COURT OF APPEALS DECISION DATED AND FILED

October 7, 1998

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. 97-2700-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY L. SCHROEDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Gregory L. Schroeder appeals from an order denying postconviction relief and from a judgment convicting him of theft, party to the crime of operating a motor vehicle without the owner's consent, and misdemeanor damage to property. Schroeder claims that the trial court erroneously exercised its discretion in denying a continuance, that he was deprived

of the effective assistance of trial counsel and that a new trial should be granted because of newly discovered evidence. We reject Schroeder claims and affirm the judgment and order.

Schroeder first argues that he was denied his right to counsel because the trial court refused to reschedule the trial when his attorney of choice, Attorney Herb Usow, announced his unavailability in advance of the trial date. The granting or denial of a continuance is within the discretion of the trial court. *See* ***State v. Fink***, 195 Wis.2d 330, 338, 536 N.W.2d 401, 404 (Ct. App. 1995). If the denial of a continuance implicates a defendant's Sixth Amendment right to counsel, we balance the defendant's right to adequate representation against the public interest in the prompt and efficient administration of justice. *See* ***id.*** In exercising its discretion, the trial court should balance the following factors: the length of delay requested; whether there is competent counsel available to try the case; whether other continuances had been requested and received by the defendant; the convenience or inconvenience to the parties, witnesses and the court; whether the delay seems to be for legitimate or dilatory purposes; and other relevant factors. *See* ***Phifer v. State***, 64 Wis.2d 24, 31, 218 N.W.2d 354, 358 (1974).

The record reveals that Schroeder's trial had been rescheduled five times. Schroeder was charged on December 29, 1994. He was appointed counsel through the state public defender. Trial was set for May 4 and 5, 1995. On the day before trial, counsel moved for an adjournment to investigate and process similar crimes Schroeder was charged with in Milwaukee county. Trial was rescheduled to June 8 and 9, 1995. On June 2, 1995, appointed counsel moved to withdraw for an unspecified conflict of interest. When Schroeder appeared on June 8 with his newly appointed counsel, trial was set for September 20 to 22,

1995. At the final status conference on September 19, 1995, the defense asked for an adjournment to retain a forensics expert. Despite the prosecution's objection, the trial court granted the request. On November 3, 1995, trial was set for January 23 to 25, 1996. When Schroeder failed to appear at the final pretrial conference on January 16, 1996, the trial court issued a bench warrant and removed the case from the trial calendar. With Schroeder in court, trial was set for May 9 and 10, 1996. That date fell to the wayside when on May 8 appointed counsel sought to withdraw and Schroeder sought to retain private counsel. The trial court recalled the history of adjournments in this matter. It told Schroeder that he would have to retain new counsel and "[b]e prepared to try this case on the date that I give you. It's the last time this case is being adjourned." The trial was rescheduled to September 4 and 5, 1996.[1]

Attorney Usow appeared with Schroeder at a June 4, 1996 status conference and expressed that he would be unavailable on the September 4 and 5, 1996 trial date. Usow asked that the trial date be changed. The trial court recounted the history of adjournments, acknowledged the availability of other counsel to handle the trial in Usow's absence and cited the practical problem for the prosecution to produce its witnesses for any earlier trial date.[2] The trial court refused to grant the continuance.

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[1] When Schroeder asked for an earlier date, the matter was set as the number two trial on July 17 and 18, 1996, if Schroeder could find an attorney willing to try the matter that soon.

[2] Neither party could use the July 17 and 18, 1996 trial date. The trial court considered requests to change the trial date at several hearings. The court attempted to accommodate Attorney Usow by scheduling the matter as the number two trial on July 11 and 12, 1996. The prosecution asked that the advanced date be canceled for two reasons. Subsequently Usow asked that the trial be held on the date set for trial on a different charge against Schroeder. The end result was that the trial remained set for September 4 and 5, 1996.

The trial court considered the appropriate factors in denying the continuance. The trial date had been changed five times. Even without assigning blame to Schroeder for the delay, Schroeder had been told that there would be no further adjournments in the case. That he retained an attorney who was unavailable on the trial date was his choice. There was inconvenience to parties, witnesses and the court in again adjourning the trial. The right to counsel of choice is limited by the trial court's inherent power to control the trial docket. *See* ***Phifer***, 64 Wis.2d at 30, 218 N.W.2d at 357. Three months before trial, Usow acknowledged that substitute counsel would be available to appear. In light of the availability of substitute counsel, "the trial court's decision to proceed as scheduled cannot be described as an arbitrary denial of the defendant's right to his choice of counsel." ***State v. Wedgeworth***, 100 Wis.2d 514, 523, 302 N.W.2d 810, 815 (1981).

