COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1471 **Cir. Ct. No. 1999CF504**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAHEIM R. CASON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Raheim R. Cason appeals *pro se* from the circuit court order that denied his motion for postconviction relief under WIS. STAT.

§ 974.06 (2005-06).[1] Cason claimed that his trial and postconviction counsel were ineffective. The circuit court denied his motion without a hearing, and we affirm.

Background

¶2 A jury convicted Cason of attempted first-degree intentional homicide while using a dangerous weapon and first-degree reckless injury while using a dangerous weapon. The evidence included Precious LeFlore's testimony that Cason shot her at point-blank range. A hospital discharge summary, admitted on stipulation of the parties, reflected that LeFlore was shot in the arm, hip, and buttocks, but sustained only soft-tissue injury.

¶3 Cason claimed that he was not the shooter. He attempted to subpoena Lisa Weddles to testify that she witnessed a man who did not match Cason's description shoot LeFlore from a distance. Cason failed to serve Weddles, and she did not appear for trial. The circuit court denied Cason's motion to introduce at trial Weddles's out-of-court statement to police.

¶4 Cason appealed his conviction in ***State v. Cason***, No. 2001AP809-CR, unpublished slip op. (WI App Jan. 29, 2002) (***Cason I***). He contended, among other matters, that the circuit court erred in refusing to admit Weddles's statement in lieu of her trial testimony. We concluded that any error was harmless. Weddles's statement was inconsistent with the physical evidence; accordingly, there was no reasonable possibility that excluding the statement affected the outcome of the trial.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶5 Cason next moved the circuit court for postconviction relief pursuant to WIS. STAT. § 974.06. He asserted that trial counsel was ineffective in several respects, including: (1) by failing to secure Weddles's presence at trial; and (2) by failing to subpoena a witness to testify that LeFlore's injuries were not life-threatening. He argued that his postconviction counsel was in turn ineffective by failing to raise these allegations during Cason's direct appeal.[2] The circuit court denied the claims without a hearing, and this appeal followed.

Discussion

¶6 The two-prong test for proving ineffective assistance of counsel requires the defendant to show that counsel's performance was deficient and that the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "'[B]oth the performance and prejudice components … are mixed questions of law and fact.'" ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985) (citation omitted). We will not overturn the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** at 634. However, determinations of whether counsel's performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review *de novo*. ***Id.***

¶7 To prove counsel's deficiency, Cason must show that "'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" ***State v. Pote***, 2003 WI App 31, ¶15, 260 Wis. 2d 426, 659 N.W.2d 82 (citation omitted). To prove prejudice

[2] Cason raised several additional claims in his circuit court motion, but he does not pursue them on appeal. We deem them abandoned, and we address them no further. *See* ***Adler v. D&H Indus., Inc.***, 2005 WI App 43, ¶18, 279 Wis. 2d 472, 694 N.W.2d 480.

from counsel's deficient performance, Cason must show that the errors "had an actual, adverse effect." ***Id.***, ¶16. Cason must satisfy both prongs of the test to be afforded relief. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

¶8 When a defendant claims ineffective assistance of postconviction counsel on the basis of a failure to assert trial counsel's ineffectiveness, the defendant must first establish that trial counsel provided ineffective assistance. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. We must therefore determine whether Cason's postconviction motion demonstrated that trial counsel performed ineffectively in any respect.

Failure to Subpoena Weddles

¶9 In his direct appeal, Cason claimed circuit court error in refusing to admit Weddles's out-of-court statement into evidence. We held that any such error was harmless. ***Cason I***, unpublished slip op. at ¶¶18-19.

¶10 In his postconviction motion, Cason claimed that trial counsel was ineffective by failing to subpoena Weddles to testify at trial. Cason did not include an offer of proof that Weddles's in-court testimony would have differed from her out-of-court statement. He merely rephrased his earlier claim of circuit court error as a claim of ineffective assistance of counsel.

¶11 The test for prejudice in an effective assistance of counsel claim and the test for harmless error are "'essentially consistent.'" ***Ziebart***, 268 Wis. 2d 468, ¶29 n.10 (citation omitted). Cason raised the question of whether he was harmed by the exclusion of Weddle's evidence in his direct appeal. We answered that he was not. We concluded that Weddles's statement, "had it been admitted, would

not have changed the outcome of the trial." *See* ***Cason I***, ¶23. That issue is resolved. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶12 Accordingly, trial counsel's failure to subpoena Weddles to testify in person to the same facts as were in her statement had no adverse effect on the outcome of the proceedings. Weddles's absence from trial thus did not prejudice Cason. *See* ***Pote***, 260 Wis. 2d 426, ¶16 (proof of prejudice requires showing that trial counsel's errors had an "actual, adverse effect" on the defense).

¶13 Our inquiry goes no further. Cason's showing was inadequate to satisfy one ***Strickland*** prong. Therefore, we need not address the other. *See* ***Pote***, 260 Wis. 2d 426, ¶14.

Failure to Offer Medical Testimony

¶14 We turn to Cason's contention that trial counsel was ineffective by failing to subpoena a witness who would testify that the victim's injuries were not serious. We conclude that Cason's motion was legally insufficient to sustain the claim.

¶15 A postconviction motion must "state sufficient material facts that, if true, would entitle the movant to relief." *See* ***Allen***, 274 Wis. 2d 568, ¶13. The motion must allege "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Id.***, ¶23. We assess the sufficiency of a postconviction motion by reviewing its contents without considering any additional allegations in the defendant's appellate briefs. *See* ***id.***, ¶27.

¶16 Cason's motion lacked the requisite specificity. Cason relied primarily on a conclusory assertion that trial counsel knew of "medical staff/doctor" who could have testified that LeFlore's injuries were not life-threatening. However, the motion did not identify the witness that trial counsel failed to subpoena. Cason's motion also failed to show how the missing witness got his or her information, and where the witness could be found.

¶17 Further, Cason identifies no deficiency in trial counsel's performance. Testimony highlighting LeFlore's injuries would have been adverse to the defense theory that Cason was not the gunman. Cason's motion does not show that counsel was unreasonable in foregoing such testimony. Reasonable strategic decisions do not constitute ineffective assistance of counsel. *See* ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983).

¶18 Nor does Cason show any prejudice from counsel's failure to subpoena a medical witness. Cason contends that the missing testimony would have nullified a necessary element of attempted first-degree intentional homicide, namely, intent to kill. Cason is wrong. "Attempted first-degree murder does not require that injuries of any particular degree of severity result. Convictions for attempted first-degree murder have resulted where the defendant attempted to shoot someone but failed and the victim went unscathed." ***State v. Dix***, 86 Wis. 2d 474, 483, 273 N.W.2d 250 (1979).

¶19 Cason shot the victim at point-blank range. As in ***Dix***, the evidence "does not suggest that [Cason] was purposely avoiding inflicting a mortal wound." *See* ***id.*** at 484. Rather, the record shows a fully completed attempt to murder that was fortuitously unsuccessful. Explicit testimony that LeFlore was not more seriously injured is simply irrelevant in this context. *Cf.* ***State v. Webster***, 196

Wis. 2d 308, 323, 538 N.W.2d 810 (Ct. App. 1995) (in prosecution for attempted first-degree murder, irrelevant that defendant failed to kill victim when evidence showed that defendant fired a shotgun at close range). Accordingly, trial counsel's failure to offer such testimony had no adverse effect on the outcome of the proceedings.

¶20 We reject both of Cason's claims that trial counsel was ineffective. Accordingly, we conclude that Cason's postconviction counsel was not ineffective for failing to pursue these claims. No attorney is ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

By the Court.—Order affirmed.

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