COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0020-CR **Cir. Ct. No. 98 CF 3770**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHURON C. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER and ROBERT CRAWFORD, Judges.[1] *Affirmed*.

Before Fine, Schudson and Curley, JJ.

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[1] The Honorable Jeffrey A. Wagner issued the judgment of conviction and order denying Davis's March 1, 2000, postconviction motion. The Honorable Robert Crawford issued the order denying Davis's November 1, 2001, postconviction motion.

¶1 PER CURIAM. Shuron C. Davis appeals from a judgment of conviction entered after a jury found him guilty of one count of first-degree intentional homicide with the use of a dangerous weapon and three counts of first-degree recklessly endangering safety with the use of a dangerous weapon. *See* WIS. STAT. §§ 940.01(1), 939.63(1)(a)2, and 941.30(1) (1997–98).[2] He also appeals from orders denying his postconviction motions. Davis claims that: (1) his trial counsel was ineffective when he advised him not to testify at trial; (2) the trial court erred when it denied his ineffective-assistance-of-counsel claim without conducting a ***Machner*** hearing; and (3) the trial court erroneously exercised its discretion when it denied his request for new counsel.[3] We affirm.

I.

¶2 Shuron C. Davis was tried for shooting and killing Reginald Jenkins. Jenkins was shot while he was the passenger in Rueben Spencer's car. At trial, Spencer testified that on the night of the shooting he, Jenkins, and two other friends were "rid[ing] around." As Spencer stopped at a red stop light, two men, who were later identified as Davis and Duran Hills, pulled up in a blue Mustang. Spencer testified that Davis and Hills were looking into his car and he asked, "Do you know somebody in this car?" According to Spencer, Hills said, "What, motherfucker?" and told Spencer to pull over.

¶3 Spencer drove away when the light turned green. According to Spencer, Davis and Hills were following his car when he heard gunshots. Spencer

[2] All references to the Wisconsin Statutes are to the 1997–98 version unless otherwise noted.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

testified that someone in his car then told him that Jenkins was shot, so he drove to get help. On the way to the hospital, Spencer saw a fire truck and told the firefighters that his friend had been shot. Several firefighters tried to resuscitate Jenkins but were unsuccessful. Jenkins died as a result of gunshot wounds.

¶4 Davis's account of the shooting is contained in a statement that he made to the police. Davis claimed that he and Hills were driving around in Hills's car trying to sell Davis's AK-47 rifle. According to Davis's statement, four men in a blue car began to "chase" Hills's car after Hills and someone in the other car exchanged "some words." Davis claimed that he pulled his AK-47 rifle out of the backseat of the car because he thought the men in the other car had guns. According to the statement, Davis was beginning to point the rifle out the passenger window of Hills's car when it "accidentally fired." Davis claimed that he then aimed at "the lower part of the car" and "fired about three times."

¶5 Davis's trial was scheduled to begin on November 16, 1998. On October 29, 1998, approximately three weeks before trial, Davis sent a letter to the trial court requesting new counsel. The trial court held a status conference on November 4, 1998. At the conference, Davis told the trial court:

> What I said in the letter was, I need new representation.
>
> I need another lawyer for the simple fact -- for the simple fact, I have no police report, no discoveries [sic], I never had a visit from [my attorney] or the investigation haven't [sic] been done on my case.
>
> I have no idea what's going on in this case at all.

Davis also told the trial court that his family was in the process of retaining a new attorney. Davis's counsel told the trial court that he was not ready for trial because "there should have been an investigation made by an investigator … [a]nd

I don't think the family has money to do that." The trial court thus indicated that it would sign an order to expedite the hiring of a private investigator. The trial court also scheduled another status conference and told Davis to "[b]ring the other lawyer."

¶6 At the second status conference, held on November 9, 1998, Davis again informed the court that he wanted new counsel. He told the trial court that his attorney was "in violation of S.C.R. rules," which he had reported to "the Board of … um, Professional Responsibility." Davis told the court, "he's already under investigation for, um, lack of diligence and incompetence." Davis, however, did not present a new attorney to the court. Davis also told the trial court that he did not cooperate with the public defender's office when it contacted him to determine if he was eligible for assistance: "I'm not willing to accept the Public Defender. My family is going to get me a lawyer that I want." The trial court ordered a third status conference and again told Davis to have his new attorney appear.

¶7 At the third status conference, held on November 11, 1998, Davis indicated that he would cooperate with the public defender's office. The trial court held two more status conferences on November 12, 1998, and November 16, 1998. At the November 16 conference, held three days before the new trial date, November 19, 1998, the trial court ruled that Davis's counsel would not be allowed to withdraw: "[A]t this point [whether or not Davis is to be represented by a public defender is] kind of moot because the Court's not -- is not allowing you [Davis's counsel] to withdraw."

