COURT OF APPEALS DECISION DATED AND FILED

September 10, 2003

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. 02-1099

Cir. Ct. No. 97-CF-826

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVON'TRE L. COTTINGHAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. DeVon'tre L. Cottingham appeals pro se from an order denying his motion under WIS. STAT. § 974.06 (2001-02),[1] alleging that he

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

was denied the effective assistance of trial counsel. He argues that counsel should have been appointed to represent him at the evidentiary motion hearing, that trial counsel failed to argue that party to a crime liability was not proven because intentional homicide was not a natural and probable consequence of armed robbery, that counsel erroneously advised him that if he testified he would have to admit to only one prior felony conviction, and that counsel prejudiced the defense by disclosing to the jury that he was on probation at the time of the crime. We conclude that Cottingham was not denied the effective assistance of trial counsel and affirm the order denying his motion for further postconviction relief.

¶2 Two occupants of the vehicle Cottingham was driving exited to rob a man on the street. The robbers brandished a sawed-off shotgun belonging to Cottingham and the victim was shot in the abdomen during the robbery. Cottingham was convicted as a party to the crime of armed robbery and attempted first-degree intentional homicide. He appealed his conviction pro se and it was summarily affirmed. ***State v. Cottingham***, No. 99-0537-CR, unpublished slip op. (WI App Apr. 19, 2000).

¶3 Cottingham filed a pro se motion for postconviction relief under WIS. STAT. § 974.06. He requested the appointment of counsel for representation at the evidentiary hearing. The request for counsel was denied and the hearing was conducted with trial counsel testifying telephonically. The motion for postconviction relief was denied.

¶4 We first address Cottingham's claim that the trial court erroneously exercised its discretion in not appointing counsel as authorized by WIS. STAT.

§ 974.06(3)(b).[2] While the State correctly points out that Cottingham had no constitutional right to counsel in a postconviction proceeding under § 974.06, *see* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 649, 579 N.W.2d 698 (1998), the State otherwise fails to respond to Cottingham's claim that the trial court should have exercised its discretion to appoint counsel. This is particularly troublesome because the trial court's rationale for denying Cottingham's request for the appointment of counsel was not stated on the record at the evidentiary hearing.[3] When faced with an inadequate record on a discretionary determination, this court is obliged to uphold a discretionary determination if it can independently conclude that the facts of record applied to the proper legal standard support the trial court's decision. *See* ***Stephanie R.N. v. Wendy L.D.***, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993); ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983). "We may independently search the record to determine whether it provides a basis for the trial court's unexpressed exercise of discretion." ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 78, 443 N.W.2d 50 (Ct. App. 1989). We look for reasons to sustain discretionary decisions. ***Prosser v. Cook***, 185 Wis. 2d 745, 753, 519 N.W.2d 649 (Ct. App. 1994).

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[2] WISCONSIN STAT. § 974.06(3)(b) provides, in part, that unless the motion, files and records of the action conclusively show that the person is entitled to no relief, the court shall: " If it appears that counsel is necessary and if the defendant claims or appears to be indigent, refer the person to the state public defender for an indigency determination and appointment of counsel under ch. 977."

[3] When pressed for a formal ruling on Cottingham's request for counsel, the trial court made reference to having denied the request "several times in the past." We note that several times the motion hearing was called and adjourned. Transcripts of those brief hearings are not part of the record. Appellants have the burden to provide an appellate record sufficient to review the issues they raise on appeal. ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). Given an incomplete record, we will assume that it supports every fact essential to sustain a trial court's exercise of discretion. ***Id.***

¶5 Counsel may be appointed for an indigent litigant when the court concludes, in the exercise of its discretion, that the "necessities of the case" and "public justice and sound policy" require it. *See* ***State v. Dean***, 163 Wis. 2d 503, 515-16, 471 N.W.2d 310 (Ct. App. 1991). Counsel may be appointed not necessarily as a matter of fairness to the litigant but in the interest of the court itself. ***Roberta Jo W. v. Leroy W.***, 218 Wis. 2d 225, 240, 578 N.W.2d 185 (1998). Here Cottingham advanced a claim that trial counsel was ineffective. The claim was one trial courts often hear and is not so complex that Cottingham's pro se representation hampered the trial court's ability to comprehend his claims or decide them. While Cottingham may have felt inept in his examination of trial counsel, the record suggests otherwise. Indeed, the trial court commended Cottingham on the artful presentation of his claims. Nothing suggests that appointed counsel was necessary to elicit testimony relevant to the issues. We conclude that the trial court did not erroneously exercise its discretion in denying Cottingham counsel at the evidentiary hearing.

