

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 96-2829-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SAMUEL L. HOGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN and MICHAEL J. BARRON, Judges. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Samuel L. Hogan appeals from a judgment entered after a jury found him guilty of one count of second-degree sexual assault. See § 940.225(2)(d), STATS. He also appeals from an order denying his postconviction motion, alleging ineffective assistance of trial counsel. Hogan claims that his trial

counsel provided ineffective assistance by failing to contact a witness who could have provided information beneficial to his defense and that his judgment should be reversed in the interest of justice. Because Hogan's trial counsel was ineffective for failing to contact a defense witness, we reverse the judgment and order and remand for a new trial.¹

On April 8, 1995, Hogan, his friend David Clarke and Clarke's girlfriend, Lulu B., went to a tavern at 4:00 p.m. to celebrate Lulu's birthday. They began drinking heavily. At 5:30 p.m., the three went to Lulu's apartment, where they smoked cocaine and marijuana. They returned to the bar, drank more alcohol, and, after midnight, returned to the apartment for additional drug use. Clarke and Lulu had sexual intercourse at 3:00 a.m. What happened next was disputed at trial.

Lulu testified that she awoke to find Hogan having sexual intercourse with her. She said she threw him out of the apartment and when she told Clarke what happened, Clarke did not believe her. Clarke testified that after he had sex with Lulu, he went to sleep in another bedroom and woke up when he heard Lulu yelling.

Hogan testified that he did have sexual intercourse with Lulu, but that it was consensual. He stated that Lulu had agreed to exchange sexual

¹ Because of our disposition of this matter we need not address Hogan's alternative "interest of justice" argument. Additionally, Hogan does not contend that there was insufficient evidence presented at trial so that a remand would violate his double-jeopardy rights. See *State v. Reinwand*, 147 Wis.2d 192, 196 n.3, 433 N.W.2d 27, 29 n.3 (Ct. App. 1988) (appellate court is not obligated to consider whether there was sufficient evidence to convict unless raised by defendant).

intercourse for drugs. He indicated that Lulu threw him out because he refused to obtain additional drugs for her.

During deliberations, the jury asked to review the cross-examination of Clarke regarding leaving Lulu's bedroom. After hearing the testimony, the jury convicted. Hogan filed a postconviction motion alleging ineffective assistance of trial counsel. He claimed that his trial counsel should have contacted a witness, Gilberto Rodriguez, whose testimony would have assisted the defense.

Rodriguez testified at the hearing required by *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979), that he had known Lulu, Clarke, and Hogan for several years having worked with all of them over the years at Chempak in Milwaukee. He further testified that sometime after the alleged rape, he had several conversations with Clarke about the events in question. His affidavit was entered into evidence at the *Machner* hearing. It explained that on several occasions, Clarke told him that Lulu agreed to have sex that night with Hogan in exchange for drugs, that Lulu became upset at Hogan because he refused to get more drugs after they had sex, and that she then decided to claim that Hogan raped her. Rodriguez testified that no attorney or investigator contacted him on behalf of Hogan prior to trial regarding this information.

Defense counsel also testified at the *Machner* hearing. He stated that he did not use an investigator in this case, but asked Hogan to supply him with a list of witnesses who could be helpful to the defense. Hogan did so, giving defense counsel a list of names that included Rodriguez. Defense counsel testified “[t]o the best of my recollection I did contact [Rodriguez]. I don’t have any notes to substantiate that fact.” Defense counsel testified that to the best of his memory,

he did eventually locate Rodriguez and determined that he had nothing of value to add to the defense case.

Hogan testified at the *Machner* hearing that he, rather than defense counsel, had produced the defense witnesses but could not find Rodriguez because he did not know where he lived. Defense counsel could not recall whether he subpoenaed any witnesses. He did not have any carbon copies of subpoenas in his file so he assumed the witnesses came in voluntarily. The trial court denied Hogan's postconviction motion.

Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668, 686 (1984), and a coterminous right under Article I, § 7 of the Wisconsin Constitution, *State v. Sanchez*, 201 Wis.2d 219, 226–236, 548 N.W.2d 69, 72–76 (1996). 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." *Strickland*, 466 U.S. at 687. *See also Sanchez*, 201 Wis.2d at 236, 548 N.W.2d at 76. The performance inquiry determines whether counsel's assistance was reasonable under prevailing professional norms and considering all the circumstances. *State v. Hicks*, 195 Wis.2d 620, 626–627, 536 N.W.2d 487, 490 (1995). Under the prejudice prong, the defendant must show there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

The trial court's determination of what the attorney did and did not do and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law that this court reviews independently.

Hicks, 195 Wis.2d at 627, 536 N.W.2d at 490 (citations omitted).

The trial court determined that defense counsel's performance was not deficient and that the absence of Rodriguez's testimony did not prejudice Hogan. Specifically, the trial court held that defense counsel must have contacted Rodriguez because it was "inconceivable" to the court that a lawyer would not have done so in a serious felony case. This finding is clearly erroneous because it was not based on the evidence of record but based on what a reasonable lawyer would have done.

The key factual question is whether defense counsel ever contacted Rodriguez. A review of the records indicates strongly that he did not. First, the list of potential witnesses Hogan gave to defense counsel contained Rodriguez's name along with a telephone number where Rodriguez could be reached, although defense counsel could not recall where he contacted Rodriguez. Defense counsel wrote the words "still available" next to two other names on the potential witness list but no such notation appeared next to Rodriguez's name, indicating that Rodriguez had not been contacted to find out if he was "still available" to testify. Additionally, defense counsel's file contained no notes concerning any contact with Rodriguez. Further, as the trial court determined, defense counsel did not subpoena the witnesses who appeared at trial for the defense; Hogan himself contacted the witnesses. Also, Rodriguez testified that he was never contacted by defense counsel. Finally, defense counsel himself was not even sure that he ever contacted Rodriguez. He testified that "[t]o the best of [his] recollection" he thought he would have contacted Rodriguez by telephone but he did not recall where he contacted him. Based upon a review of defense counsel's testimony, and the testimony and affidavit of Rodriguez, we conclude that defense counsel's performance was deficient. *See Crisp v. Duckworth*, 743 F.2d 580, 584 (7th Cir.

1984) (“[A]s a general rule an attorney must investigate a case in order to provide minimally competent professional representation.”).

We now turn to the prejudice prong of the *Strickland* test. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691. The test for evaluating the prejudice component is whether there is a reasonable probability that counsel’s errors affected the outcome of the trial. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, 466 U.S. at 694.

The State’s evidence at trial consisted primarily of the testimony of Lulu, Clarke and Hogan. The other witnesses who testified at trial did not alter the basic nature of this case as a “swearing match,” with Lulu and Clarke against Hogan. There were no other eyewitnesses. The jury was presented with a straightforward credibility choice. Given the standoff between Lulu and Clarke and Hogan, independent corroboration by a neutral disinterested witness would, perforce, be extremely significant. *See People v. McVay*, 354 N.W.2d 281 (Mich. App. 1984) (pre-*Strickland* case finding ineffective assistance of counsel where defense counsel did not present testimony of neutral witness who would have lent credibility to the defendant’s version of the facts in a situation where credibility was a crucial issue). Hogan has pointed to a specific witness whose missing testimony would have been exculpatory. In fact, Rodriguez’s testimony was significant to Hogan’s defense in several respects. First, it directly contradicted the State’s chief witnesses, Lulu, who testified that Hogan raped her, and Clarke, whose testimony backed up Lulu’s claim. Thus, Rodriguez’s testimony would have directly contradicted both Lulu and Clarke. Furthermore, this is not a case where the evidence of Hogan’s guilt was overwhelming. The nurse who examined

Lulu the day after the alleged rape found no evidence of physical injury. None of the hairs recovered from Lulu's body were Hogan's. The State's case turned on the credibility of Lulu and Clarke. Hogan has established the requisite prejudice. Accordingly, the judgment and order of the trial court are reversed and this case is remanded for a new trial.

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

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

