COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1995

No. 95-1466-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FRANK NMN JOHNSON, JR.,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and TIMOTHY G. DUGAN, Judges. *Reversed and cause remanded.*

FINE, J. Frank Johnson, Jr., appeals from his misdemeanor conviction for operating an automobile while under the influence of an intoxicant, *see* §§ 346.63(1)(a) and 346.65(2), STATS., and from the trial court's denial of his motion for postconviction relief. Johnson claims that he was deprived of his right to effective assistance of counsel. We reverse.

Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686

(1984). In order to establish violation of this fundamental right, a defendant must prove two things: (1) that his or her lawyer's performance was deficient, and, if so, (2) that "the deficient performance prejudiced the defense." ***Id.***, 466 U.S. at 687. A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." ***Ibid.*** Similarly, a defendant alleging prejudice must demonstrate that the trial lawyer's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Ibid***. As recently restated, the "prejudice" component of ***Strickland*** "focusses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." ***Lockhart v. Fretwell***, 113 S. Ct. 838, 844, 122 L.Ed.2d 180, 191 (1993).

On appeal, the standard of review is a question of both fact and law. ***Strickland***, 466 U.S. at 698. The trial court's findings of fact will not be reversed unless clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). Questions of whether counsel's actions were deficient, however, and, if so, whether they prejudiced the defense, are questions of law to be determined independently by the reviewing court. ***Id.***, 124 Wis.2d at 634, 369 N.W.2d at 715.

Johnson's conviction arose out of a one-car accident. The issue at his trial was whether he or Robert McClain was driving Johnson's car. Johnson admitted that he was under the influence of an intoxicant at the time. In her opening statement to the jury, Johnson's trial counsel told the jury that Johnson, McClain, and Dwayne Sanders were drinking before they went to Sanders' home, and that when, later that night, McClain wanted to go home to Racine to check on his invalid mother, Johnson let McClain drive. Johnson's trial lawyer also told the jury that Sanders would corroborate Johnson's story that McClain and not Johnson was driving.[1] Sanders, however, did not come to court in time

[1] Johnson's trial lawyer told the jury:

> We will also have testimony from [Dwayne] Sanders, who will testify that yes, indeed, he spent the better part of the previous evening with Rob McClain, and Frank Johnson, and several other people, and they did sleep over at his house, and that he and another friend did indeed take them to the highway with [McClain] behind the wheel.

to testify. Johnson claims that his trial lawyer should have asked for an adjournment.

This case first came to us on a "no-merit" brief filed by Johnson's appellate attorney. *See* ***Anders v. California***, 386 U.S. 734 (1967); RULE 809.32, STATS. We rejected counsel's no-merit brief, and remanded to the trial court for a hearing, as required by ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908–909 (Ct. App. 1979). On remand, the trial court, the Honorable Timothy Dugan, presiding, heard testimony from Johnson, Sanders, and Johnson's trial counsel. Sanders' testimony corroborated Johnson's version of the incident. Johnson's trial counsel testified that she did not seek an adjournment of the trial to try to find Sanders, who, apparently, was at work at his employment by the City of Milwaukee, because, based on her pre-trial discussions with Sanders, she "felt that Mr. Sanders would not corroborate with Mr. Johnson." This testimony, however, directly contradicts what Johnson's trial lawyer told the jury in her opening statement. Nevertheless, the trial court that conducted the ***Machner*** hearing found credible the testimony of Johnson's trial lawyer that, as phrased by the ***Machner*** court, Sanders "would not say that he saw Mr. McClain driving the vehicle to the highway." Accordingly, the ***Machner*** court concluded that Johnson's trial lawyer "was not ineffective in [not] seeking to have the trial adjourned because of Mr. Sanders' failure to appear," and that Johnson "was not prejudiced and, in fact, would not have been assisted by the testimony of Mr. Sanders." The ***Machner*** court, however, was not shown the transcript of the opening statement by Johnson's trial lawyer.

The conflict between the ***Machner***-hearing testimony by Johnson's trial lawyer and that lawyer's opening statement to the jury renders her ***Machner***-hearing testimony on what Sanders told her in their pre-trial discussions incredible as a matter of law. Whether Johnson was the driver of the car at the time of accident was the only issue the jury had to decide. Johnson testified that McClain was driving; McClain testified that Johnson was driving. Although there was other evidence from which the jury could conclude that Johnson was the driver, Sanders' testimony was critical to Johnson's defense. Under these circumstances, we cannot say that the result of the trial was reliable, *see* ***Lockhart***, 113 S. Ct. at 844, 122 L.Ed.2d at 191. Accordingly, we reverse and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.