¶6 Our standard of review on a claim of ineffective assistance of counsel is summarized in ***State v. Byrge***, 225 Wis. 2d 702, 719, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477 (citations omitted):

> 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.

¶7 Cottingham first argues that trial counsel failed to argue that attempted intentional homicide was not the natural and probable consequence of the armed robbery and therefore Cottingham had no party to the crime liability on the attempt charge. However, Cottingham was not prejudiced by counsel's failure to articulate that precise argument. As a matter of law no reasonable jury could conclude that attempted homicide was not the natural and probable consequence of brandishing a shotgun during a robbery. *See* ***State v. Oimen***, 184 Wis. 2d 423, 441, 516 N.W.2d 399 (1994) (death is a natural and probable consequence of the felony of armed robbery). Moreover, counsel acknowledged that the theory of defense was the failure of proof by the prosecution and to demonstrate that Cottingham did not have any direct involvement or knowledge that the crime was going to take place. Counsel argued during opening and closing statements that Cottingham was unaware of what his companions were doing and that they had removed the shotgun from the back of the car. This was effective presentation of the viable theory of defense.

¶8 Next, Cottingham explains that the defense theory was based on his intent to testify and that trial counsel informed the jury that he would testify. He claims that trial counsel wrongly informed him that if he testified, he would have

to admit to only one prior adult felony conviction. *See* WIS. STAT. § 906.09(1). He contends he learned for the first time at trial that in addition to his one adult conviction, he would have to admit to four juvenile adjudications for an admission of five prior convictions. He argues that he elected not to testify in light of that information and his defense was prejudiced because the jury expected him to testify.

¶9 When the question of whether Cottingham would testify came up at trial, trial counsel indicated that Cottingham had a prior offense. The prosecution immediately interjected that there were five prior offenses. Counsel acknowledged that some juvenile adjudications existed and that she advised Cottingham that his credibility could be impeached with that information. The prosecution explained what the prior offenses were and the trial court advised Cottingham that if he testified, he would have to admit to five prior convictions. Cottingham expressed his desire to testify. Then after a brief recess, trial counsel informed the court that upon further discussion Cottingham elected not to testify. Trial counsel testified at the postconviction motion hearing that she had advised Cottingham that any of his prior convictions could be used to impeach him but that the prosecution was precluded from going into the specific crimes. Counsel indicated that there was disagreement on the number of convictions.

¶10 The trial court found that Cottingham was "advised properly." It is not clear if the trial court found that from the start trial counsel had properly advised Cottingham that he would have to admit his juvenile adjudications or if he was just properly advised during trial when he elected not to testify. The lack of clarity in the trial court's finding is of no consequence. Even if trial counsel gave Cottingham incorrect advice prior to trial as to the number of convictions he would have to admit to, Cottingham was not prejudiced. At trial the matter was

decided and Cottingham's decision to not testify was based on correct information. Nothing in the record supports Cottingham's contention that his decision not to testify was based on information that he would have to admit to five prior convictions. Cottingham did not mention the "new" information during his colloquy with the court about waiving his right to testify. As trial counsel explained at the postconviction hearing, Cottingham could also have been impeached by prior statements he gave to the police in which he admitted that all three men had decided to rob the victim. It is possible that upon further reflection the potential admission of his statements to police was the driving force behind Cottingham's decision not to testify.

¶11 Additionally, as the trial court noted, Cottingham benefited from having the trial proceed as if he were going to testify. In his opening statement Cottingham got to present his side of the story. Thus, the jury heard his version but Cottingham was not actually subject to cross-examination or impeachment. Although the jury was instructed that the opening arguments were not evidence, it was also advised not to draw any negative inference from Cottingham's decision not to testify. The jury was not, as Cottingham suggests, left hanging when he did not testify. We conclude that Cottingham was not prejudiced by counsel's advice about whether he should testify.

¶12 Finally, Cottingham argues that trial counsel was ineffective for telling the jury he was on probation at the time of the crime. Trial counsel explained that she revealed to the jury that Cottingham was on probation in order to explain why he ran from police when they came to arrest him. Counsel wanted the jury to know that Cottingham ran because he was on probation and in violation of his curfew and not because of his involvement in the robbery and shooting. Counsel indicated that it was a matter of trial strategy in light of Cottingham's

desire to testify and his intent to explain why he ran from police. We disapprove of second-guessing trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Again, Cottingham was not prejudiced by giving the jury a less incriminating explanation for his flight from police under circumstances which did not subject him to cross-examination. Cottingham was not denied the effective assistance of trial counsel.

By the Court.—Order affirmed.

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