COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2234-CR **Cir. Ct. No. 00CF002966**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE S. SOTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Jose S. Soto appeals from a judgment entered after a jury found him guilty of first-degree intentional homicide for the fatal shooting of Hector Rodriguez. Soto also appeals from a postconviction order denying his claim that newly discovered evidence required a new trial. Soto claims: (1) the trial court erred in denying his postconviction motion; (2) he received ineffective

assistance of trial counsel; (3) the trial court erred in ordering his trial counsel not to disclose addresses of State witnesses to Soto; and (4) the trial court should have suppressed letters he wrote while being held, pretrial, at the Waupun Correctional Institution, which were intercepted by prison officials. Because the trial court did not err in denying the newly discovered evidence motion, because Soto's trial counsel provided effective assistance, because there was no error in limiting the disclosure as to the State's witnesses' personal information, and because the trial court did not err in denying Soto's suppression motion, we affirm.

I. BACKGROUND

¶2 On June 8, 2000, Hector Rodriguez was shot and killed in the lobby of an apartment building at 3014 West Pierce Street, Milwaukee, Wisconsin. A complaint charging Soto with first-degree intentional homicide, together with a warrant for his arrest, were issued. Soto was arrested by Houston, Texas police on the homicide warrant. City of Milwaukee Police Detectives Gregory Schuler and Matthew Quist traveled to Houston to interview Soto. Soto admitted his involvement in Rodriguez's death and signed a written statement to that effect. He was extradited to Milwaukee and was housed at the Waupun Correctional Institution because authorities felt he was too great a security risk to be kept in the county jail. While at Waupun, several of his letters were intercepted by the prison's gang intelligence unit and forwarded to the Milwaukee County District Attorney. The letters addressed a number of issues, including attempting to bribe a witness into saying someone else committed the murder, threatening to kill a witness if she testified, and asking a fellow gang member, Hipolito Claudio, who was also incarcerated, to admit that Claudio committed the murder. Soto moved to suppress the intercepted letters, but his motion was denied. The letters were never used at trial.

¶3 Trial was set for May 7, 2001; however, the trial court permitted Michael Fitzgerald to substitute as attorney for Soto. Accordingly, the trial date was postponed. Fitzgerald represented Soto at the suppression hearing, at which Soto alleged that his confession was coerced and should have been suppressed. The trial court denied the motion and the jury trial began on June 4, 2001.

¶4 On the second day of trial, Fitzgerald moved to withdraw as counsel because he discovered that he had represented the victim's brother five years earlier on a drug charge. Soto refused to waive the potential conflict of interest. The trial court allowed Fitzgerald to withdraw and declared a mistrial. Attorney Mark Richards was allowed to substitute in as Soto's counsel and a new trial commenced on July 23, 2001.

¶5 The jury found Soto guilty and he was sentenced to life in prison. Soto filed a postconviction motion alleging newly discovered evidence and ineffective assistance of trial counsel. The trial court summarily denied the motions in a written order. Soto now appeals.

II. DISCUSSION

A. Newly Discovered Evidence.

¶6 Soto claims the trial court erred in denying his postconviction motion alleging newly discovered evidence without conducting an evidentiary hearing. He also argues that, based on the newly discovered evidence, he is entitled to a new trial. We reject his arguments.

¶7 There are strict requirements which must be proven by clear and convincing evidence in order for a convicted defendant to receive a new trial based on newly discovered evidence. The defendant must show that: "(1) the

evidence was discovered after conviction; (2) the defendant was not negligent in seeking to discover it; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the testimony introduced at trial; and (5) it is reasonably probable that, with the evidence, a different result would be reached at a new trial." ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999). The standard of review for a motion based on newly discovered evidence is whether the trial court erroneously exercised its discretion. *See* ***State v. Brunton***, 203 Wis. 2d 195, 201-02, 552 N.W.2d 452 (Ct. App. 1996).

¶8 Here, the alleged newly discovered evidence is presented in affidavits from five individuals. James Saldana's affidavit states that one of the State's trial witnesses, "Awilda Ortiz," admitted to Saldana that she lied during her testimony because she did not know anything about the homicide. Awilda told Saldana that the only reason she testified for the State was because the police were threatening her with life in prison if she refused to testify.

¶9 The second affidavit was from Ricky Ortiz, Awilda's brother. He too states that Awilda told him she was forced to lie when giving a statement to the police and that she was threatened with life in prison. The third affidavit was from Lestencia Vallejo, who claims that another State trial witness, Elva Carmona, told him that the police said, "it was either me or [Soto] who was going to be charged" and that Carmona said, "it wasn't gonna be me."

¶10 The fourth affidavit was from David Claudio, who claims that he actually shot Rodriguez after the two got into an argument over a drug debt. The fifth affiant was John Griffin, who stated that he heard two gunshots and shortly thereafter saw Claudio leave the Wingate Towers apartment building, where Rodriquez was shot.

