COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1427-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. LEIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] John A. Lein appeals from a judgment of conviction for operating an auto after revocation of license contrary to § 343.44(1) & (2) STATS., and an order denying his § 809.40, STATS., motion which alleged ineffective assistance of trial counsel.

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

Lein raises two issues of error: (1) whether the trial court erred as a matter of law when it concluded that his trial counsel provided effective assistance; and (2) whether the trial court erroneously exercised its discretion when it failed to grant him a hearing on his ineffective assistance of counsel motion. Because the trial court did not err as a matter of law in concluding that trial counsel's performance was neither prejudicial nor deficient, and because the trial court did not erroneously exercise its discretion in denying the postconviction motion without holding a hearing, this court affirms.

BACKGROUND

On June 11, 1996, Lein was arrested and charged with operating an auto after revocation of his driving license. He waived his right to a jury trial and was convicted after a bench trial. Postconviction, he moved for a new trial claiming he had not been fully informed when he earlier waived his right to a trial by jury. The motion was granted. He was then tried by jury and again found guilty. He filed a motion for a new trial based upon ineffective assistance of counsel.[2]

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[2] His motion papers set forth the following:

> As grounds, Defendant asserts:
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> 1) That his trial counsel made several omissions in this case that were prejudicial and deficient, constituting ineffective assistance of counsel. The omissions violated Mr. Lein's rights under the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I of the Wisconsin Constitution.
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> 2) Specifically, the Defendant alleges that despite having an opportunity to do so, and despite repeated requests from the Defendant, defense counsel failed to question the arresting officer, the sole witness for the prosecution, along several lines that would probably have supported the Defendant's version of facts, and cast doubt on the State's version.

(continued)

On May 5, 1998, the return date for the motion, the trial court asked Lein's counsel to make an offer of proof demonstrating deficiency of performance on the part of his trial counsel and how it prejudiced Lein. After Lein's counsel completed the offer of proof, the court ruled that defense counsel's performance was adequate "or even assuming inconsistent performance failed to demonstrate prejudice." The trial court, therefore, denied the motion without actually conducting an evidentiary hearing. Lein now appeals.

ANALYSIS

For Lein to establish that he did not receive effective assistance of counsel, he must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense."

> 3) The Defendant's attorney either did not obtain the transcript of the original court trial held June 14, 1996, or failed to use the same to impeach the officer's credibility with his inconsistent testimony.
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> 4) The Defendant's attorney failed to timely move for dismissal of the complaint against the Defendant on the ground that it was inconsistent with the testimony presented.
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> 5) Said attorney failed to question jury panel members who admitted to having police officers and district attorney relations as to whether such close associations with law enforcement officials might affect their ability to fairly assess the evidence in a case where the issue was whether the Defendant or a law enforcement officer was telling the truth.
>
> 6) Said attorney failed to object to the Court's proposed response to a jury question which was framed in a manner that assumed the truth of the State's version of the very fact at issue, and thus assumed the fact of Defendant's guilt.
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> (Citations omitted).

Strickland v. Washington, 446 U.S. 668, 687 (1984). 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." ***Id.*** Even if Lein can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id.*** Stated otherwise, to satisfy the prejudice-prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

In assessing the defendant's claim, we need not address both the deficient performance and prejudice components, if he cannot make a sufficient showing on one. *See* ***Strickland***, 446 U.S. at 697. A showing of prejudice requires more than speculation, *see* ***State v. Wirts***, 176 Wis.2d 174, 187, 500 N.W.2d 317, 321 (Ct. App. 1993); rather, the defendant must affirmatively prove prejudice, *see* ***State v. Pitsch***, 124 Wis.2d 628, 641, 369 N.W.2d 711, 718 (1985). The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the question of whether counsel's performance was deficient or prejudicial are legal issues this court reviews independently, *see* ***id.*** at 236-37, 548 N.W.2d at 76.

Lein claims four instances of ineffective assistance of counsel entitling him to a new trial: (1) failure to obtain or use the transcripts of the first (bench) trial to impeach the police officer, the sole witness for the State; (2) failure to question a witness as to specifics that could have benefited the defendant;

(3) failure to question prospective jurors for prejudice after they revealed police officer and prosecutor relatives; and (4) failure to object to a corrective jury instruction that assumed the defendant's guilt. Each claim will be addressed in turn.

Although all parties appeared with their witnesses on the return date for Lein's motion, no testimony was taken. Instead of deciding the motion based solely upon written submissions or in combination with testimony, the motion court asked for an oral offer of proof demonstrating deficiency and prejudice. As a result, except for the fourth claim of ineffectiveness, the trial court rejected all of the claims on the basis of an absence of prejudice. As to the latter claim, the trial court concluded there was no deficient performance.

