

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 2008

David R. Schanker
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. 2007AP2363-CR

Cir. Ct. No. 2006CF5083

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO P. OWENS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. Antonio Owens appeals judgments convicting him of being a felon in possession of a firearm, carrying a concealed weapon, obstructing an officer, and mistreatment of an animal. He also appeals the order denying his postconviction motion. The issues are whether he received effective

assistance from his trial counsel, and whether he should receive a new trial in the interest of justice. We affirm.

¶2 Owens was with a group of people gathered on a porch at 2522 West Legion Street in Milwaukee. When two police officers approached the group, Owens jumped off the porch and began running away, with officer Brian Biscobing pursuing on foot. The chase ended a short time later when Owens was caught and arrested. The charges resulted from police reports that, during the pursuit, Owens pulled a gun and shot a dog that confronted Owens in its owner's back yard at 2511 West Burnham Street in Milwaukee.

¶3 At trial, Biscobing testified that he was never more than ten to twenty feet behind Owens during the chase. Biscobing saw Owens jump a fence into the yard at 2511 West Burnham, where a large dog ran toward Owens. Biscobing then saw Owens pull a gun out of his waistband and fire a shot. After the arrest, Biscobing conducted a search of the area and discovered a handgun along the route Owens took between Owens' confrontation with the dog and Owens' arrest. A spent casing in the gun indicated that it had been fired. On cross-examination, Biscobing described Owens as wearing a big sweatshirt. No evidence linked the discovered weapon to Owens other than the circumstances described above.

¶4 Steve Miljus owned the residence at 2511 West Burnham and was in the front yard when he heard his two dogs barking in the back yard and saw a man he identified at trial as Owens jump over the gate to the back yard and run toward him. Miljus testified that, as Owens approached, Owens told Miljus to get out of the way "or I will pop you, I will bust a cap in you." Miljus saw a bulge in Owens' shirt and trousers that he assumed was a weapon. Miljus then knocked

Owens to the ground, but Owens immediately jumped up and ran off. A police officer later asked Miljus to examine his dogs, and Miljus noticed that one of his dogs was bleeding from what appeared to be a bullet hole in his snout. The veterinarian who treated the dog confirmed in testimony that the dog had been shot. Miljus conceded that he did not hear a shot when Owens passed through his back yard.

¶5 Owens admitted that he was chased by police and apprehended on the day in question. He denied, however, that the chase went through the yard at 2511 West Burnham, and denied any confrontation with a dog or with Miljus during the chase. Owens denied having a weapon on him at any time that day.

¶6 The jury found Owens guilty on all counts, and he was convicted and sentenced. His postconviction motion alleged that trial counsel negligently failed to discover and use information that would have undermined Officer Biscobing's version of events and identification of Owens. That information included: (1) Biscobing's communications with other officers during the chase that reported the suspect's description and location but failed to mention that the suspect was armed; (2) significant discrepancies between the clothing Owens was wearing when arrested and the description of the suspect's clothing provided by Biscobing, such as the fact that he was wearing a jacket rather than a sweatshirt, and black shoes rather than white shoes; and (3) the police call history of the incident that never mentioned Biscobing's discovery of a handgun, although the call history extended several hours after Owens' arrest. Owens also alleged that counsel inadequately cross-examined Miljus concerning the reliability of Miljus's identification of Owens. The circuit court denied the motion without a hearing, resulting in this appeal. In the circuit court's view, there was no probability of a

different outcome no matter what counsel may have done differently, given the overwhelming evidence against Owens.

¶7 The circuit court may deny a motion alleging ineffective assistance of counsel, without an evidentiary hearing, if the record conclusively shows that the appellant is not entitled to relief. *State v. Bentley*, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996). We review the circuit court's determination of that issue under the erroneous exercise of discretion standard. *Id.* at 318. To succeed on an ineffectiveness claim, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

¶8 The circuit court reasonably determined from the record that Owens was not prejudiced by counsel's alleged errors. Owens did not dispute that Biscobing chased him through the neighborhood where 2511 West Burnham was located. Biscobing and Owens agreed that Owens initially fled through the back yard of 2522 West Legion, toward West Burnham. Owens also agreed that, at the time the chase occurred, a dog was shot in the back yard at 2511 West Burnham. The theory of the defense was that these were two unrelated incidents, and that Owens was charged on the basis of a misidentification. None of the information counsel allegedly failed to discover, however, would have impeached Miljus's identification of Owens, nor would it have explained how Biscobing could have remained within twenty feet of Owens during the chase, observed a different man shoot the dog, and somehow confused that man with Owens. While Owens makes much of Biscobing's inaccurate description of Owens' clothing in radio calls made during the pursuit, it is clear, and not disputed, that Biscobing was describing the clothing of the person he was chasing, and that he was chasing Owens. Therefore,

while it is evidence that Biscobing erred in describing Owens, it is not evidence that he mistook Owens for someone else. Consequently, it is not reasonably probable that the undiscovered information would have persuaded the jury that Biscobing saw someone else shoot the dog, and confused that person with Owens.

¶9 The only potential value of the undiscovered information would have been to persuade the jury that Biscobing, for unknown reasons, fabricated Owens' involvement in the shooting. The information, however, did not provide significant evidence of fabrication. According to the police call history, the chase lasted about two minutes and forty seconds. Biscobing appears to have called in at least four reports after Owens shot the dog, describing Owens' location, but without mentioning the gun Biscobing saw Owens use. Owens contends that, had Biscobing seen him use a gun, Biscobing surely would have reported it to his fellow officers converging on the scene. Consequently, in Owens' view, the fact that Biscobing did not contemporaneously report the gun means Biscobing never saw Owens with a gun, and falsely testified otherwise at trial. We are not persuaded.

¶10 The transcript of the call history supports rather than undermines Biscobing's testimony. Within two minutes of calling in Owens' arrest, the report "subj possibly took shot at dog" is attributed to Biscobing.¹ So far as the evidence before us reveals, Biscobing's source of that information could only have been himself, because Owens had not confessed, and Miljus had no idea anything happened to his dog until he subsequently examined the dog, at a police officer's

¹ The caller is identified as unit 60E, which is the code for both Biscobing and his partner. Biscobing's partner, however, did not take part in the chase and did not witness any part of it. A report on a possible dog shooting could only have come from Biscobing.

request, and discovered a bullet wound. The “subj,” evidently meaning the “subject,” could only have been Owens, who was the only person in custody. One might question why Biscobing failed to report the presence of a gun during the chase, but the fact that Biscobing reported a possible dog shooting almost immediately after the chase, when only he (and the shooter) knew about the shooting, precludes an inference from the call history that Biscobing did not witness the shooting.

¶11 Owens also considers it significant that the call history contains no report that Biscobing discovered a gun along Owens’ route. However, there was no evidence that the call history presented, or was intended to present, a full account of everything that occurred. It is not reasonably probable that the jury would have found that Biscobing lied, and acquitted Owens, merely because the call history did not confirm Biscobing’s testimony as to when and where he found the gun.

¶12 Because we conclude that none of the undiscovered information would have made any difference in the result of the trial, we deny the request for a new trial in the interest of justice. The matter was fully tried.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

