COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2018-CR **Cir. Ct. No. 2006CF4994**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD LEE MORENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK and JEAN M. DIMOTTO, Judges. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Richard Lee Morens appeals from a judgment of conviction and from an order denying a postconviction motion in which he alleged

ineffective assistance of trial counsel.[1] We agree with the circuit court that neither attorney performed deficiently, so we affirm.

BACKGROUND

¶2 The Milwaukee Police Department had a particular residence under surveillance for several days. Morens was observed entering and exiting the residence on multiple occasions, facilitated by his possession of a key to the home. Morens was first detained following a traffic stop. He originally denied living at the residence but reportedly admitted to police that he lived at the home after they informed him of the surveillance. During the traffic stop, officers found a small amount of marijuana in the car, and Morens indicated that some additional quantity was at the residence. Officers, armed with that information and other information from their surveillance, sought a search warrant for the home.

¶3 When police executed the warrant, they found drugs, multiple weapons, and other items, including: a black nylon bag containing a handgun, ammunition, and a suppressor; a shaving bag containing over $6300 in cash; a yellow vinyl bag containing a dust mask;[2] a second yellow vinyl bag containing heroin and cocaine; and other firearms, drugs, and ammunition. Many items were tested for the presence of DNA; Morens' DNA was found on the black nylon bag, the dust mask, and the yellow bag containing heroin and cocaine. Morens was charged in an amended information with eight counts: one count of possession

[1] The Honorable Timothy M. Witkowiak presided over the trial in this matter and entered the judgment of conviction. The Honorable Jean M. DiMotto presided over postconviction proceedings and entered the order denying Morens' motion.

[2] According to one of the officers who testified at trial, dust masks are often worn when a person is cutting one drug with another substance.

with intent to deliver more than fifty grams of heroin, one count of possession with intent to deliver more than forty grams of cocaine, and six counts of possession of a firearm by a felon.

¶4 Morens' trial attorneys, Chris Hartley and Mark Pecora, developed a theory to explain the presence of Morens' DNA on those items. Specifically, they conceded that Morens lived at the residence but attempted to show that the house was a "party house" to which many people had access. Further, they suggested that when police removed the contraband items from their storage spaces in the home, the items were laid out on a bed in Morens' room for photographing. Thus, the defense suggested, Morens' DNA was on the various items not because he used them or because they were his items but because his genetic material transferred to the items when police used his bed as a staging area for their photos.

¶5 The jury evidently was not persuaded, as it convicted Morens on all eight counts. He was sentenced to an aggregate eighteen and one-half years' initial confinement, and thirteen and one-half years' extended supervision.[3]

[3] The State points out that there are errors in the judgment of conviction that effectively create an impossible sentence structure. Our review of the sentencing transcript confirms at least one scrivener's error in the judgment of conviction, relating to the description of count 3 as being concurrent with count 4: count 4 is consecutive to all other sentences.

The State agrees with Morens' summary of his sentence, as set forth on page 2 of the appellant's brief, and Morens' summary appears to accurately reflect the circuit court's intention as we discern it from the transcript. We take Morens' summary as a concession of the actual sentence, and the comments for each of the following charges should therefore reflect as follows:

Count 2: Concurrent to count one.

Count 3: Concurrent to counts 5, 6, 7 and 8, but consecutive to counts 1 and 2.

Count 5: Concurrent to counts 3, 6, 7 and 8, but consecutive to counts 1 and 2.

Count 6: Concurrent to counts 3, 5, 7 and 8, but consecutive to counts 1 and 2.

(continued)

¶6 In order for the proffered defense to be viable, Morens had to link as many people as possible to the home. Thus, in the postconviction motion, Morens alleged that his trial attorneys were ineffective because they failed to call two witnesses: Ernette Griggs and Maurice Sanders. Griggs was a probation agent supervising an individual, who, as far as Griggs knew, lived at the residence in question. Sanders, whose DNA was also found on some of the seized items, would have testified that the house was open to multiple people. Additional facts relating to these witnesses will be discussed below as needed.

¶7 Following a hearing on the motion at which both attorneys testified, the circuit court specifically concluded that counsel had not been deficient for failing to call Sanders, and they were neither deficient nor prejudicial for failing to call Griggs. The circuit court denied the motion, and Morens appeals.

