COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1939 **Cir. Ct. No. 2002CF396**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC L. TOLONEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Eric L. Tolonen appeals from the order that denied his motion for postconviction relief alleging that he received ineffective assistance of counsel. Because we conclude that he did not receive ineffective assistance of postconviction or trial counsel, we affirm.

¶2 Tolonen was convicted after a jury trial of first-degree reckless homicide as a party to a crime. The court sentenced him to twenty years' initial confinement and thirty years' extended supervision. He appealed, we affirmed, and the supreme court denied his petition for review. Tolonen then filed a motion for postconviction relief under WIS. STAT. § 974.06 (2005-06), arguing that his postconviction counsel was ineffective for failing to pursue a claim that he received ineffective assistance of trial counsel. The circuit court held a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and denied the motion, concluding that Tolonen had not established that he received ineffective assistance of counsel.

¶3 Tolonen was charged with his co-defendant, Jay Weiss, for having beaten Jose Guerrero to death. The testimony at trial established that Tolonen struck Guerrero in the back with a broomstick, and that both Weiss and Tolonen repeatedly struck and kicked Guerrero. Guerrero was kicked in the head and neck, and died as a result of blunt force trauma to the head. They both argued at trial that they were acting in defense of others, and Tolonen also argued that he did not deliver the lethal blow to Guerrero's head.

¶4 In his postconviction motion, Tolonen argued that his trial counsel was ineffective for: (1) failing to call an expert to testify that an injury to the victim's head had the impression of a pattern that matched the bottom of his co-defendant's shoe; (2) failing to call Tolonen as a witness; (3) failing to call as a witness a person who said that he did not see Tolonen kick or stomp the victim; (4) failing to request a jury instruction on voluntary intoxication to negate the element of "utter disregard of human life;" (5) failing to present evidence of the victim's criminal record at sentencing; and (6) failing to develop a theory of the defense. Tolonen also argued that he had newly discovered evidence in the form a

recantation from Jay Weiss, and that the State did not have sufficient evidence at trial to establish the element of "utter disregard of human life." Because the issues were not raised in his previous appeal, Tolonen argues that his postconviction counsel was ineffective for not challenging trial counsel's effectiveness. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 683, 556 N.W.2d 136 (Ct. App. 1996). We will address the issues on the merits.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 619-20, 516 N.W.2d 362 (1994). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697. If this court concludes that the defendant has failed to prove one prong, we need not address the other prong. ***Id.*** To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.*** "In determining whether there was any act or omission which would constitute deficient performance, the standard is one of reasonable professional judgment or reasonable professional conduct." ***Flores***, 183 Wis. 2d at 620. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

Further, counsel is not ineffective for failing to make meritless arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶6 Tolonen first argues that his trial counsel was ineffective because he did not call an expert witness who would have testified that the victim had a pattern impression in one of his head injuries that matched the pattern on the bottom of his co-defendant's shoes. The trial court found that the evidence had no probative value because Weiss admitted that he had kicked the victim in the face, Weiss and others testified that Tolonen had kicked the victim, and there was no testimony identifying which of the victim's multiple injuries was the fatal blow. Consequently, expert testimony that Weiss had delivered one of the blows was not necessary and would not have discredited any of the other testimony that Tolonen had also struck the victim. Consequently, we conclude that Tolonen was not prejudiced by counsel's decision not to call this witness.

¶7 Tolonen also argues that his trial counsel was ineffective because he did not call Tolonen as a witness. First, the record establishes that it was Tolonen who decided not to testify. Further, Tolonen's defense was that he was acting in defense of others. Had he testified consistently with the statement to the police, the testimony would have contradicted his defense. Had he testified inconsistently with his statement to the police, he could have been impeached with that statement. Tolonen has not established that he was prejudiced by this decision.

¶8 Tolonen next argues that his trial counsel was ineffective because he did not call a witness who he claims would have testified that Tolonen was swinging a baton during the fight, but that he did not see Tolonen hit the victim with the baton, he did not see Tolonen kicking or stomping on the victim, and by the time the victim was lying motionless on the ground, the witness did not know

where Tolonen had gone to. He argues that counsel's failure to call this witness was deficient performance because the jury would have heard testimony that Tolonen was not even around when Weiss was stomping on the victim. This testimony would have been contradicted by other testimony, and would have contradicted Tolonen's defense that he acted in self-defense or defense of others. Counsel's decision not to call this witness was a reasonable trial strategy and did not constitute deficient performance.

