COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2468-CR **Cir. Ct. No. 2006CF21**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE A. VEGA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Jose A. Vega has appealed from a judgment convicting him of first-degree intentional homicide, party to the crime. He also appeals from an order denying his motion for postconviction relief. We affirm the judgment and the order.

¶2 On August 14, 2007, a jury found Vega guilty of intentionally causing the death of William D. Schipper. Police found Schipper lying in a pool of blood on his basement floor at approximately 6:00 p.m. on December 21, 1994. Expert testimony at trial indicated that Schipper died as a result of blunt force trauma to the head. The parties stipulated that the time of death was approximately 5:05 p.m. on December 21, 1994.

¶3 A bottle of Kessler's whiskey was found in the basement at the time Schipper's body was discovered. It was found in an ash bin with Schipper's glasses about three feet from Schipper's body. Testimony indicated that Schipper often carried a bottle of Kessler's whiskey in his back pocket.

¶4 Vega's defense at trial was that the murder was committed by Casimer Leschke, an acquaintance of Vega's who did chores for Schipper and socialized with him. Evidence indicated that Vega and Leschke were together on December 21, 1994, both before and after the murder. However, Vega's defense was that he did not accompany Leschke to Schipper's home on December 21, 1994, and that Leschke committed the murder.

¶5 The sole issue on appeal is whether Vega is entitled to a new trial based on ineffective assistance of trial counsel. Vega contends that his trial counsel, Attorney Joseph Norby, performed deficiently by failing to call James Ferrier, a fingerprint analyst, as an expert witness at trial. Vega contends that Ferrier should have been called to testify concerning a fingerprint found on the whiskey bottle.

¶6 The trial court denied Vega's claim of ineffective assistance after an evidentiary hearing at which Norby testified as provided in ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The trial court determined that

Norby's representation was neither deficient nor prejudicial. We conclude that the trial court properly denied Vega's motion.

¶7 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** at 687-88. To prove 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.'" ***State v. Thiel***¸ 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting ***Strickland***, 466 U.S. at 694). The critical focus is not on the outcome of the trial but on the reliability of the proceedings. ***Thiel***, 264 Wis. 2d 571, ¶20.

¶8 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. A trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the ultimate determination of whether counsel's performance satisfies the constitutional standard for effective assistance of counsel presents a question of law. ***Thiel***, 264 Wis. 2d 571, ¶21. This court reviews de novo the legal questions of whether deficient performance has been established and whether the deficient performance led to prejudice rising to a level undermining the reliability of the proceedings. ***Id.***, ¶24.

¶9 Review of trial counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***State v. Johnson,*** 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the appellant to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** The appropriate measure of attorney performance is reasonableness, considering all the circumstances. ***State v. Brooks***, 124 Wis. 2d 349, 352, 369 N.W.2d 183 (Ct. App. 1985).

¶10 This court 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. ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996). A strategic trial decision rationally based on the facts and law will not support a claim of ineffective assistance of counsel. ***Id.*** at 464-65.

¶11 The trial court found that Norby's decision not to call Ferrier as a witness at trial was a deliberate and reasonable trial strategy, and did not constitute deficient performance. The record supports the trial court's finding and conclusion.

¶12 At trial, Steven Harrington, a fingerprint analyst from the state crime laboratory, testified that he located one latent print on the whiskey bottle recovered from Schipper's basement. He testified that the lab photographed the print. He testified that he compared the print to Vega's fingerprints, and opined that the fingerprint on the bottle matched the print of the left index finger of Vega.

¶13 On appeal, Vega argues that Norby should have called Ferrier as a witness at trial to rebut Harrington's testimony. The record indicates that Norby

had retained Ferrier to examine the fingerprint evidence prior to trial, and presented him as a witness at a pretrial suppression hearing. Ferrier testified that he was retired from the city of Milwaukee police department and that he owned a business that did fingerprint analysis. Ferrier examined the whiskey bottle from which the fingerprint was lifted, and two photographs of the fingerprint. He opined that the fingerprint was not suitable for analysis in either form because it did not have sufficient points of identification. He indicated that twelve points of identification, such as ridge endings and bifurcations, are necessary to identify a latent fingerprint by comparing it to a known sample. He testified that the twelve-point test has been standard for a long as he could remember. He testified that the points of identification on the fingerprint on the bottle and in the photographs of the fingerprint were both insufficient to permit identification. He testified that he therefore could not identify the print as coming from Vega, nor eliminate Vega as the source of the print.

