

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 20, 2002

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.

Appeal No. 01-3465-CR

Cir. Ct. No. 99-CF-79

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEYONTA T. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Keyonta T. Williams appeals from a judgment of conviction of party to the crime of armed robbery and from an order denying his postconviction motion alleging that trial counsel was ineffective. He argues that trial counsel was ineffective because after receiving information that head injuries impaired Williams's cognitive functioning, the possibility of entry of a plea of not

guilty by reason of mental disease or defect (NGI) never crossed counsel's mind. We affirm the judgment and order based on the trial court's finding that trial counsel's conduct was not deficient and because Williams failed to prove his defense was prejudiced by the failure to pursue an NGI defense.

¶2 Williams was charged for taking cash and the coat of a sixteen-year-old at gunpoint. Williams and his cousin were later identified from photo arrays. Williams offered an alibi defense at trial. He testified that he was at his girlfriend's house at the time of the reported robbery. The jury found Williams guilty.

¶3 The presentence investigation report (PSI) indicated that in his youth Williams suffered head injuries which may have caused organic deficits and cognitive dysfunction affecting his behavioral patterns. In the hope of mitigating circumstances of the offense, trial counsel had Williams evaluated by a psychologist. The evaluator testified at sentencing that Williams suffers impairment of cognitive processing which involves abstract thinking, logical analysis, and the ability to establish learning patterns from life experiences. Williams was characterized as being very impulsive, having impaired judgment and being gullible to follow the suggestions of others without thinking about the potential consequences.

¶4 A motion for postconviction relief alleged that trial counsel was ineffective for not investigating or pursuing an NGI defense once counsel learned that Williams's cognitive thinking was impaired. Williams did not seek a new trial on the finding of guilt but asked that an NGI defense be presented to a jury. Trial counsel testified that he was aware before trial that Williams had suffered a head injury as a child, but not until counsel reviewed the PSI did he think of

having Williams evaluated. Counsel indicated that after reading the evaluation and speaking with the evaluator, “the thought of an NGI plea did not cross my mind.”

¶5 The trial court concluded that trial counsel acted reasonably in not further investigating a possible NGI defense. The court found that both before and after counsel received further information from the PSI and evaluation, counsel did not see a reason to enter an NGI plea. Based on counsel’s communications with Williams in preparation for trial and formulation of the alibi defense, counsel believed that Williams understood the criminal justice system and the wrongfulness of his behavior. The court also concluded that the evaluation did not establish the necessity of entering an NGI defense. Postconviction relief was denied.

¶6 A claim of ineffective assistance of trial counsel requires that the defendant demonstrate deficient performance and prejudice. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997).

The test for deficient performance is whether counsel’s representation fell below objective standards of reasonableness. In applying this test, we inquire whether, under the circumstances, counsel’s acts or omissions were outside the wide range of professionally competent assistance. Trial counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment. We also must be careful to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.

As to prejudice, the 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.

What occurred at the trial level and what the attorney did or did not do are questions of historical or evidentiary fact. We will not upset the trial court's findings about these matters unless they are clearly erroneous. However, the ultimate conclusion of whether the attorney's conduct resulted in a violation of the defendant's right to effective assistance presents a legal question which we review de novo.

State v. Byrge, 225 Wis. 2d 702, 719, 594 N.W.2d 388 (Ct. App. 1999) (citations omitted), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477.

¶7 We conclude that Williams has failed to satisfy both prongs of the ineffective assistance test. Trial counsel's failure to investigate an NGI defense before trial or prior to sentencing was not unreasonable based on counsel's extensive communications with Williams. Nothing in conversations with Williams and the formulation of the alibi defense caused counsel to question whether Williams was incapable of understanding the wrongfulness of his conduct. Counsel was aware of Williams's prior record and that an NGI defense had not been used in his prior criminal cases. Further, nothing suggests that counsel should interpret a mere low level of intellectual ability or a defendant's emotional and social problems as indicators of a possible NGI defense.

¶8 Even if counsel's performance was deficient, Williams must affirmatively prove prejudice. *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). A defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Williams has not met his burden because he did not establish that an NGI defense existed.

¶9 The evaluator's report and testimony do not establish grounds for an NGI defense. All they show is that Williams's impaired functioning contributed

to his criminal and antisocial behavior. This conclusion does not begin to approach the required proof under WIS. STAT. § 971.15(1), that at the time of the crime Williams lacked “substantial capacity either to appreciate the wrongfulness of his ... conduct or conform his ... conduct to the requirements of the law.”

¶10 We conclude that Williams was not denied the effective assistance of trial counsel. Not only was there no reason for counsel to believe that investigation of an NGI defense was necessary, Williams has not shown prejudice by proof that an NGI defense was viable.

By the Court.—Judgment and order affirmed.

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