A. Use of Prior Transcript and Questioning of Police Officer.

Because the first two claims of ineffective assistance of counsel are interdependent, we examine them as one. This alleged instance of deficient performance is the failure to utilize the transcript of the first trial to impeach the credibility of the testimony of the arresting police officer in the second trial. During the first trial, the officer testified that Lein admitted driving the car involved in the arrest. In the second trial, the same officer asserted that Lein denied driving. Lein now argues that because the State only presented one witness, and because the essence of the case was "he said, he said" credibility was crucial. Thus, argues Lein, if inconsistencies could be shown in the State's witness, the jury could conclude that the testimonial account presented by the State was of little value. Therefore, a different result was reasonably probable and because trial counsel did not engage in this pursuit, he was ineffective.

The trial court was not convinced, nor is this court. The trial court reasoned that, if trial counsel had impeached the arresting officer with the testimony of Lein's admission of driving, it would have placed before the jury more evidence of a nature corroborating the officer's trial testimony that he saw Lein driving. For this reason, the trial court concluded no prejudice was shown regardless of the level of trial counsel's performance. Lein's analysis notwithstanding, it is important to note that the focal point of the prosecution was whether Lein was driving, not the chronology of the stopping and arrest. Therefore, even if Lein's trial counsel had used the prior transcript to impeach the officer on this point, the probability of a different result was not reasonably likely. Accordingly, no prejudice was shown.

B. Trial Court's Jury Instruction.

The second claim of deficient performance concerned the trial court's amendment to the complaint to conform to the proofs and a supplemental instruction to the jury informing it of this action by the court. This action arose as follows. The complaint stated that the incident of arrest occurred on West Burnham Street in Milwaukee, whereas all the proofs referred to West Lapham Street. After both sides had rested and the case had been submitted to the jury, the State discovered the discrepancy and moved to conform the complaint to the proofs. Trial counsel for Lein objected for two reasons: it was too late in the proceedings, and he felt the complaint should be dismissed because of a defect in the complaint. The trial court, taking into account the provisions of § 971.29, STATS.,[3] reserved its ruling to see if the jury discovered the discrepancy. In short

[3] Section 971.29, STATS., provides:

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order, the jury did just that and made inquiry of the court. At the urging of trial counsel, the court then, in effect, considered Lein's motion to dismiss, and denied it, finding no prejudice. The court then fashioned a supplementary instruction explaining what had happened and how the jury was to consider the amendment.[4] The court presented the instruction to both counsels and asked for a response. The State declared "It's wonderful." Lein's counsel said "I have no problems with it." It is this remark that forms the basis for Lein's second claim of deficient performance.

Lein argues that because part of the instruction read: "Members of the Jury: After you retired to deliberate, the district attorney noted that the police

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> **(1)** A complaint or information may be amended at any time prior to arraignment or without leave of the court.
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> **(2)** At the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant. After verdict the pleading shall be deemed amended to conform to the proof if no objection to the relevance of the evidence was timely raised upon the trial.
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> **(3)** Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary and may proceed with or postpone the trial.

[4] The instruction provided:

> Members of the Jury:
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> After you retired to deliberate, the district attorney noted that the police ticket mentioned the wrong address. She noted that Mr. Lein drove on Lapham and not Burnham. I was asked to amend the criminal complaint, and I did so. I determined that I would wait to see if the street name became an issue before reinstructing you.
>
> Given your question, I now instruct you that the amended criminal complaint charges that John Lein did on June 11, 1996, operate a motor vehicle at 3414 W. Lapham Street after the revocation of his operating privilege.
>
> This note to you amends the contrary instruction on page 3 of the instructions which I provided when you retired to deliberate.

ticket mentioned the wrong address. She noted that Mr. Lein drove on Lapham and not Burnham," the instruction is a statement telling the jury that the court agreed that "Mr. Lein drove on Lapham and not Burnham." He reasons that the instruction assumes the truth of the State's case and denies the truth of his.

If all that transpired in regard to this scrivener's error was the final remark of trial counsel before the supplemental instruction was submitted to the jury, Lein's claim might merit further consideration. Trial counsel's response, however, to the trial court's inquiry was not in isolation. First, it is fundamental that when examining possible error relating to jury instructions, regardless of the nature of the proposed error, this court must view the jury instructions as a whole and not just focus on isolated parts that convey an incomplete portrayal of the message the trial court was sending to the jury. This case is not an exception to the same rule. *See* ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976). The part of the instruction quoted above was only a part of the supplemental instruction which, in turn, was only a small portion of the trial court's total instruction relating to the specific charge. The relevant part of the instruction as originally given to the jury reads:

> The complaint charges that on June 11, 1996, at 3414 W. Burnham in the City of Milwaukee, Wisconsin the defendant, John Lein, did [drive] an automobile after revocation of his driving license.
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> To this charge, John Lein entered a plea of not guilty. This means the State must prove every element of the offense of driving an automobile after revocation of his driving license beyond a reasonable doubt.
>
> The complaint is nothing more than a written, formal accusation against a defendant charging the commission of a criminal act. You are not to consider it as evidence against John Lein in any way. It does not raise any inference of guilt.

