COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1472-CR **Cir. Ct. No. 1998CF432**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGELIO V. LOPEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL S. FISHER, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Rogelio Lopez appeals from the judgment of conviction entered against him and the order denying his motion for postconviction relief. He argues on appeal that the circuit court erred when it concluded that he did not receive ineffective assistance of trial counsel. Because

we conclude that Lopez did not establish that he received ineffective assistance of trial counsel, we affirm the judgment and order.

¶2 Lopez was convicted after a jury trial of first-degree homicide with a dangerous weapon. The court sentenced him to life in prison. The underlying incident took place in April 1998. Lopez was driving in a car late at night with two passengers, Juan Medina and Ubaldo Morales. Lopez and Morales began arguing, then got out of the car to continue the argument. Eventually, Lopez returned to the car as Morales began to walk home. Lopez, who was driving, hit Morales with the car, and then backed over Morales's body, killing him. Lopez and Medina drove off and soon went off the road into a ditch. Medina escaped from the car and walked to a nearby house, where he talked to the two occupants and asked to call the police. The police arrived and found Lopez lying in tall grass in a ditch. Eventually, the police took him to a hospital to be treated. Medina testified against Lopez at the trial.

¶3 Because of delays unrelated to the issues in this appeal, Lopez did not bring a motion for postconviction relief until seven years after his conviction. He argued in his motion that he was entitled to a new trial, that his trial counsel was ineffective, and that the sentence imposed was too harsh, among other things. The court held a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). After hearing testimony, the court concluded that Lopez did not receive ineffective assistance of trial counsel and that the sentence was fair and appropriate. The court denied the motion in all respects.

¶4 Lopez first argues to this court that his trial counsel was ineffective. 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. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. ***State v. Moats,*** 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). There is a strong presumption that counsel rendered adequate assistance. ***Strickland***, 466 U.S. at 690. We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***Id.*** at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶5 Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made 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." ***Strickland***, 466 U.S. at 689. To demonstrate 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. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶6 Lopez argues first that his counsel was ineffective because he did not call two witnesses during the trial. The State called Juan Medina as a witness at the trial. Lopez argues that his counsel should have called as witnesses the two occupants of the house with whom Medina spoke after the car went into the ditch. Lopez asserts that these witnesses would have testified that Medina spoke to them in English, although he subsequently told the police that he did not understand

English. Lopez argues that this testimony would have seriously impeached Medina's trial testimony.

¶7 Although Medina's postconviction counsel called trial counsel as a witness at the ***Machner*** hearing, postconviction counsel did not ask trial counsel why he did not call these witnesses. Without giving trial counsel a chance to explain his decision, we cannot conclude that he was ineffective for not calling these witnesses.

¶8 Further, we are not convinced by the underlying argument. The argument that the testimony of the two occupants of the house would have impeached Medina is mere speculation. One of the occupants who testified at the ***Machner*** hearing stated that Medina's English was "rough." Moreover, we do not find it surprising that a person fluent in Spanish, in a crisis situation in which he was seeking help from English-speaking people, would himself speak in English. We do not believe that this testimony would have seriously impeached Medina.

¶9 Lopez next argues that trial counsel was ineffective because he did not stipulate to the admissibility of Lopez's blood alcohol content reports. This is, in essence, a challenge to trial counsel's successful motion to suppress the reports. Lopez argues that the evidence of his blood alcohol content would have explained some of his statements at the scene of the crash, as well as provided a basis for a lesser included offense of reckless homicide. Lopez does not cite any law in support of this argument, but merely states his conclusion. Further, we cannot conclude that evidence of his blood alcohol content would have supported a lesser included offense. Lopez's theory of defense was that he was not the one driving the car. As the trial court found, any evidence to support a lesser included offense would have contradicted this theory by suggesting that Lopez was driving. We

again conclude that counsel was not ineffective for moving to suppress this evidence.

