

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 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. 02-0326-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-721

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HERSCHEL KNIGHTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Herschel Knighton appeals from the judgment of conviction entered against him and from the order denying his motion for postconviction relief. The issue on appeal is whether Knighton received ineffective assistance of trial counsel. Because we conclude that trial counsel was not ineffective, we affirm.

¶2 Knighton was charged with one count of delivery of cocaine as a repeater and one count alleging a stamp tax violation. At his trial, the only witness who testified for the State was the undercover officer who bought cocaine from Knighton. The jury convicted Knighton and the court sentenced him to a total of nine years in prison. Knighton subsequently brought a motion for postconviction relief alleging that he received ineffective assistance of trial counsel. Specifically, Knighton alleged that his trial counsel was ineffective because he did not object to the undercover officer testifying that the drugs were cocaine. Defense counsel did not cross-examine the officer on this issue and did not challenge the officer's expertise. The circuit court denied the motion for postconviction relief after a hearing. The court concluded that counsel had not cross-examined or challenged the officer as a matter of a reasonable trial strategy.

¶3 Knighton argues on appeal that counsel was ineffective because he, in effect, waived the requirement that the State prove each element of the offense without Knighton's consent. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *See id.* at 697. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citations omitted).

¶4 We conclude that counsel's decision not to cross-examine or challenge the officer's testimony about the cocaine was a reasonable trial strategy

and did not constitute a waiver of Knighton's right to a jury trial on each element of the offense. Counsel testified that the theory of the defense was to create a reasonable doubt that Knighton had sold the cocaine. Counsel stated that he attempted to "highlight the fact that the officer could have done more to present more evidence against Mr. Knighton."

¶5 There was no serious doubt that the evidence was cocaine. Had counsel challenged the officer on the introduction of the crime lab report, the State simply would have called the crime lab analyst. The evidence would have been allowed through the analyst but the jury would have heard even more testimony about the cocaine. Counsel stated that he thought "the more the word 'cocaine' was repeated in front of the jury, the more it was going to prejudice Mr. Knighton." We agree that this was a reasonable trial strategy.

¶6 Knighton also asserts that counsel was ineffective for failing to challenge the chain of custody of the cocaine. Again, however, challenging the chain of custody would have given rise to the same problems created by challenging the introduction of the crime lab report. The decision not to do so was a reasonable strategic decision. Knighton has not established that this was deficient performance nor that he was prejudiced by it. We affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