The relevant balance of the supplemental instruction states:

> I now instruct you that the amended criminal complaint charges that John Lein did on June 11, 1996, operate a motor vehicle at 3414 W. Lapham Street after the revocation of his operating privilege.
>
> This note to you amends the contrary instruction on page 3 of the instructions which I provided when you retired to deliberate.

(Emphasis added). Thus, when put in proper context, the new instruction did not "assume the truth" of the State's case. It properly retained the position of the burden of proof by informing the jury it was an amendment to the complaint and advised the jury exactly where it was to apply.[5]

Second, trial counsel's earlier objection to the amendment was rejected. Thus, the only question that remained open was the wording of the instruction. Considering the nature of the supplementary amendment, how the presentation would be made to the jury was of secondary importance in terms of preserving an issue for appeal. Merely responding to the wording of the amendment rather than whether the amendment should have been made, to which counsel had previously objected, Lein's counsel did not perform deficiently. Having lost the dispute over the presentation of an amendment, all counsel agreed to was the wording which, in the context of the total supplementary instruction, was not improper.

C. Jurors.

He next claims his trial counsel failed to question prospective jurors for prejudice after they revealed police officer and prosecutor relatives. Of eight

[5] We note no argument was proffered on the content of the original instruction.

who were so connected, three were selected as jurors. He argues that despite the fact that the sole witness for the State was a Milwaukee police officer, trial counsel asked no specific questions of any of them. He asked only general questions of the panel as a whole and did not probe at all the element of prejudice. He asserts that asking questions of an inferentially negative nature such as: "is there anyone here who believes that more trust should be put in the testimony of a police officer [simply because he is a police officer?]" is not adequate. The weakness of his contention, as alluring as the argument may be, is that Lein fails to cite any authority for his position or demonstrate any presumption of prejudice largely because it is sheer speculation to presume the effect of abstaining from further inquiry about the significance of any relationship with a relative who is involved in law enforcement. In the final analysis, even postconviction counsel conceded he could prove no prejudice.

D. Evidentiary Hearing.

Last, Lein claims the trial court erred by failing to hold an evidentiary hearing on his motion for postconviction relief. Here, the trial court, in all but one of the claims, assumed the correctness of his claims of deficient performance. Nevertheless, it denied the claims because no prejudice had been demonstrated.

Recently, this court restated that "we may avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." ***State v. O'Brien***, 214 Wis.2d 328, 346, 572 N.W.2d 870, 878-79 (Ct. App. 1997), *review granted*, 217 Wis.2d 517, 580 N.W.2d 668 (1998). Standards governing a defendant's contention that the trial court should not have denied the request for a hearing on a postconviction motion were set forth in ***State v. Bentley***, 201 Wis.2d

303, 308-10, 548 N.W.2d 50, 52-53 (1996). A defendant is not entitled to an evidentiary hearing on a postconviction motion unless the motion alleges facts which, if proven, would entitle the defendant to relief. *See* ***id.*** at 310-11, 548 N.W.2d at 53. The trial court has the discretion to summarily deny the motion if: (1) the motion fails to allege sufficient facts to raise a question of fact: (2) the motion presents only conclusory allegations; or (3) the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***id.*** at 309-10, 548 N.W.2d at 53. It is only when the motion alleges sufficient facts which, if proven, would entitle the defendant to relief that the trial court does not have any discretion and must hold an evidentiary hearing. *See* ***id.*** at 310, 548 N.W.2d at 53.

Whether the motion alleges sufficient facts is a question of law that this court reviews independently. *See* ***id.*** When, however, the motion does not raise sufficient facts, the trial court's decision is reviewed under the erroneous exercise of discretion standard. *See* ***id.*** at 310-11, 548 N.W.2d at 53. This court deems that the same standards set forth also apply when a trial court orally entertains an offer of proof such as occurred here.

From this court's review of the motion transcript, this court concludes that Lein failed to set forth sufficient facts showing that the alleged instances of deficient conduct demonstrated any prejudice. Rather, the motion contains only conclusory allegations that prejudice resulted from the claimed deficient performance. Because the necessary element of prejudice has not been sufficiently demonstrated, the trial court did not erroneously exercise its discretion in denying a hearing.

By the Court.—Judgment and order affirmed.

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