Before addressing the appeal further, the factual basis for the conviction must be laid out. Schroeder was charged with stealing construction equipment, including a dump truck with an attached trailer carrying a "skid loader." The crime was committed in the late evening on December 16, 1994, or early morning of December 17, 1994. The equipment was found several days later in the salvage yard utilized by Schroeder. David Batchman, a codefendant, recounted how he helped Schroeder obtain the equipment and attempt to sell it to codefendant Jerome Metcalfe. Batchman said he accompanied Schroeder around 11:00 or 11:30 p.m. on December 16 to the site where the truck and skid loader were located.

Schroeder's claim that counsel was ineffective and that newly discovered evidence justifies a new trial is based on Milwaukee police department reports relating to the investigation of the theft of construction tools and paint

sprayers. One report indicates that the construction tools and paint sprayers were taken between 2:30 p.m. on December 16 and 7:00 a.m. on December 17, 1994. A report dated December 22, 1994, relates that Ronald Repinski told police that he and Batchman were together for a couple hours in a certain tavern starting about 11:00 p.m. on December 16 and that he purchased one of the stolen paint sprayers from a man in the tavern parking lot. A report dated January 12, 1995, indicates that Repinski admitted that his previous story about purchasing the paint sprayer was a lie and that he and Batchman stole the items. That report also relates an interview with Batchman in which Batchman admitted stealing the items with Repinski. Schroeder believes that the investigation reports and Repinski's statements establish that Batchman was with Repinski at the time Batchman testified that he was with Schroeder stealing the truck and skid loader.

We turn to Schroeder's claim that he was denied the effective assistance of counsel. "There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis.2d 258, 273, 558 N.W.2d 379, 386 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

Much of Schroeder's complaint about trial counsel[3] is not conduct specific. He makes a general claim that trial counsel was rendered ineffective by a "combination of circumstances," that counsel lacked experience and familiarity with his case, and that counsel did not have the same "personal rapport" with him as he enjoyed with Usow. Not one scintilla of prejudice is attributed to these supposed shortcomings of trial counsel. We do not consider them further.

Schroeder suggests that trial counsel should have pursued a theory of defense that Repinski, and not Schroeder, was involved with Batchman in the theft of the truck and skid loader. Schroeder argues that counsel was ineffective because counsel did not call Repinski at trial even though asked to do so.

Trial counsel testified that he and Schroeder discussed the theory of defense and they decided to go with the alibi defense. The decision was based in part on the fact that proving Repinski's involvement, if any, in the theft did not necessarily absolve Schroeder. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). The defense selected need not be the one that by hindsight looks best. *See* ***id.*** The record establishes that the selection of the theory of defense was properly based on rationality founded on the facts and law. *See* ***id.***

Repinski was not called as a witness because counsel had information that, if called, Repinski would either refuse to testify under his Fifth

[3] Attorney Robert Sherry acted as substitute counsel for Usow at trial and sentencing.

Amendment right against self-incrimination or incriminate Schroeder in the theft.[4] It is reasonable and professional judgment not to call a witness whose testimony is unknown. Additionally, in his testimony at the postconviction motion hearing, Repinski denied having made the statements to the police that he was involved with Batchman in a theft on December 16, 1994.[5] Because of Repinski's inconsistent statements to police, his denial at trial would not have served Schroeder well. Schroeder was not prejudiced by counsel's failure to call Repinski.

The remaining claim of ineffective assistance of counsel is linked to Schroeder's claim that the police reports about Repinski's statements are newly discovered evidence. The trial court found that because the reports were in existence in advance of Schroeder's trial, they are not newly discovered. From this Schroeder contends that trial counsel was deficient for not obtaining copies of the reports before trial.

Even assuming trial counsel knew that the police reports existed and he should have obtained them,[6] we conclude that Schroeder was not prejudiced.

