COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0234-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL C. CLUSSMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

EICH, J.[1] Daniel Clussman appeals from a judgment convicting him of obstructing an officer, and from an order denying his motion for post-conviction relief. He argues that his trial counsel was ineffective for failing to request and secure a jury instruction regarding an arresting officer's authority to use force, and for failing to argue that the arresting officer used more force than

[1] This appeal is decided by a single judge pursuant to §752.31(2)(c), STATS.

was reasonably necessary to take him into custody. We reject his arguments and affirm the judgment and order.

The charge arose from a struggle which ensued between Clussman and State Patrol Officer Laurie Grote during the course of Clussman's arrest for operating a vehicle while under the influence of an intoxicant. Grote, who had observed Clussman speeding on the highway, activated her flashing lights and siren, followed him, and eventually stopped behind his vehicle in the driveway of his home. In dispute is what happened next. Grote testified that she approached Clussman's vehicle, tapped on the driver's side window, and, when he attempted to exit, ordered him to remain seated inside. He disregarded her instructions—and her repeated assertions that he was under arrest—and began walking away from the car. They began to struggle when Grote attempted to stop him from leaving the scene.

Clussman testified that, as he exited the vehicle, Grote immediately shoved her forearm underneath his neck between the windshield and the door pillar. He said that he was attempting to walk to his neighbor's house to look for witnesses when the struggle ensued. Although it is disputed who was the initial aggressor, there is no dispute that, after the initial contact, Grote and Clussman "struggled" for nearly fifteen minutes, until, eventually, an arrest was effectuated with the assistance of a private citizen and a backup officer who had been called to the scene.

As indicated, the jury found Clussman guilty of obstructing an officer and he seeks reversal of the conviction on grounds that his counsel was ineffective.

The Sixth Amendment to the United States Constitution and Article I, § 7 of the Wisconsin Constitution guarantee every criminal defendant the right to effective assistance of counsel. ***State v. Felton***, 110 Wis.2d 485, 499, 329 N.W.2d 161, 167 (1983). We invoke the two-step analysis set forth in ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984), when reviewing ineffective assistance of counsel claims. First, the defendant must show counsel's performance was deficient—that counsel made errors so serious that counsel was no longer functioning as the 'counsel' guaranteed by the Sixth Amendment. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). We pay great deference to counsel's professional judgment and make every effort to eliminate the distorting effects of hindsight. ***Id.*** Counsel's performance is not deficient unless the defendant shows that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 38 (Ct. App. 1992). Second, the defendant must show that the deficient performance prejudiced the defense—that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Johnson***, 153 Wis.2d at 129, 449 N.W.2d at 848.

Whether counsel's actions constituted ineffective assistance presents a mixed question of fact and law. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). The trial court's factual findings will be upheld unless they are clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). However, whether the attorney's performance was deficient and, if so, whether it prejudiced the defendant, are questions of law which we review *de novo*. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992).

Clussman argues that his trial counsel's performance was deficient because, once the jury heard Clussman's testimony that Grote shoved her arm under his neck as he attempted to get out of his vehicle, counsel should have requested a jury instruction which would have allowed the jurors to consider whether Grote's conduct exceeded her lawful authority. Absent such an instruction, he claims, the jury was denied the opportunity to consider whether Grote's actions spawned his attempt to leave the scene and the struggle that followed.[2]

We are not persuaded. At the post-conviction ***Machner*** hearing, counsel testified that, although Clussman had indicated to him that Grote used force very early on in their contact, he did not request a jury instruction on excessive force because it "wasn't the gist of the way the trial went." According to counsel, "the obstructing charge was a small charge in the overall trial" because "the [drunk-driving charge] was [a] fourth [offense] with a refusal, had a significant jail sentence, had a significant fine, [and] had loss of the vehicle, whereas the obstructing for the most part was going to be a probation case." He did not think an instruction "as to whether [Grote's use of force] was ... supposed to be excessive force" fit in the overall scheme of the trial, or that pursuing that avenue "would have been a successful challenge to the obstructing charge." Counsel explained that "when [he] take[s] a look at use of force on an obstructing or resisting charge [he] look[s] to an isolated incident where something may have been done" and that, in this case, the testimony revealed that "[there was] a

[2] The standard instruction for obstructing an officer, WIS J I—CRIMINAL 1766, states generally, that, to convict, the jury must find that the defendant (a) obstructed an officer (b) who was doing an act in an official capacity and (c) with lawful authority, and (d) that the defendant knew the officer was acting in her official capacity and with lawful authority, and (e) knew that his or her conduct would obstruct the officer.

conduct that lasted where [Clussman] not only tried to get in the house, he continued to walk away [and] [h]e continued to go over to the neighbor's." Clussman's testimony as to why he sought out his neighbors, counsel believed, was because "he wanted a witness to observe him because he felt he was not drinking and driving," not because he was worried about excessive or unreasonable use of force on Grote's part. "[H]e wanted a witness of the officer's activities as it related to the OMWI or the drunk driving ... because he felt that officers lie." In light of the testimony and evidence, and based on his twenty-four years of legal experience and past dealing with obstruction charges, counsel decided not to focus on the "excessive force" issue—which he thought would be unsuccessful considering the evidence as to Clussman's continued physical resistance—but elected to concentrate on the drunk driving charge, which carried more severe penalties.

We will not second-guess trial counsel's considered selection of trial tactics or strategies in the face of alternatives which have been weighed. ***State v. Elm***, 201 Wis.2d 452, 464-65, 549 N.W.2d 471, 476 (Ct. App. 1996) (citation omitted). Rather, we "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." ***State v. Pitch***, 124 Wis.2d 628, 636-37, *citing* ***Strickland***, 466 U.S. at 690. It is strongly presumed that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions, and the defendant bears the burden of establishing deficient performance. ***Johnson,*** 153 Wis.2d at 127, 449 N.W.2d at 847-48.

On this record, we agree with the trial court that counsel's strategic decision not to request an excessive-force instruction on an officer's authority to use force, and to then argue that Grote in fact used excessive force in effectuating

the arrest, was not unreasonable and was within professional norms. His performance was, therefore, not constitutionally deficient.[3]

By the Court.—Judgment and order affirmed.

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

[3] Clussman's other argument—that counsel was ineffective for failing to argue that Clussman did not have the state of mind required to find him guilty of obstructing an officer, to wit, that Clussman *knew* the arresting officer was acting with lawful authority—also lacks merit. He argues that if Grote was indeed acting outside her lawful authority by using unnecessary force, then Clussman could not have had the *mens rea* to commit the offense, because the statute requires knowledge that the officer was acting with lawful authority. However, since counsel was not ineffective for failing to request a jury instruction regarding an officer's lawful authority to use force, it follows that he cannot be ineffective for failing to argue Clussman's lack of knowledge as to that authority.

Even were we to consider the prejudice element of the ***Strickland*** test, Clussman has not satisfied us that there is a reasonable probability that the omitted instruction—and any arguments based thereon—would have effected the outcome of the proceedings.