response to it. *See, e.g.*, ***State v. Rewolinski***, 159 Wis. 2d 1, 30, 464 N.W.2d 401 (1990) (evidence that the defendant first strangled his victim manually, then with a belt, and then in a tub of water did not suggest action in a single spontaneous moment of anger); *see also* ***Williford***, 103 Wis. 2d at 116-17 (evidence of a cooling off period may defeat the subjective element of provocation).

¶12 There is evidence that Haut was drinking before the murder and that his father had died recently, leaving him unhappy and vulnerable. If established, those facts might have made him a more sympathetic figure, but they do nothing to establish the subjective element of "provocation." *See* ***Marks v. State***, 63 Wis. 2d 769, 778, 218 N.W.2d 328 (1974) (allegations of intoxication do not constitute provocation). Haut simply does not identify any facts in the record or any other information that would support "provocation."[3]

¶13 Haut's claims with regard to the objective element are even weaker. Whatever Haut may have subjectively felt when Tucci ended their relationship, an ordinarily constituted person does not lose all control when a girlfriend of six

[3] In 2002, appellate counsel arranged for Haut to be interviewed by Dr. Kenneth Smail, a forensic psychologist to "evaluate his mental responsibility for his conduct on the date in question." Haut told Smail that he had encountered Tucci at Hesse's apartment, that she broke up with him then, asking him to leave so she could go to bed with Hesse. Haut does not indicate whether any evidence supports this version of the facts, and Smail's analysis is focused on whether Haut suffered from a mental disease or defect. Haut does not indicate how a report such as Smail's would have helped establish provocation.

weeks breaks up with him. Nor does he maintain that out-of-control state for several hours until he murders another person.[4]

¶14 Rather than claiming he could have satisfied the two elements of the adequate provocation defense, Haut essentially argues that trial counsel was required to pursue that defense because it was the only one theoretically available to him. Haut cites ***Emerson v. Gramley***, 91 F. 3d 898 (7th Cir. 1996), for the proposition that a defense attorney has the obligation to formulate an adequate theory of defense after careful investigation and then execute that theory in the presentation of the case. But while ***Emerson*** suggests that a defense strategy could be disastrous enough to constitute ineffective assistance of counsel, it concludes that, "given the lack of a good alternative," the United States Constitution only requires "a reasonable strategy." ***Id.*** at 905. As the preliminary hearing shows, Haut's trial counsel initially considered raising an adequate provocation defense, but later decided against it, presumably because he concluded there was no basis for that defense. Given the lack of good alternatives in his case, we cannot agree with Haut that trial counsel was ineffective for not pursuing a nonexistent one. We therefore also cannot agree with Haut that appellate counsel's failure to make that argument fell outside the range of professionally competent assistance.

¶15 Because Haut fails to establish that appellate counsel's performance was deficient, we need not address the question of prejudice. *See* ***Strickland***, 466 U.S. at 697.

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[4] Haut does not argue that the triggering event was finding Tucci and Hesse together. Nor does he identify anything that happened in the minutes after he entered Hesse's apartment that might cause an ordinarily constituted person to lose all control.

Haut's Request for an Evidentiary Hearing

¶16 As Haut's reply brief recognizes, the circuit court must grant an evidentiary hearing if a motion to withdraw on its face alleges facts which would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 550 (1996). Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law we review de novo. ***Id.*** If a motion fails to allege specific facts, the court can, at its discretion, deny a postconviction motion without a hearing based on any one of the three factors set out in ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). We review such discretionary decisions deferentially. ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

¶17 Haut's motion does not allege facts that would entitle him to relief. He tells the court what he thinks of his trial counsel's actions: "had counsel actually taken the time or interest in defendant's case to advise him in a manner consistent with counsel's constitutional duty to his client, defendant would have undoubtedly elected to retain his right to trial." This is opinion, however, not fact. Haut does not allege information that would show how counsel did or did not advise him, how counsel showed lack of interest, and what counsel did after the preliminary hearing when he raised the adequate provocation defense. Because Haut alleges nothing from which the circuit court could have gained "a sense of 'what is really true,'" we conclude that a hearing was not required. *See* ***State v. Saunders***, 196 Wis. 2d 45, 51-52, 538 N.W.2d 546 (Ct. App. 1995).

¶18 The circuit court cursorily denied Haut's motion for a hearing on the grounds that most of the issues it raised had already been addressed. Despite the brevity of the decision and order, however, there is no evidence that the court

erroneously exercised its discretion by not reviewing the record and pleadings, applying the proper law, or engaging in rational decision making. ***Nelson***, 54 Wis. 2d at 497-98. We therefore affirm the judgment and the order.

By the Court.—Judgment and order affirmed.

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