

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1582-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID L. WIENER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD J. HANAWAY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. David Wiener appeals a judgment convicting him of second-degree reckless homicide and an order denying his postconviction motion. He argues that his trial counsel was ineffective because he failed to present evidence that the victim, Wiener's brother Tim, had persistent suicidal tendencies and a "nothing to lose, I'll never live past thirty" life philosophy. Wiener argues that this evidence would have supported his theory of self-defense because it showed a basis for his heightened fear of his brother. We reject this argument and affirm the judgment and order.

Tim Wiener called David on the day of his death and was upset because David had refused to help him park his car near the football stadium the day before. After a brief conversation, David hung up on Tim. Tim called back and told David he was going to come over and beat him up. David contends that the threat included a death threat, although other witnesses to both sides of the conversation did not get the impression that extreme violence was imminent. After David hung up the second time, Tim called again to say that he was on his way over. David told Tim that he had a gun and would call the police. After that conversation, David called his mother and told her Tim was causing trouble. She told him they should settle it themselves. David then tried calling his brother back to tell him not to come over, but got no answer. He then locked the doors, instructed his wife on what to do if Tim came over, removed a pistol from his safe and made sure it was loaded. When Tim arrived, he broke down the door and entered the house. David testified that he believed his brother was going to beat him to death. Tim had twice before battered David, resulting in black eyes, bloody noses, loose teeth and a fat lip. David testified that he showed his brother that he had a gun and Tim responded "you ain't got the balls." Tim then clenched his fist and rushed up the stairs at David. David shot once, but was uncertain whether the bullet hit Tim. After Tim went backwards down the stairs, he again charged David. David then fired three or more shots into Tim's torso, killing him. David then called the police and told the dispatcher he had shot his brother after he "started to come at me" He also stated "he was beating me up before and I wasn't going to take it." The jury rejected David's claim of self-defense and found him guilty of second-degree reckless homicide.

To establish ineffective assistance of trial counsel, David must show that his trial attorney's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Professionally competent assistance of counsel encompasses a wide range of behaviors and a fair assessment of the attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.* at 689. Strategic choices made by counsel after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. *Id.* at 690-91. To establish prejudice, Wiener must show that but for his counsel's errors, there is a reasonable probability the result would have been different. A reasonable probability is one that undermines confidence in the outcome. *Id.* at 694.

Counsel's failure to present evidence on Tim's suicidal tendencies and a suicide pact, as well as his generally reckless behavior, did not constitute ineffective assistance of counsel. While this information was marginally relevant to establish the reasonableness of David's belief that he had to use deadly force, the evidence was not so persuasive that failure to present it constitutes ineffective assistance. The proffered evidence would have showed that Tim had expressed a belief that he would not live to be thirty, so he intended to live in the "fast lane." He had told a co-worker that he did not care if he contracted AIDS and would do whatever he could to "take as many people as [he] can down with [him]." Another witness would have testified that in 1991, Tim told him he had contracted herpes and Tim was depressed. The two of them agreed that if they made it to thirty years old, and still hadn't accomplished the things they wanted to accomplish, they would die together.¹ A third witness would have testified that Tim mentioned suicide at least six times and intended to use his car as the method of suicide.

None of this testimony would have established that it was reasonable for David to use lethal force against Tim. The State successfully argued that Tim had previously battered David and other family members without inflicting great bodily harm or causing death, that the threat of imminent death or great bodily harm was not corroborated by other witnesses in a position to hear the conversations and that the circumstances did not justify the use of deadly force. In his seven-page statement to the police on the day of the shooting, David did not mention Tim's talk of suicide or his life philosophy. The proffered evidence had minimal value in establishing a justification for David's decision to use lethal force against Tim. Wiener's trial counsel was not ineffective for deciding not to present this evidence.²

In addition, Wiener has not established that he was prejudiced by his counsel's decision not to present this evidence. Defense counsel successfully introduced substantial evidence regarding prior threats and violent acts by Tim. The omitted evidence, consisting of words not deeds, sometimes made years earlier and describing a means of suicide dissimilar from the present situation, is not as persuasive as the evidence the jury heard regarding Tim's previous acts

¹ Tim was nearly twenty-nine years old at the time of his death.

² Wiener concedes on appeal that his trial counsel reasonably decided not to present a defense that Tim used David as an instrument of suicide.

of violence and explosive temper. The defects in the defense related to David's failure to prove that he reasonably believed there was imminent danger of great bodily harm or death and that he used excessive force in defending himself. The jury's rejection of this defense in light of the evidence presented regarding Tim's previous behavior shows that additional evidence regarding his statements and lifestyle would not have been persuasive on the issues relating to self-defense.

Finally, Wiener requests a new trial in the interest of justice. We conclude that the issue of self defense was fully and fairly tried, justice has not miscarried and there was no reason to believe retrial would result in a different verdict. *See* § 752.35, STATS.

By the Court. – Judgment and order affirmed.

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