COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP145-CR **Cir. Ct. No. 2005CF212**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY CONJEROME HERRING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Johnny Conjerome Herring appeals from a judgment convicting him of first-degree intentional homicide, armed robbery with use of force and possession of a firearm by a felon, all as party to a crime, and the

latter two as a habitual criminal. He also appeals from orders denying his motion for postconviction relief wherein the trial court declined to order testimony stricken from the record and to order a new jury trial based on newly discovered evidence in the form of an alibi defense. We affirm the judgment and orders.

¶2 A jury found Herring guilty of killing Michael Bizzle with a gun and then robbing him. The evidence was that Herring acted with his cousin, Daryise Earl. Herring did not testify in his own defense. The court sentenced him to life imprisonment, with eligibility for extended supervision after fifty-five years.

¶3 Nine months later, citing newly discovered evidence—an alibi—and that his trial counsel rendered ineffective assistance by failing to adequately follow up on the alibi, Herring moved to vacate the judgment and sentence and for a new trial. The motion was supported by an affidavit of Shana Wooden, Herring's girlfriend and the mother of his two children. Wooden claimed that on the date of the offense, she and Herring had attended a party in Chicago and, upon returning to Racine that evening, spent the rest of the night together. Wooden also claimed that she attempted to contact Herring's trial counsel but he "did not communicate with [her] about [her] story."

¶4 Before that postconviction motion was decided, Herring filed a second motion relating to testimony he gave under a grant of immunity in Daryise Earl's trial some months after his own conviction. Herring initiated contact with the State and the State subpoenaed him to testify. At trial, however, Herring answered only, "I plead the Fifth." The State offered immunity but wanted to speak with him first. No one, the trial court included, asked Herring if he was represented by postconviction counsel. After court adjourned for the day, two prosecutors and investigating detective William Warmington visited Herring in

jail. Warmington took notes as Herring talked. The next day at trial Herring was granted immunity and gave testimony putting himself at the scene of Bizzle's murder. Warmington also testified and his notes were admitted into evidence.

¶5 Herring sought to have his testimony and Warmington's testimony and notes prohibited in his postconviction proceedings and stricken from the record of the Earl case. The court granted the motion to the extent of prohibiting their use in postconviction proceedings, but refused to order anything stricken.

¶6 The trial court then held a ***Machner***[1] hearing to address the ineffective assistance of counsel claim raised in the first postconviction motion. The incompatibility of this alibi-based claim with the inculpatory testimony Herring gave in the Earl trial ethically stymied Herring's postconviction counsel. Accordingly, counsel was in court only as a spectator and Herring appeared pro se.

¶7 Herring's trial counsel, Richard Poulson, testified that Herring first told him the name of a possible alibi witness on the morning of trial. Poulson said he "instantly knew we had a problem" because a fifteen-day notice of alibi was required. He thus immediately requested an adjournment to permit investigation. The court denied the stay. Poulson testified that since being appointed to represent Herring eighteen months earlier, no one, including Wooden, had come forward about being an alibi witness, nor had Herring ever said he had been anyplace else or mentioned anyone in terms of being an alibi witness. The court found credible Poulson's account of his efforts to pursue an alibi defense and denied the motion.

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶8 Herring's notice of appeal states that he appeals from both orders denying his postconviction motions. He does not brief or argue the denial of the motion based on newly discovered evidence and ineffective assistance of counsel, however. The State urges that we deem those issues waived or abandoned. *See* ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994).[2] Appellate counsel's position is that he ethically cannot argue the alibi issues due to his awareness of Herring's testimony at Earl's trial. As waiver is a rule of administration only, we may choose to address the issue on the merits. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998). We do so here, since it will not alter the disposition of this appeal.

¶9 To secure a new trial based on newly discovered evidence, the defendant must prove by clear and convincing evidence all four of the following criteria: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking it; (3) the evidence is material to an issue in the case; and (4) it is not merely cumulative. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If he or she does so, it then must be determined whether a reasonable probability exists that a new trial would yield a different result. ***Id.***

¶10 Herring's newly discovered evidence claim was too early because it was "discovered" pretrial and it was too late to be credible. Herring advised counsel on the morning of trial that his mother had information about someone

[2] The State also urges that we summarily affirm the trial court for Herring's failure to comply with appellate briefing requirements, particularly his failure to cite legal authority for his arguments. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980); *see also* WIS. STAT. RULE 809.83(2) (2007-08). We admonish Herring's appellate counsel, but opt to address the arguments.

