COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2186 **Cir. Ct. No. 2003CF1883**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYNARD R. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Reversed and cause remanded for further proceedings*.

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Raynard R. Jackson appeals from a postconviction order summarily denying his motion for a new trial. The issue is whether Jackson alleged a *prima facie* claim of ineffective assistance of his original postconviction

counsel for failing to seek a new trial on the basis of newly discovered evidence that the same group of police officers who apprehended him had engaged in misconduct similar to that which formed the basis for his defense at trial.[1] We conclude that the trial court erred in summarily denying his postconviction motion. We therefore reverse and remand the cause for an evidentiary hearing on Jackson's postconviction claims.

¶2 Milwaukee Police Officers Ala Awadallah, Paul Lough and Thomas Dineen were on patrol when they saw Jackson and his co-defendant Morris Rash outside the Guru Food Store. Jackson and Rash entered the store. The squad car circled the block and when it returned, the officers saw Jackson and Rash walking down the street. When they saw the police, they ran in opposite directions; both Jackson and Rash were subject to outstanding warrants. Lough chased Jackson; Awadallah chased Rash. Lough testified that while he was chasing Jackson, he "saw him take his right hand and reach in the area of his right waistband and kind of turn and then he discarded what appeared to be a black firearm, semiautomatic pistol." Lough testified that he recovered a forty caliber Glock pistol while pursuing Jackson, and admitted that this was the same type of gun issued to police officers. Jackson was ultimately apprehended by Officer Keith Dodd. Lough also testified that he placed the Glock he recovered in inventory; however, police inventory reports indicate that it was actually Awadallah, not Lough, who placed

[1] This appeal involves two postconviction motions: one filed pursuant to WIS. STAT. RULE 809.30(2)(h), which was litigated on direct appeal, and one filed pursuant to WIS. STAT. § 974.06, which is being litigated in this appeal. To distinguish our references to postconviction counsel and their respective motions, we refer to the former as original, and the latter as current. Current postconviction counsel alleges that original postconviction counsel was ineffective.

the Glock in inventory. The pistol did not bear Jackson's fingerprints; it had not been reported as stolen. Jackson's defense was that he was framed by police.

¶3 A jury found Jackson guilty of possessing a firearm as a felon, carrying a concealed weapon, and resisting an officer, in violation of WIS. STAT. §§ 941.29(2)(a) (amended Feb. 1, 2003), 941.23 (2003-04) and 946.41(1) (2003-04). For the possession conviction, the trial court imposed a ten-year sentence, comprised of two five-year periods of initial confinement and extended supervision. For the two remaining convictions, the trial court imposed a nine-month consecutive sentence for each, both running consecutive to each other and to the ten-year sentence. Original postconviction counsel unsuccessfully pursued two issues, and the judgment and postconviction order were affirmed on appeal.[2] *See* ***State v. Jackson***, No. 2005AP1580-CR, unpublished slip op., ¶1 (WI App Aug. 22, 2006).

¶4 While Jackson's original postconviction motion, pursuant to WIS. STAT. RULE 809.30(2)(h) (2005-06), was pending, Awadallah was charged in federal court with police misconduct, specifically for threatening to plant evidence on a suspect.[3] The federal misconduct charges against Awadallah were prominently reported in the MILWAUKEE J. SENTINEL, the largest newspaper in the

[2] In Jackson's original postconviction motion, he challenged the trial court's denial of his suppression motion, and alleged that his trial counsel was ineffective for failing to "properly and effectively cross-examine the State's witnesses so as to highlight the inconsistencies in their testimony," and for failing to object to the prosecutor's golden rule analogy during closing argument. These issues are not related to those in this appeal.

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

state, and the principal newspaper in the Milwaukee area. A SENTINEL article suggested that all prosecutions involving Awadallah, then a Milwaukee City Police Officer, were in jeopardy. Jackson's original postconviction counsel did not raise this issue despite Awadallah's involvement in Jackson's prosecution. While Jackson's appeal was pending, this court released its decision in ***State v. Missouri***, 2006 WI App 74, 291 Wis. 2d 466, 714 N.W.2d 595, granting a new trial because of the trial court's refusal to admit evidence of other acts involving police misconduct by Awadallah, Lough and other officers who were also involved in apprehending Jackson. Original postconviction counsel never sought relief on the basis of Awadallah's federal conviction or ***Missouri***, involving similar police misconduct by some of the same officers who were principally involved in apprehending Jackson.

¶5 Jackson then filed the current postconviction motion, this pursuant to WIS. STAT. § 974.06, for a new trial on the basis of ineffective assistance of original postconviction counsel, newly discovered evidence, and in the interests of justice, on the basis of similar police misconduct in Jackson's case, involving these same officers. The trial court summarily denied the motion. Jackson appeals.