¶9 Tolonen next argues that his trial counsel was ineffective because he did not request a jury instruction on voluntary intoxication to counter the element of "utter disregard of human life." To convict of first-degree reckless homicide, the State must prove that: (1) the defendant caused the death of the victim; (2) the defendant caused the death by criminally reckless conduct; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. WIS JI—CRIMINAL 1020. Utter disregard for human life "is measured objectively, on the basis of what a reasonable person in the defendant's position would have known." ***State v. Jensen***, 2000 WI 84, ¶17, 236 Wis. 2d 521, 613 N.W.2d 170. Because the test is based on a reasonable person standard, the fact that Tolonen may have been intoxicated at the time was irrelevant. Counsel is not ineffective for failing to make a meritless argument.

¶10 Tolonen further argues that trial counsel was ineffective because he did not present evidence of the victim's criminal record at sentencing. He argues that the victim's criminal record would have been relevant to Tolonen's argument that he acted in self-defense or in defense of others. He argues that under ***State v. Spears***, 227 Wis. 2d 495, 499, 596 N.W.2d 375 (1999), he is entitled to present evidence of the victim's criminal record to support his version of the crime. First, counsel did tell the court at sentencing that the victim was violating his rules of

probation. He mentioned that the victim had a criminal record, but stated that the victim's convictions were not relevant. Certainly by these statements he reminded the court that the victim had a criminal record. Further, Tolonen has not established prejudice. He has not shown that there was a reasonable probability that with more detailed information about the victim's criminal record the result of the proceeding would have been different, nor has he undermined our confidence in the sentencing hearing.

¶11 Tolonen also argues that his trial counsel picked the wrong theory of the defense. Tolonen appears to suggest that counsel should have argued that it was Weiss, and not he, who delivered the fatal blow. Tolonen ignores that he was charged as a party to a crime, and that the State did not have to prove that he delivered the fatal blow. Further, the theory of the case that counsel chose was a reasonable tactic under the circumstances of this case, and we will not second guess the choice.

¶12 We reject Tolonen's arguments that he received ineffective assistance of trial counsel. Since we have concluded that trial counsel was not ineffective on any of the asserted grounds, then we also must conclude that postconviction counsel was not ineffective for failing to challenge trial counsel's effectiveness.

¶13 Next Tolonen argues that he has newly discovered evidence in the form of a recantation by Jay Weiss. At trial, Weiss testified that Tolonen hit the victim with a broom and kicked the victim in the head or face. Tolonen now has an affidavit from Weiss in which he says that Tolonen hit and kicked the victim in the back and not in the head. To prove newly discovered evidence, the defendant must prove that:

> (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.

State v. McCallum, 208 Wis. 2d 463, 473-474, 561 N.W.2d 707 (1997). When the evidence involves a witness's recantation, "the recantation must be corroborated by other newly discovered evidence." ***Id.***

¶14 The circuit court found that the affidavit was unreliable, and Tolonen did not offer any corroboration to support Weiss's supposed recantation. Further, even if he had, as the circuit court stated: So what? Tolonen was charged as a party to a crime. Even if Weiss did change his testimony to say that Tolonen struck the victim only in the back, he still would be testifying that Tolonen struck the victim. Because Tolonen was charged as a party to a crime, it does not matter whether he struck the fatal blow. What matters is that he was "concerned in the commission of the crime," which is to say he intentionally aided and abetted in the commission of a crime. WIS. STAT. § 939.05(2) (2005-06).

¶15 For the same reason, we reject Tolonen's argument that there was insufficient evidence that he acted with "utter disregard for human life." Tolonen admits that there was sufficient evidence to establish that Weiss acted with "utter disregard" for the victim's life. There was more than sufficient evidence presented at trial to support the conclusion that Tolonen was concerned in the vicious beating that caused the victim's death. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).