

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 14, 2009

David R. Schanker
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. 2008AP751-CR

Cir. Ct. No. 2006CF4162

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY S. REED,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Anthony S. Reed appeals from an amended judgment of conviction for possessing cocaine with intent to deliver, and from a

postconviction order summarily denying his motion for a *Machner* hearing.¹ The issues are whether Reed's trial counsel was ineffective for allowing Reed to proceed to a jury trial in jailhouse clothing, and whether counsel violated the attorney-client privilege by disclosing the substance of his related discussions with Reed. We conclude that Reed personally waived his right both to proceed to trial in street clothes (non-jailhouse clothing), removing this issue from the realm of ineffective assistance, and for failing to raise the privilege issue initially in his postconviction motion. We therefore affirm.

¶2 Reed was charged with possessing between fifteen and forty grams of cocaine with intent to deliver, in violation of WIS. STAT. § 961.41(1m)(cm)3. (2005-06). He appeared for trial dressed in an orange jumpsuit.

¶3 Before calling in the jury to commence the trial, the court stated:

I would just note that the defendant is in prison garb. Counsel, any objection to proceeding to the jury at this point?

DEFENSE COUNSEL: No, there isn't.

Judge, I had informed the defendant that he needed street clothes. And he's aware of that. He tells me that his clothing somehow or another didn't make it with him from Dodge. And at the same time maybe I can get clothes for him later in the day, maybe not, but there's no objection to proceeding.

....

THE COURT: All right. Sir, is that correct?

THE DEFENDANT: Yes.

¹ A *Machner* hearing is an evidentiary hearing to determine trial counsel's effectiveness. See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

THE COURT: All right, why don't we bring the jury panel in.

¶4 The case proceeded to a jury trial; Reed wore jailhouse clothing and was identified by a police detective as being “seated at the defense table, wearing the orange jump suit.” At the close of the evidence, defense counsel again addressed Reed’s attire for purposes of the record.

[T]he defendant has appeared at trial in his jail clothes, specifically orange, and I alerted him as to what it is that he needed to do in order to have street clothes which, of course, was his right. He indicated that his street clothes got lost in transit somewhere along the line. Certainly, there are no records that would indicate that there were any clothes or that it’s lost or otherwise. The defendant and the defense went forward without objection with regards to the jail clothes.

Now, I want the Court to ... know ... that I actually had a discussion with the defendant yesterday at noon before we even got into it to see whether or not I should follow up with his girlfriend and get some clothes or shoes or what have you. A message was shuttled through the bailiffs. He [Reed] asked me not to do that.

Also, there was a discussion with regards to instructions and should we devise an instruction to tell the jury not to use the orange clothes against him and that it’s not evidence and the like. There was some discussion as to whether or not that might give undue attention to the matter, and the bottom line is ... call it a tactical decision as it were we’re not asking for any kind of instruction ... as it relates to the jail garb.

Ultimately, the jury found Reed guilty as charged. The trial court imposed a nine-year sentence to run consecutive to any other sentence, comprised of three- and six-year respective periods of initial confinement and extended supervision.

¶5 Reed filed a postconviction motion for a *Machner* hearing, alleging that trial counsel was ineffective for failing to: (1) “properly advise Reed on the dangers of having a jury trial in jail clothes”; (2) instruct Reed not to proceed to

trial in jail clothing; and (3) seek an adjournment to obtain street clothes for Reed. The trial court summarily denied the motion because: (1) Reed “waived any objection to proceeding in jail clothing on the morning of trial”; and (2) the “abundance of evidence tending to show the defendant’s guilt was sufficient to eliminate any prejudice from his presence in jail clothing.” Reed appeals, raising the ineffective assistance issue, and raising, for the first time, the issue of his trial counsel violating the attorney-client privilege by disclosing confidential information about their conversation on proceeding to trial in jail clothing.

¶6 To prevail on an ineffective assistance claim, the defendant must show that trial counsel’s performance was deficient, and that this deficient performance prejudiced the defense. *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.

¶7 Compelling a criminal defendant to appear in identifiable prison clothing at trial may compromise the presumption of innocence to which the accused is entitled. *See Estelle v. Williams*, 425 U.S. 501, 504 (1976); *State v. Clifton*, 150 Wis. 2d 673, 679, 443 N.W.2d 26 (Ct. App. 1989). “[T]he failure to make an objection to the court as to being tried in [prison] clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.” *Estelle*, 425 U.S. at 512-13.

¶8 The trial court expressly inquired about Reed's clothing. Trial counsel responded that Reed had no objection to proceeding to a jury trial. The trial court specifically asked Reed personally to confirm counsel's rendition of the circumstances and Reed's having "no objection" to proceeding as attired; Reed did so. At the close of the evidence, trial counsel reiterated Reed's failure to object to wearing prison clothing in front of the jury, explaining that he (counsel) had addressed what needed to be done to obtain street clothes, and claimed that he had expressly offered to "follow up with [Reed's] girlfriend and get some clothes or shoes or what have you.... [Reed] asked me not to do that." Reed was present during his counsel's additional explanation and did not clarify or supplement that explanation.

¶9 Reed personally waived any objection to his proceeding to a jury trial in prison clothing. *See id.* Reed cannot maintain an ineffective assistance claim for his counsel's failure to object to Reed proceeding to his jury trial in jail clothing when Reed himself confirmed that he had no objection to proceeding so attired. *See State v. Divanovic*, 200 Wis. 2d 210, 224-25, 546 N.W.2d 501 (Ct. App. 1996).

¶10 Reed also contends that his trial counsel violated the attorney-client privilege of WIS. STAT. § 905.03 (2007-08), by disclosing their conversations about proceeding to trial in jail clothing.² Reed's failure to raise this issue in his postconviction motion constitutes waiver. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (generally, an appellate court will not consider an

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

issue raised for the first time on appeal), *superseded on other grounds by* WIS. STAT. § 895.52.

¶11 Reed's waiver is particularly significant because the attorney-client privilege attaches only to confidential communications as defined by WIS. STAT. § 905.03(1)(d), and the trial court was not asked for factual findings on precisely what communications were confidential and disclosed. Reed's appearance in jail clothing was not a communication, nor was it confidential. Trial counsel's rendition and explanation regarding Reed's clothing was to buttress Reed's confirmation that he had no objection to proceeding to trial in jail clothing. Absent a request of the trial court to conduct an evidentiary hearing on the privilege issue (in addition to the ineffective assistance issue) to determine what, if any, confidential communications were disclosed, this issue was waived. *See Wirth*, 93 Wis. 2d at 443-44.

By the Court.—Judgment and order affirmed.

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