¶10 Lopez next argues that the trial court improperly admitted certain statements that were taken in violation of his ***Miranda*** rights.[1] Specifically, Lopez argues that his ***Miranda*** rights were not properly translated into Spanish and that his subsequent statements, made after he was given properly translated rights, must be excluded as fruits of the poisonous tree.[2] Lopez challenged these statements before trial. The trial court held a ***Miranda-Goodchild*** hearing, and allowed the statements.[3]

¶11 The first challenged statement is one that Lopez made to one of the officers who first found him. The officer found Lopez lying in some tall grass. The officer was investigating the death of the victim. This officer had another officer translate his questions into Spanish. Lopez was asked his identity, whether the keys in the ignition of the car in the ditch were his, and whether he knew the victim. The trial court concluded that these questions were merely investigatory and, consequently, the officer was not required to give ***Miranda*** warnings before asking.

¶12 We agree with the trial court that these questions were investigatory. The police are required to give ***Miranda*** warnings before engaging in custodial

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[2] The court admitted four statements. The first one was one Lopez made to a private citizen and he does not challenge it in this appeal.

[3] ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264-65, 133 N.W.2d 753 (1965) and ***Miranda***, 384 U.S. 436.

interrogation. ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. Custodial interrogation is questioning by law enforcement officers after a person has been taken into custody or when their "freedom of action" has been curtailed in a way that is comparable to an arrest. ***Id.*** (citation omitted). An officer is not required to give ***Miranda*** warnings when he or she engages in "*[g]eneral on-the-scene questioning as to facts surrounding a crime* or other general questioning of citizens in the fact-finding process …." ***State v. Kraimer***, 99 Wis. 2d 306, 330, 298 N.W.2d 568 (1980) (quoting ***Miranda***, 384 U.S. at 477-78).

¶13 In this case, the police were investigating the body on the road, as well as the car in the ditch, and a man lying in tall grass. The questions they asked Lopez were general fact-finding questions. We conclude that Lopez was not in custody at the time the questions were asked. The circuit court properly allowed this statement.

¶14 Lopez also argues that a statement he made to an officer after he was taken to the hospital should have been excluded. In this case, an officer had given Lopez his ***Miranda*** rights, but had done so using "street" Spanish. Lopez argues that the translation was insufficient, relying on ***State v. Santiago***, 206 Wis. 2d 3, 556 N.W.2d 687 (1996). In ***Santiago***, the supreme court concluded that the circuit court had erred when it found a translated version of the ***Miranda*** warnings to be adequate without any evidence of the Spanish words the officer actually used. ***Santiago***, 206 Wis. 2d at 26-27. The supreme court stated:

> Although ***Miranda*** warnings need not be conveyed by "talismanic incantation," ***California v. Prysock***, 453 U.S. 355, 359 (1981), they must convey the substantive message that the suspect has the right to remain silent; that anything the suspect says can be used against him or her in a court of law; that the suspect has the right to have a lawyer and to

> have the lawyer present if he or she gives a statement; and that if the suspect cannot afford an attorney, an attorney will be appointed for him or her both prior to and during questioning. ***Id.*** at 361.

Santiago, 206 Wis. 2d at 19.

¶15 In this case, the circuit court found that the officer did provide adequate warnings. At the ***Miranda-Goodchild*** hearing, the court had the officer translate the English warnings into Spanish, and then the interpreter translated the officer's Spanish back to English. The court officer found that he had given Lopez all of the appropriate warnings. The court further found that Lopez waived his rights and indicated that he understood when he replied that: "Lawyers aren't of any use anyway."

¶16 The last statement that Lopez challenges is a statement he gave at the sheriff's department. At this point, an interpreter read Lopez the warnings in Spanish. Lopez does not challenge the adequacy of this translation. He argues instead that the statement he made as a result of this interrogation should be suppressed as fruit of the poisonous tree because the previous statements were tainted. We concluded, however, that the previous statements were constitutionally valid. Consequently, there could be no taint. Further, in this situation Lopez received ***Miranda*** warnings and signed a valid waiver of his rights. Further, the police stopped questioning when he requested an attorney. Under these facts, we conclude that the court again properly allowed this statement.

¶17 Lopez's final argument is that he is entitled to a new trial in the interest of justice. We have concluded, however, that his challenges are not

meritorious. Consequently, justice does not require that he receive a new trial. For the reasons stated, 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.