¶14 In response to Ferrier's testimony at the suppression hearing, the State presented Harrington's testimony. Harrington testified that a fingerprint is suitable for identification when it contains sufficient discernable ridge detail that allows for an accurate comparison and identification. He indicated that there was no standard in the profession or at the state crime lab requiring a particular number of points of comparison in order to make a valid fingerprint identification. He testified that the number of points of identification and the sufficiency of the ridge detail are both factors in the identification of a fingerprint. He testified that in addition to the number of comparable characteristics, factors include the rarity and clarity of the characteristics of the print. He testified that points of identification refer to ridge endings or dividing ridges, dots, or islands. However, he further testified that an actual ridge is neither straight nor continuous, and has pore

structure, curvature, and irregularity at the edges. He testified that these individual characteristics cannot be calculated in terms of numbers, and that fingerprint analysis is based more on the quality of the identifying features than on the quantity of points to compare. Harrington also testified that his identification of Vega's fingerprint had been independently confirmed by Patrick Lutz, another state crime lab examiner, through a peer review process.

¶15 The record indicates that after the suppression hearing, Lori Higginbothum, an analyst from the FBI, evaluated the fingerprint evidence on behalf of the State. Like Harrington, Higginbothum concluded that the fingerprint evidence derived from the whiskey bottle was suitable for identification and matched Vega's fingerprint. The record indicates that the State was prepared to present Higginbothum as a witness at trial if Ferrier testified, but canceled her appearance when the defense elected not to present Ferrier.

¶16 At the postconviction hearing, Norby detailed his reasons for choosing not to call Ferrier as a witness at trial. Essentially, he concluded that Ferrier was not a good witness, and that Ferrier's testimony would not significantly enhance Vega's defense, and might harm it.

¶17 Norby testified that, after observing Ferrier at the suppression hearing, he concluded that Ferrier's appearance and testimony did not demonstrate the level of professionalism that he would have expected. He concluded that Ferrier lacked a professional appearance and that his testimony was not clear. He testified that Ferrier seemed to be relying on outdated methods of analysis and did not seem up-to-date in his understanding of the methods used by the other fingerprint experts. Norby concluded that Ferrier's credibility would not come close to matching that of the State's expert witnesses.

¶18 Because Ferrier could not eliminate Vega as a source of the fingerprint on the bottle, Norby also concluded that his testimony would not add significantly to the defense. Information in the record indicated that Vega had admitted to police that he had been to Schipper's home on an earlier occasion to deliver wood. In addition, Norby testified that Vega told him that he might have handled a whiskey bottle belonging to Schipper in the past. In light of the identification made by the State's experts, Ferrier's inability to exclude Vega as a source of the print, and because the defense was not premised on a claim that Vega had never been at Schipper's home and could never have touched the whiskey bottle, Norby concluded that nothing significant would be gained from Ferrier's testimony. He concluded that, if anything, Ferrier's testimony might harm Vega by making the defense look less credible.

¶19 In response to questioning by Vega's postconviction counsel, Norby denied that his decision not to call Ferrier as a witness at trial was affected by limitations on state public defender reimbursement of experts or a dispute with Ferrier as to payment.

¶20 The record clearly supports the trial court's finding that Norby's decision not to call Ferrier as a witness at trial was deliberate and reasonable. Because it constituted a reasonable, strategic decision, no basis exists to conclude that Norby performed deficiently. Because Vega failed to establish that his trial counsel's representation was deficient, we need not address the deficiency prong. *See* ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11.

By the Court.—Judgment and order affirmed.

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