All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

who was with him on the night in question. The "someone" was Herring's girlfriend—the mother of his children.

¶11 The alibi defense also was too late to form the basis for a claim of ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and prejudice resulting from the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). A lawyer's performance is deficient only if counsel erred so seriously as to not function as the "counsel" the Sixth Amendment guarantees. ***Strickland***, 466 U.S. at 687. To demonstrate prejudice, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. If we conclude that the defendant has failed to prove one prong, we need not address the other. ***Id.*** at 697.

¶12 Trial counsel moved for an adjournment upon learning of the purported alibi. Finding that the case was pending for eighteen months, no notice of alibi had been filed and jury selection was only a half hour off, the trial court denied the motion. At the ***Machner*** hearing, Poulson testified that he queried Herring at the outset about an alibi, "but I never got anything from him in terms of where he was or what he was doing or who he was with at the time. Never told me anybody's name in regards to an alibi witness." Poulson also testified that he and a private investigator had gone door to door several times in the area of the murder and turned up nothing. Contrary to Wooden's claim, Poulson testified that no one had contacted him by letter, telephone or in person about an alibi. As a result, he had no witness placing Herring elsewhere at the time of the offense and therefore could not provide the State a notice of alibi.

¶13 Herring has not established deficient performance. The trial court found that counsel attempted in various ways to pursue an alibi defense, to no avail, and when he learned on the morning of trial that Herring claimed one, he moved for an adjournment. These findings are not clearly erroneous and Herring does not challenge the denial of a stay as an erroneous exercise of discretion. Trial counsel performed as best he could with what he had. Although he does not raise it, we also conclude that Herring's pro se appearance at the ***Machner*** hearing was immaterial to the motion's failure. The flimsiness of the ineffective assistance claim would have been no more substantial in anyone's hands.

¶14 The issue Herring does argue on appeal is that the trial court should have stricken problematic testimony and notes from the record of the Earl trial. He contends the evidence was obtained in violation of his rights to remain silent and to counsel—especially when postconviction counsel already had been appointed—which continued beyond his conviction because his appeal process was not complete.[3] Herring offers no legal authority that redacting the record in another's trial is the proper remedy.

¶15 The State responds that it attempted to ascertain through the automated circuit court records whether Herring was represented by counsel. Although the record reveals other avenues the prosecutor also might have used, the trial court's finding that her representation was credible is not clearly erroneous. The State also argues that it intends to honor the immunity agreement

[3] Herring does not claim that he was in custody in respect to Earl's case or that he should have been given warnings pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966), before testifying at Earl's trial. We see no harm in not giving them.

such that, unless Herring's request for a new trial is granted, the notes and testimony do not pose an issue. We agree with the State.

¶16 The Fifth Amendment privilege against self-incrimination applies to the extent Herring had a real and appreciable fear of further incrimination and he could show a reasonable chance of postconviction success. *See* ***State v. Marks***, 194 Wis. 2d 79, 95-96, 533 N.W.2d 730 (1995). Having been granted immunity, he has no real and appreciable fear of further incrimination. Furthermore, Herring waived his privilege against compulsory self-incrimination when he chose to testify. *See* ***Neely v. State***, 97 Wis. 2d 38, 51, 292 N.W.2d 859 (1980). Regardless of the Earl trial testimony, Herring's alibi as a basis for ineffective assistance of counsel offered little chance of success and, in fact, failed.

¶17 Besides the absence of cited authority, we also miss the logic in Herring's argument that proceeding without counsel merits striking portions of the record from another person's trial. Herring had no obligation to testify. He chose to do so with immunity. The State cannot use his testimony against him unless it is untruthful—and then the State's sole recourse is to prosecute for perjury. *See* WIS. STAT. § 972.08(1)(a). Furthermore, the court barred the use of the challenged testimony and notes in further proceedings. Thus, an intact record does no harm to Herring because the evidence cannot be used against him. Indeed, it was not the unredacted record that posed a problem in the postconviction proceedings. The problem was the ill-timed and inherently implausible alibi.

By the Court.—Judgment and orders affirmed.

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