[4] It was not necessary for trial counsel to personally interview Repinski. An investigator hired by Schroeder's previous attorney had made the file notation regarding Repinski's potential testimony. Upon inheriting the file, trial counsel was not required to duplicate previous investigative efforts.

[5] Repinski also denied any involvement in the theft of the truck and skid loader. Schroeder's representation in his reply brief that Repinski's testimony was "absolutely supportive" to Schroeder's position is a gross misrepresentation of the record.

[6] Counsel testified that he knew Schroeder believed that Batchman acted with Repinski and that there was a witness to place Repinski in Batchman's company close to the period of time that it was believed the truck and skid loader were stolen. However, counsel could not recall receiving any information about Repinski and Batchman stealing a paint sprayer, the context in which Repinski's statement was made and recanted. Counsel had never before seen the Milwaukee police reports Schroeder produced at the postconviction motion hearing.

Repinski gave inconsistent statements about his activities on December 16, 1994. Although he first stated that he and Batchman were together between 11:00 p.m. and 1:00 a.m., he stated later that the story in which that time frame was mentioned was a lie. Not only was Repinski's statement that he and Batchman were together unreliable, it did not exclude the possibility that Schroeder was involved with Batchman in the theft of the truck and skid loader. Neither Repinski's nor Batchman's subsequent admission of guilt in stealing the paint sprayer mentioned the time of night that the theft occurred.

Moreover, the police report was inconsistent with Schroeder's alibi defense. Schroeder's witnesses placed Batchman and Repinski together and looking for Schroeder at Schroeder's girlfriend's house at about 11:00 p.m. Two other defense witnesses placed Repinski at their residence at 11:30 p.m. Repinski's statement that he was at a tavern with Batchman from 11:00 p.m. to 1:00 a.m. would have detracted from the defense theory. A trial attorney need not undermine the chosen strategy by presenting inconsistent alternatives. *See* ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992). We conclude that trial counsel was not ineffective.

Finally, we consider Schroeder's claim that he is entitled to a new trial on the account of newly discovered evidence, including Repinski's statements and two affidavits from witnesses who saw Repinski and Batchman together on the night of December 16, 1994. Ordinarily whether to grant a new trial on grounds of newly discovered evidence is a discretionary determination of the trial court. *See* ***State v. Kimpel***, 153 Wis.2d 697, 702, 451 N.W.2d 790, 792 (Ct. App. 1989). The five criteria for granting a new trial due to newly discovered evidence are: (1) the new evidence was not discovered until after trial; (2) the party moving for a new trial must not have been negligent in seeking to discover such new

evidence; (3) the new evidence must be material to the issue; (4) the new evidence must not be merely cumulative to testimony introduced at the trial; and (5) the new evidence must be such that it will be reasonably probable that a different result would be reached on a new trial. *See* ***State v. Boyce***, 75 Wis.2d 452, 457, 249 N.W.2d 758, 760 (1977). All five elements must be established. *See* ***State v. Johnson***, 181 Wis.2d 470, 489, 510 N.W.2d 811, 817 (Ct. App. 1993).

The trial court found that the evidence was known to Schroeder before trial. This finding is not clearly erroneous. *See* ***State v. McCallum***, 208 Wis.2d 463, 486, 561 N.W.2d 707, 716 (1997) (Abrahamson, C.J., concurring). Both Schroeder and trial counsel admitted knowing of Repinski's statement before trial[7] and that certain witnesses could place Repinski with Batchman.[8] Additionally, as alluded to with respect to the absence of prejudice, the police reports lacked materiality. Discovery of new evidence which merely impeaches the credibility of a witness is not a basis for a new trial on that ground alone. *See* ***Simos v. State***, 53 Wis.2d 493, 499, 192 N.W.2d 877, 880 (1972).

The only evidence that was actually not discovered until after trial was an anonymous letter someone attempted to send Schroeder in jail. This exhibit at the postconviction motion hearing was accompanied by a police report indicating that the author of the letter could not be determined. The letter suggested to Schroeder that he keep quiet because that "rat David is barking" and "his story is not consistent." It is unlikely that the letter constitutes admissible evidence. Even if it did, it certainly is not exculpatory. The trial court's finding

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[7] *See* note 6.

[8] Trial counsel explained the strategy behind not utilizing such witnesses.

that the letter and police report are not material is not an erroneous exercise of discretion.

By the Court.—Judgment and order affirmed.

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