¶11 The trial court concluded that Saldana's and Ricky Ortiz's affidavits did not satisfy the fifth element of the newly discovered evidence test—that is, even if Awilda's statements about lying were true, there is no reasonable probability of a different outcome after a new trial. We agree. Although Awilda testified for the State, her testimony was not critical to conviction. She was not present in the lobby with Soto and Rodriguez when Rodriguez was shot. The State offered the credible testimony of Carmona, who was an eyewitness to the shooting itself. Further, Awilda was thoroughly examined at trial as to whether she was offering biased testimony. Thus, we agree with the trial court that Awilda's statements to Saldana and Ricky do not satisfy the standards necessary to obtain a new trial based on newly discovered evidence.

¶12 Next, the trial court rejected the Vallejo affidavit as containing newly discovered evidence because, although he avers that Carmona said police told her "it was either me or [Soto]," Vallejo does not say that Carmona lied as a result of the police statement. There is nothing in Vallejo's affidavit indicating that Carmona's eyewitness testimony was false because of pressure from police or that she is recanting her trial testimony. In fact, Carmona was questioned about her motive for testifying. It is clear that at the time of trial, Carmona knew she would be prosecuted if she did not cooperate. The jury was able to properly assess this.

¶13 Moreover, there were additional State witnesses who testified as to details that support Soto was the killer and not David Claudio. Michelle Rasmussen, a friend of Soto, testified that on the evening of the homicide, Soto asked her to hold a gun for him, that he told her he just killed somebody—"shot him in the head"—and that she watched Soto break the gun and throw the pieces

in the river. None of the newly discovered evidence explains away the Rasmussen testimony.

¶14 Finally, the trial court rejected the affidavits offered by David Claudio and Griffin which supported the theory that Claudio was actually the perpetrator. The trial court concluded that Claudio's affidavit was insufficient to satisfy the definition of newly discovered evidence because Claudio failed to allege that this information was not discovered until *after* the trial. Thus, Claudio's affidavit does not constitute newly discovered evidence. Because Claudio's affidavit fails the test, Griffin's affidavit corroborating Claudio's affidavit is insufficient to justify a new trial. Given the incriminating and credible testimony of eyewitnesses Carmona and Rasmussen, Griffin's testimony would not have altered the outcome of this trial.

¶15 In addition, both Claudio's and Griffin's affidavits were inconsistent with the facts presented in the other three affidavits and completely contradictory to the eyewitness accounts and the Rasmussen testimony. Based on the foregoing, we conclude the trial court did not err in summarily denying Soto's motion alleging the existence of newly discovered evidence. None of the allegedly new evidence satisfied the legal test outlined above. Accordingly, we affirm the trial court's decision.

B. Ineffective Assistance of Counsel.

¶16 Soto claims he received ineffective assistance of counsel. He provides two instances for this court to review. First, he claims that Richards, his trial counsel appointed after Fitzgerald raised the issue of potential conflict of

interest, was deficient for failing to move for a new ***Miranda-Goodchild*** hearing.[1] Soto argues that because Fitzgerald represented him at the first ***Miranda-Goodchild*** hearing, Richards should have moved for a new hearing so Soto could have been represented by a non-biased attorney. Second, Soto claims Richards was ineffective for failing to call Detective Quist as a witness. He contends that Quist would have testified that he was at the Soto home at approximately 6:45 p.m. and did not see Carmona or Ortiz. He argues that Quist's testimony would have negatively affected Carmona's credibility because she testified that she was at the Soto home before going to the apartment building where Rodriguez was killed. We conclude that Soto has failed to establish that either instance constituted ineffective assistance for the reasons explained below.

¶17 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

1. ***Miranda-Goodchild*** Hearing.

¶18 In order to establish ineffective assistance of counsel with respect to this issue, Soto must prove by clear and convincing evidence that Fitzgerald had an actual conflict of interest at the time he represented him during the ***Miranda-***

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***Goodchild v. State ex rel. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), *cert. denied*, 384 U.S. 1017 (1966).

Goodchild hearing. *See* ***State v. Kalk***, 2000 WI App 62, ¶16, 234 Wis. 2d 98, 608 N.W.2d 428. An actual conflict exists if an attorney is actively representing a conflicting interest. ***Id.*** Whether an actual conflict exists is a question of law that we decide independently. ***Id.***, ¶13.

¶19 Here, the facts demonstrate that Fitzgerald's potential conflict of interest was that he represented the victim's brother in an unrelated matter five years earlier. Fitzgerald did not even realize that a conflict may have existed until the second day of trial when he recognized his former client, who was sitting in the courtroom. Thus, at the time the ***Miranda-Goodchild*** hearing took place, Fitzgerald had no knowledge that he had represented the victim's brother at an earlier time. Soto provides no analysis explaining how any potential conflict of interest affected Fitzgerald's lawyering at the ***Miranda-Goodchild*** hearing. Given the undisputed facts in this case, we conclude as a matter of law, that Soto has failed to establish that an *actual* conflict of interest existed at the time the hearing occurred. Accordingly, if there was no conflict of interest, there was no reason for Richards to request that a new hearing take place. If there was no reason for Richards to request a new hearing, there was no ineffective assistance.