¶6 To demonstrate entitlement to a postconviction evidentiary hearing, the defendant must meet the following criteria:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [***State v.***] ***Bentley***, 201 Wis. 2d [303,] 309-10[, 548 N.W.2d 50 (1996)]. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. ***Id.***

> at 310; ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the [defendant] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. ***Bentley***, 201 Wis. 2d at 310-11; ***Nelson***, 54 Wis. 2d at 497-98.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶7 In the current postconviction motion, Jackson alleged the reported incidents of misconduct by this rogue group of police officers, including Awadallah, Lough, Dineen and Dodd, all of whom were involved in his and Rash's apprehensions. In his motion, Jackson explained how these allegations constituted newly discovered evidence. To establish newly discovered evidence, the defendant must clearly and convincingly show that:

> (1) the evidence was discovered after trial;
>
> (2) the defendant was not negligent in seeking evidence;
>
> (3) the evidence is material to an issue;
>
> (4) the evidence is not merely cumulative to the evidence presented at trial; and
>
> (5) a reasonable probability exists of a different result in a new trial.[4]

State v. Coogan, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990) (footnote added). When the trial court judge who decides the postconviction motion is a different judge than the judge who presided over the trial, the

[4] "The reasonable probability determination does not have to be established by clear and convincing evidence, as it contains its own burden of proof." ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62.

postconviction allegations are entitled to a *de novo* assessment. *See* ***State v. Herfel***, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971).

¶8 We now consider Jackson's ineffective assistance claim against his original postconviction counsel for failing to raise this newly discovered evidence. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996). To demonstrate entitlement to a ***Machner*** hearing, in addition to meeting the ***Allen*** requisites, Jackson must also allege a *prima facie* claim of ineffective assistance of counsel, showing that postconviction counsel's performance was deficient, and that this deficient performance prejudiced the result of his postconviction motion.[5] *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

¶9 The trial court summarily denied the motion, focusing on its determination that Jackson had not shown a reasonable probability of a different outcome, a requisite of both newly discovered evidence and ineffective assistance of counsel claims. The trial court reasoned that there was

> absolutely **no evidence** that Officer Lough "planted" the gun … nor can it be assumed by any stretch of the imagination that Officer Awadallah had anything to do with the gun that Jackson discarded at the time of the chase.

[5] An evidentiary hearing to determine counsel's effectiveness is known as a ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

> Without a sufficient connection between Officer Awadallah's former misconduct and the gun that Lough himself retrieved from the ground, there is no basis for a new trial. The court agrees with the State that none of the evidence relating to Jackson depended upon the credibility or testimony of Officer Awadallah as to what occurred….
>
> [T]here was simply no evidence connecting Awadallah with Jackson. It was Lough who saw the gun drop and it was Lough who recovered the gun within seconds of it dropping during his pursuit of the defendant.[6]

¶10 The trial court ignored Jackson's allegations of misconduct against Lough, Dineen, Dodd, and other members of this same group of rogue officers that included Awadallah, who were accused of lying and planting evidence on other suspects. It also erroneously short-circuited the process by presuming that Lough testified truthfully, depriving Jackson of the opportunity to cross-examine him and challenge his credibility. *See* ***Missouri***, 291 Wis. 2d 466, ¶17. Moreover, as current postconviction/appellate counsel here demonstrated, much of Jackson's defense depended on credibility determinations, which cannot now be discounted. *See* ***id.***, ¶22. For purposes of determining entitlement to an evidentiary hearing on a postconviction motion, the trial court must accept as true the postconviction allegations. *See* ***Bentley***, 201 Wis. 2d at 309. The trial court failed to accept Jackson's current postconviction allegations about the inconsistencies in Lough's testimony, and the police and inventory reports, and the factual disputes regarding the degree of involvement by Lough and Awadallah in his arrest and their claimed discovery of the gun.

[6] This quotation is from the trial court's postconviction order. (Emphasis in original; footnotes omitted.)

¶11 We first analyze the sufficiency of Jackson's newly discovered evidence allegations because they provide background and context to our ineffective assistance analysis. Current postconviction counsel alleged the date of the SENTINEL article reporting the federal misconduct charges against Awadallah that involved charges of planting evidence on a suspect, the same defense Jackson used at trial, the circulation of the SENTINEL, and its suggestion that all cases involving Awadallah were in jeopardy. Current postconviction counsel also alerted the trial court to the ***Missouri*** decision involving Lough, Awadallah, Dineen, and others in this same group of officers who worked together at that time, and had also apprehended Jackson and Rash.[7] These allegations are sufficient to meet the first two newly discovered evidence requisites, that the evidence was discovered after trial, and that Jackson was not negligent in discovering this evidence sooner.

¶12 Current postconviction counsel alleged, with citations to the trial transcript, that Jackson's defense was essentially that Lough lied about seeing him discard the gun as he was fleeing, and that that gun was planted. Jackson's prosecution depended on Lough's credibility. Lough's involvement during that same time period, individually and as part of the same group of rogue officers who had engaged in the same type of misconduct on which Jackson's defense

[7] Following the testimony on remand, the trial court will find whether original postconviction counsel was aware of this misconduct from the media reporting and/or our ***Missouri*** decision. *See* ***State v. Missouri***, 2006 WI App 74, 291 Wis. 2d 466, 714 N.W.2d 595. The trial court will then determine whether original postconviction counsel's performance was deficient for failing to alert the trial court, this court, or the supreme court of the significance of this misconduct to Jackson's case before his judgment of conviction became final. (A conviction becomes final after a direct appeal from that judgment and any right to directly review the related appellate decision is no longer available. *See* ***State v. Howard***, 211 Wis. 2d 269, 282 n.8, 564 N.W.2d 753 (1997) (citing ***Griffith v. Kentucky***, 479 U.S. 314, 321 n.6 (1987)), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W.2d 765.)

depended, and about which the jury had heard nothing, renders this evidence both relevant and material. "The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely." ***State v. Williamson***, 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978).