¶8 Davis did not testify at trial. His statement was introduced, however, through the testimony of the police officer who interviewed him. The

jury found Davis guilty on all charges and the trial court sentenced him to life in prison on the homicide charge and five years in prison for each count of recklessly endangering safety, to run consecutive to each other and the life sentence.

¶9 Davis filed two postconviction motions.[4] In his first motion, he claimed that his trial counsel was ineffective because he advised him not to testify at trial. Specifically, Davis appears to have claimed that he was prejudiced as a result of his failure to testify because the jury did not hear "evidence" that he acted in self-defense. The trial court denied the motion, concluding that Davis had waived his right to testify "freely and voluntarily, … after consultation with his lawyer." The trial court also concluded that "there's nothing in the record that … would warrant a [***Machner***] hearing."

¶10 In his second postconviction motion, Davis alleged that the trial court erred when it denied his request for new counsel. The postconviction court denied the motion:

> The circuit judge conducted five status hearings in the weeks before trial to inquire into Mr. Davis's complaints about his privately-retained attorney. The circuit judge arranged to have the State Public Defender interview Mr. Davis so that a specialist might represent him from the public defender's homicide practice group. Mr. Davis did not cooperate during the public defender's first effort. The circuit judge then appointed an investigator at county expense so that Mr. Davis's privately-retained

[4] Davis appealed from the first postconviction motion. Davis's appellate counsel moved to remand the case to the trial court because he determined that an issue of potential merit was not raised in the postconviction motion. We treated his request as a voluntary dismissal of the appeal and ordered Davis to file a new postconviction motion with the trial court. Davis filed a second postconviction motion and appealed after the motion was denied. Both postconviction motions are now properly before us. *See* WIS. STAT. RULE 809.10(4) ("An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.").

> attorney had access to any necessary investigative services. Throughout this process, the prosecutor expressed concern that Mr. Davis was manipulating the legal system and that delays might result in prosecution witnesses being lost.
>
> The circuit judge's denial of the request to withdraw by the privately-retained attorney was not an [erroneous exercise] of discretion.

II.

A. *Ineffective Assistance of Counsel*

¶11 Davis first claims that the trial court erred when it denied his ineffective-assistance-of-counsel claim without a ***Machner*** hearing.[5] The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶12 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. To succeed, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors,

[5] Davis also claims that the trial court "erred when it decided that [he] had not received the ineffective assistance of counsel." (Uppercasing omitted.) A ***Machner*** hearing, however, is a prerequisite to granting relief on an ineffective-assistance-of-counsel claim. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554–555, 582 N.W.2d 409, 410 (Ct. App. 1998). Thus, we only address whether a ***Machner*** hearing was warranted.

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.

¶13 Our standard for reviewing an ineffective-assistance-of-counsel claim involves a mixed question of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, are questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. We need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶14 A trial court must hold a ***Machner*** hearing if the defendant alleges facts which, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53. If, however, "'the defendant fails to allege sufficient facts in his [or her] motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Id.***, 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (quoted source omitted).

¶15 Davis alleges that his trial counsel was ineffective for advising him not to testify because his "version of [the] events" would have "persuade[d]" the jury that he acted in self-defense. Thus, Davis claims that the trial court erroneously exercised its discretion when it denied his claim without a ***Machner*** hearing because "such a hearing would have made it possible to explore the facts

behind trial counsel's alleged deficient performance." Davis's claim fails for two reasons.

¶16 First, Davis's allegation that his trial counsel was ineffective is conclusory and undeveloped. Other than presenting his self-serving claim, Davis does not allege, let alone show, how his attorney acted improperly. As noted above, he simply claims that a ***Machner*** hearing is warranted because "such a hearing would have made it possible to explore the facts behind trial counsel's alleged deficient performance." Davis misinterprets the showing required for a ***Machner*** hearing. To obtain a ***Machner*** hearing, a defendant must allege sufficient facts to establish that his trial counsel's performance was deficient and that the deficient performance was prejudicial. ***Bentley***, 201 Wis. 2d at 309–310, 548 N.W.2d at 53. A defendant cannot make conclusory allegations hoping to supplement them at a later hearing. *See* ***Levesque v. State***, 63 Wis. 2d 412, 421, 217 N.W.2d 317, 322 (1974). Thus, Davis's claim fails because he does not make the threshold allegation necessary for a ***Machner*** hearing—he does not allege sufficient facts to establish that his counsel performed deficiently.

