

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 25, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2723-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMY WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Jimmy Williams appeals from judgments convicting him of forgery and theft, as a party to the crime, and two misdemeanors. He also appeals from an order denying postconviction relief. The convictions followed a jury's guilty verdicts. The issues are whether the trial court erred by refusing to order scientific tests on certain physical evidence; whether

Williams received effective assistance from counsel; whether he should receive a new trial based on newly discovered evidence; and whether he should receive a new trial in the interest of justice. We affirm.

¶2 The principal evidence against Williams consisted of testimony from two accomplices, Frederick Simms and Anita Freeman. Both testified that Williams masterminded the scheme. Freeman testified that Williams typed in the blank areas on stolen checks, and that another accomplice endorsed the checks.

¶3 In postconviction proceedings, the trial court denied Williams's motion to have the State crime lab perform handwriting and fingerprint analyses on the two checks in question. The court concluded that there was no need for handwriting analyses because it was never alleged that Williams wrote anything on the checks. The court also concluded that the checks had been handled by so many people that results of fingerprint analyses would not be reliable. The court further noted that due to the extensive handling, it would not exculpate Williams even if his fingerprints were not found on the checks.

¶4 The trial court also denied Williams's postconviction motion for a new trial based on ineffective assistance of counsel. Williams contended counsel was ineffective for failing to elicit clear and unequivocal testimony that Simms and Freeman were well acquainted with each other, failing to pursue an alibi defense that was available from Williams's ex-girlfriend, failing to exercise all of his peremptory jury strikes, and failing to obtain handwriting and fingerprint analyses of the checks.

¶5 Another issue in postconviction proceedings concerned a claim of newly discovered evidence. That evidence consisted of a witness offering testimony that Simms and Freeman had a grudge against Williams, and therefore

had a motive to falsely implicate him in their forgery scheme. Finally, Williams sought a new trial in the interest of justice on the grounds that the various errors and omissions in the proceeding prevented a full trial of the real controversy. The trial court denied relief on all grounds, resulting in this appeal.

¶6 The trial court properly denied counsel's request for handwriting and fingerprint analyses of the checks. A defendant has a right to postconviction discovery when the sought after evidence is such that had it been disclosed earlier there is a reasonable probability that the result of the proceeding would have been different. *State v. O'Brien*, 223 Wis. 2d 303, 320-21, 588 N.W.2d 8 (1999). However, evidence that Williams's handwriting did not appear on the checks would have changed nothing because neither Simms nor Freeman testified that Williams wrote on the checks. We also concur with the trial court's conclusion that fingerprint analyses of the checks would have minimally assisted Williams. The checks were handled by a number of people and there would have been several alternative explanations why analyses might not have revealed Williams's prints, assuming, *arguendo*, those were the results from the tests. The mere possibility that the evidence might have helped the defense is not sufficient. *See id.* at 321.

¶7 Williams failed to prove that his trial counsel was ineffective. To prove ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by the objective standard of what a reasonably competent attorney would do in similar circumstances. *Id.* at 636-37. Prejudice results when counsel's errors deprive the defendant of a fair trial with a reliable result. *Id.* at

640-41. Whether counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law. *Id.* at 634.

¶8 Here, Williams cannot fault counsel for failing to show that Freeman and Simms were well acquainted. Williams neither showed that counsel should have known of the alleged relationship, nor that the relationship actually existed. In ruling on the postconviction motions, the trial court expressly rejected the testimony that Simms and Freeman knew each other, and that credibility determination is not subject to review. *See Lessor v. Wangelin*, 221 Wis. 2d 659, 667, 586 N.W.2d 1 (Ct. App. 1998).

¶9 Williams also failed to prove that trial counsel knew or had reason to know of the potential alibi witness. Nor did he show that failure to present the alibi prejudiced him. The witness gave vague and uncertain testimony concerning the general or likely whereabouts of Williams during the month that the crime occurred. She gave no testimony as to Williams's whereabouts on the specific dates and times that other witnesses testified he performed criminal acts.

¶10 As for counsel's failure to pursue handwriting and fingerprint analyses of the checks, these omissions did not prejudice Williams for the reasons already discussed in this opinion. Additionally, counsel reasonably explained his tactical decision not to pursue tests that had little exculpatory value balanced against a high risk of incriminating Williams.

¶11 Finally, Williams did not show prejudice from counsel's failure to exercise all of his peremptory strikes. Williams's burden was to show a reasonable probability of a different result but for counsel's omission. *State v. Erickson*, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Williams did not meet this burden.

¶12 Furthermore, the trial court reasonably denied a new trial on newly discovered evidence. We apply the erroneous exercise of discretion standard to a court's decision not to grant a new trial. *State v. Kaster*, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). To grant a new trial, a trial court must conclude, among other things, that the new evidence has a reasonable probability of producing a different result. *Id.* Here, Williams presented testimony from a prison acquaintance, Marshall McKnight. He testified that he knew Simms and Freeman and described an incident during which they planned to physically attack Williams because of his conduct toward the daughter of their friend. Freeman, however, had rebutted McKnight's testimony and denied knowing Simms. The trial court believed Freeman's testimony and expressly rejected the cellmate's story, which it characterized as "incredible." Consequently, the court reasonably determined that a jury probably would not acquit Williams if McKnight testified at a new trial.

¶13 And finally Williams is not entitled to a new trial in the interest of justice. The matter was fully and fairly tried, without prejudicial error. There is no reasonable probability of a different result on retrial.

By the Court.—Judgments and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5. (1999-2000).