¶13 Jackson also explained that his defense relied on his assertion that the police had lied and planted the gun, and that the previous misconduct charges against these same officers were relevant and admissible as other acts evidence to demonstrate a motive to lie, and a *modus operandi* of how they worked together, supporting one another by lying, planting evidence, and acquiescing to each others' misconduct, in an ends-justifying-the-means approach to law enforcement. *See* WIS. STAT. § 904.04(2)(a); ***Missouri***, 291 Wis. 2d 466, ¶¶15-25. As we explained in ***Missouri***, "[t]his court cannot decide [who] is telling the truth." ***Id.***, 291 Wis. 2d 466, ¶25. Jackson has specifically alleged sufficient, non-cumulative and independent evidence of covert police action involving similar misconduct by these same officers; the relevance and materiality of that conduct to Jackson's defense entitle him to an evidentiary hearing.

¶14 We next analyze Jackson's ineffective assistance claim, first whether Jackson has sufficiently alleged that postconviction counsel was deficient for failing to pursue this newly discovered evidence. In Jackson's recent postconviction motion, he alleged that "[d]uring closing arguments, [defense counsel] pointed out several times that the Glock 22, .40 caliber, is a weapon which is issued to police officers, strongly implying that the gun was planted." During closing argument, defense counsel emphasized inconsistencies and "hole[s]" in the evidence to support the misconduct defense. Current postconviction counsel explained to the trial court that the jury reached its verdict without evidence to support Jackson's defense of this same type of misconduct by

these same officers. The allegations are sufficient to raise an inference that original postconviction counsel should have known that the perpetrators and misconduct reported in the SENTINEL and in ***Missouri*** was sufficiently similar to that in Jackson's case to have warranted postconviction relief before Jackson's case became final.[8]

¶15 Current postconviction counsel alleged that two weeks after the initial postconviction motion was filed, the SENTINEL, the primary newspaper in Wisconsin with a weekday circulation of approximately 236,000 people, reported along with Milwaukee television stations, that Awadallah had been charged with misconduct, which was similar to that alleged in this case. Original postconviction counsel did not supplement the original motion or include this new information in the reply brief, which he filed approximately two months after this widely disseminated news about Awadallah. At no time prior to the final denial of Jackson's direct appeal, almost two years later, was this misconduct ever brought to the court's attention.

¶16 Current postconviction counsel filed a supplemental motion to alert the trial court to information he discovered in the ultimately successful postconviction motion in ***Missouri***, a recent decision on the same type of police misconduct as Jackson alleged. The conduct included many of the same officers involved in Jackson's arrest, including Awadallah, Lough, Dodd and Dineen.

[8] The evidence on remand will establish whether and when original postconviction knew of this misconduct by these same officers. There will be sufficient evidence for the trial court to then determine whether and when original postconviction counsel should have been aware of this misconduct by these same officers, and whether his performance was deficient for failing to seek relief in this case before Jackson's judgment became final. *See* ***Howard***, 211 Wis. 2d at 282 n.8 (citing ***Griffith***, 479 U.S. at 321 n.6), *overruled on other grounds by* ***Gordon***, 262 Wis. 2d 380, ¶5.

Jackson has alleged with the requisite specificity that original postconviction counsel was deficient for failing to raise the publicly disclosed misconduct of the same officers involved in Jackson's apprehension. That public disclosure included a published decision from this court.[9] Jackson's allegations are sufficient to entitle him to a ***Machner*** hearing.

¶17 Jackson alleged the same type of misconduct and complicity by the same rogue officers from other cases to bolster his attempted defense. *See* ***Missouri***, 291 Wis. 2d 466, ¶¶2, 10. He also alleged that in the ***Missouri*** postconviction motion there was evidence of misconduct by Dineen, and that Lough was part of the same group of officers who, at minimum, acquiesced to each other's misconduct. Jackson emphasized inconsistencies in Lough's testimony and the police reports about the chain of custody and other issues involving the gun, including whether it was planted. Jackson has alleged with the requisite specificity a *prima facie* claim of prejudice, namely, that it is reasonably probable that had counsel included these allegations in his original postconviction motion, the result would have been different. *See* ***Strickland***, 466 U.S. at 694.

¶18 We conclude that Jackson's postconviction allegations were sufficient for an evidentiary hearing. We therefore remand this matter for a ***Machner*** hearing on Jackson's claims.

[9] We decided ***Missouri***, 291 Wis. 2d 466, on March 14, 2006; we decided Jackson's direct appeal on August 22, 2006.

By the Court.—Order reversed and cause remanded for further proceedings.

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