¶17 Second, the record demonstrates that Davis's decision not to testify was voluntary. *See* ***State v. Simpson***, 185 Wis. 2d 772, 778–780, 519 N.W.2d 662, 663–664 (Ct. App. 1994) (record as a whole showed that defendant knowingly and voluntarily waived right to testify). At trial, the trial court had the following colloquy with Davis regarding that decision:

> THE COURT: Defendant's not going to testify?
>
> [DAVIS'S COUNSEL]: No.
>
> THE COURT: And, sir, that's a choice that you're making yourself?
>
> [DAVIS]: Yeah.

> THE COURT: And you've discussed that with your lawyer -- lawyer; is that correct?
>
> [DAVIS]: Yeah.
>
> ….
>
> THE COURT: So it's my understanding that you're voluntarily and knowingly choosing not to testify; is that correct? That -- you have to -- all you have to do is say yes or no.
>
> [DAVIS]: Yes.

The trial court also had the following colloquy with Davis's counsel:

> THE COURT: And you've talked to your client about, um, the pros and cons of testifying?
>
> [DAVIS'S COUNSEL]: Yes, I have.
>
> THE COURT: And, um, it's his decision then not to testify; is that correct?
>
> [DAVIS'S COUNSEL]: That's his decision and my decision, Judge.

The trial court properly denied Davis's motion without a ***Machner*** hearing.

B. *Request for New Counsel*

¶18 Davis also claims that the trial court erroneously exercised its discretion when it denied his request for new counsel. A defendant's request for the appointment of new counsel is addressed to the sound discretion of the trial court. ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89, 90 (1988). We will not reverse a trial court's discretionary determination if the trial court examined the facts, applied the proper legal standard, and reached a reasonable determination. ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879, 883 (1994). In evaluating a trial court's denial of a request for new counsel, we consider: (1) the adequacy of the trial court's inquiry into the

defendant's complaint; (2) the timeliness of the defendant's request; and (3) whether the alleged conflict between the defendant and counsel was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case. ***Lomax***, 146 Wis. 2d at 359, 432 N.W.2d at 90. Davis's claim fails on all three prongs.

¶19 First, Davis claims that the trial court erroneously exercised its discretion because it "never made an adequate inquiry into [his] request." We disagree. The record shows that the trial court inquired extensively into Davis's complaint. The trial court held at least five pretrial conferences on the issue.[6] Moreover, the trial court was aware that Davis was unhappy with his counsel because, in Davis's own words: "I have no police report, no discoveries [sic], I never had a visit from [my attorney] or the investigation haven't [sic] been done on my case. I have no idea what's going on in this case at all." Davis also told the trial court that he wanted a new attorney because his then-current attorney was allegedly incompetent, a "liar," and did not represent his best interests. Thus, the trial court made a more than adequate inquiry into Davis's complaint—Davis was given an ample opportunity to explain why he was not satisfied with his attorney and the trial court was well aware of the reasons why Davis wanted new counsel.

¶20 Second, Davis alleges that the trial court erroneously exercised its discretion because his request for new counsel was timely. He claims that his request was not "an eleventh hour request" because he informed the trial court that he wanted another attorney almost three weeks before trial. We disagree. The

[6] Five status conferences were held on the record. A sixth status conference was not recorded.

trial court twice gave Davis the opportunity to present new counsel at a status conference. Davis did not do so. Moreover, Davis refused to consider public defender representation until five days before the original trial date. Thus, contrary to Davis's assertion, his request for new counsel was not timely—Davis delayed the appointment of new counsel until mere days before his trial was originally scheduled to begin. *See* ***id.***, 146 Wis. 2d at 361–362, 432 N.W.2d at 91 ("Eleventh-hour requests are generally frowned upon as a mere tactic to delay the trial…. [T]he trial judge may have had a good reason to protect his [or her] calendar and the time set aside for a trial.").

¶21 Finally, Davis claims that the trial court erroneously exercised its discretion because there was no communication between Davis and his attorney. But he does not specify what any additional communication would have produced; he has not pointed to anything that his lawyer should have done or not done that flowed from the alleged failure of the lawyer to discuss the case with Davis as often as Davis would have liked. Indeed, at the first status conference, Davis's counsel told the trial court that he appeared in court three times, talked to Davis three times while Davis was in jail, and talked to Davis's family about hiring a private investigator. Additionally, at the final status conference, Davis's attorney indicated that he was ready to proceed to trial. Davis does not point us to anything, other than his mere assertion, that his attorney did not adequately communicate with him or was unprepared for trial. The trial court properly exercised its discretion when it denied Davis's request for new counsel.

By the Court.—Judgment and orders affirmed.

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