2. Detective Quist.

¶20 Soto's second ineffective assistance contention is that his counsel should have called Quist as a witness so that he could attest to the fact that when he was at the Soto home, he did not see Carmona or Ortiz. Soto asserts that this testimony could have been used to impeach Carmona. We conclude that Soto failed to establish ineffective assistance.

¶21 Carmona testified that on the date of the shooting, she was with Soto at the Soto home. She indicated that upon leaving the Soto home, they went to

Rodriguez's "boss's" house and then to the apartment building where the shooting occurred. It is undisputed that the shooting occurred at approximately 7:00 p.m. Based on these facts, Soto contends that Carmona was at the Soto home between 6:30 p.m. and shortly before 7:00 p.m.

¶22 Detective Quist's report reflects that on the date of the shooting at approximately 6:28 p.m., he was showing photos to a witness at an undisclosed location. Thereafter, he went to the Soto home. Quist did not see Carmona at the Soto home. Based on these facts, Soto argues that Quist must have been at the Soto home at the very same time Carmona was there, but Quist did not see Carmona at the Soto home.

¶23 As the State points out, these facts fall far short from presenting an absolute accounting as to the timing regarding who was where and when. It is very possible that Quist did not arrive at the Soto home until after Carmona left. Soto's claim is based on unfounded assumptions as to the time that Carmona indicated they were at the Soto home and the time Quist would have arrived at the Soto home.

¶24 Accordingly, we agree with the trial court that Soto has not shown that failing to call Quist as a witness constituted ineffective assistance. Soto failed to establish deficient performance or prejudicial effect. Even if trial counsel called Quist to testify to impeach Carmona, such testimony would not have altered the outcome of the trial. The timing was too indefinite and could have easily been explained. Moreover, the timing questions would not have altered the eyewitness account of the shooting or the other credible facts and witnesses supporting Carmona's testimony.

C. Witnesses' Addresses.

¶25 Soto's next claim is that the trial court erroneously exercised its discretion when it ordered Fitzgerald not to communicate information to Soto. Specifically, the court ordered that Fitzgerald not disclose to Soto any address or contact information relating to the State's witnesses.

¶26 This issue arose when the State filed a motion seeking a protective order pursuant to WIS. STAT. § 971.23(6). The motion indicated that the request was made because there were numerous instances in which witnesses had been threatened or offered money in connection with their testimony in this case. One witness indicated that her house had been "fire bombed" and that she was receiving threatening phone calls, was shot at, and offered $13,000 if the witness refused to testify at the Soto trial.

¶27 The protective order did not impinge on Soto's ability to prepare a defense. Rather, it limited the disclosure of the contact information to Soto's counsel and defense investigators. The purpose was to keep the contact information from Soto to avoid tampering with the State's witnesses. From this review, we conclude that the trial court did not erroneously exercise its discretion in issuing the protective order. There was a compelling need to keep this information directly from Soto and the order did not prejudice or impact the preparation of his defense as his lawyer and investigator had the contact information. Further, Soto admits that he was not prejudiced and provides no explanation as to why he *personally* needed to know where witnesses lived.

¶28 Soto suggests that by agreeing to the order, his counsel violated SCR 20:1.4(a), which requires an attorney to respond to client requests for information. We reject this argument. Although the rule does require a lawyer to

keep a client reasonably informed and promptly comply with reasonable requests for information, the rule also acknowledges: "[r]ules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client." Comment to SCR 20:1.4.

¶29 Based on the foregoing, we conclude that the trial court did not erroneously exercise its discretion in issuing the protective order requested by the State. Soto's counsel did not violate any rules by following the trial court's order.

D. Suppression of Letters.

¶30 Soto's final claim is that the trial court erred when it denied his motion to suppress the letters intercepted while he was being detained, pretrial, at the Waupun Correctional Institution. The State responds that there is no reason to address this issue because the letters were never used at trial. Soto responds that his strategy was adversely impacted by the fear that the letters *may* be introduced at any time. We decline to address the merits of this issue.

¶31 Although the trial court denied Soto's motion seeking to suppress the incriminating letters, the State elected not to use any of the letters during trial. We are not convinced that we should review a suppression ruling when the subject of that ruling was not used at trial. *See* ***Briggs v. State***, 76 Wis. 2d 313, 322, 251 N.W.2d 12 (1977).

¶32 Further, we are not persuaded by Soto's claims that the *potential* use of the letters impacted his trial strategy. He suggests that the State's use of the letters undoubtedly affected his strategy insofar as the witnesses he decided to call. He does not, however, explain or offer any affidavits alleging specifically what witnesses would have been called or not called. Consequently, his assertion that

the suppression ruling "colored" his trial strategy is pure speculation and does not merit further review.

By the Court.—Judgment and order affirmed.

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