DISCUSSION

¶8 There are two elements to an ineffective-assistance-of-counsel claim. First, the defendant must demonstrate that counsel's performance was deficient; second, the defendant must show that the deficiency was prejudicial. ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. We need not address both prongs if the defendant fails to make a sufficient showing on one. ***Id.***, ¶61.

Count 7: Concurrent to counts 3, 5, 6 and 8, but consecutive to counts 1 and 2.

Count 8: Concurrent to counts 3, 5, 6 and 7, but consecutive to counts 1 and 2.

We direct these corrections to be made upon remittitur: the circuit court may make the corrections itself, or it may direct the circuit court clerk to make the corrections. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857. Counts 1 and 4 are correctly described and do not require revisions.

¶9 Ineffective-assistance claims present a mixed question of fact and law. ***State v. DeLain***, 2004 WI App 79, ¶15, 272 Wis. 2d 356, 679 N.W.2d 562. We uphold the circuit court's factual findings, including the circumstances of the case and counsel's conduct and strategy, unless clearly erroneous. ***Id.*** Whether counsel's performance was constitutionally ineffective is a question of law reviewed *de novo*. ***Id.***

¶10 Counsel's performance is "constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. Deficient performance "may be demonstrated by acts and omissions 'outside the wide range of professionally competent assistance.'" ***State v. McDowell***, 2004 WI 70, ¶50, 272 Wis. 2d 488, 681 N.W.2d 500 (citing ***Strickland v. Washington***, 466 U.S. 668, 690 (1984)). "We are highly deferential to counsel's performance and must avoid the distorting effects of hindsight." ***DeLain***, 272 Wis. 2d 356, ¶14 (internal quotation marks and citation omitted).

¶11 We review the case from counsel's perspective at the time of trial. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Counsel is not ineffective simply because an otherwise reasonable trial strategy is unsuccessful. *See* ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. The burden is on the defendant "to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127.

A. Failure to Call Ernette Griggs

¶12 In his postconviction motion, Morens alleged that probation agent Griggs would allegedly have testified that Gregory Hawthorne—who was Morens'

passenger at the time of the traffic stop—lived at the residence in question, thereby linking another individual to the home. Defense counsel admitted that they had hoped to use Griggs to introduce this fact at trial.

¶13 However, police had interviewed Griggs themselves and, when one of the detectives testified, he stated that Griggs had told police that Hawthorne lived at the residence. The State did not object to the hearsay. Attorney Hartley indicated that once the fact of Hawthorne's residence came in through the detective's testimony, counsel determined there was no need to call Griggs. Aside from the redundancy, counsel had not directly interviewed Griggs and was uncertain what else she might say once on the stand.

¶14 In his postconviction motion, Morens complains that by not calling Griggs, counsel was not able to elicit her testimony about a timeline of her visits relative to execution of the search warrant, or testimony that it was her job to verify the addresses of her supervisees. Morens contends that by not independently interviewing Griggs, counsel lost the opportunity to anticipate any additional testimony so that she could be called. Morens also laments the fact that, in its closing argument, the State made much of the fact that Griggs had not actually been called to testify. Indeed, Hartley indicated that he wished he had called Griggs once he heard the State's closing argument.

¶15 The circuit court found that defense counsel, despite not personally interviewing Griggs, did have some idea of what she might have said, given that the police had interviewed her. The circuit court also noted that the key testimony that counsel wanted to extract from Griggs—that another person lived at the house—had been admitted through a police officer's testimony. Thus, the circuit court also found that defense counsel made a strategic decision not to call Griggs,

alluding at one point to the "power" of the defense getting a salient point to the jury through a police officer, and categorizing Morens' motion as a matter of hindsight "teaching or highlighting … the downside risk of not having called her."[4]

¶16 A circuit court's determination that counsel has made a reasonable strategic choice is "virtually unassailable." *See* ***Maloney***, 275 Wis. 2d 557, ¶23. Relying on introduction of a key point through a police officer put on by the State, rather than independently calling a witness to testify to the same point, was not an unreasonable strategy. We discern no deficient performance from failing to call Griggs to the stand.[5]

B. Failure to Call Maurice Sanders

¶17 Maurice Sanders was seen exiting the house prior to the execution of the search warrant, when Morens was already in custody. Sanders had a key to the house, and his DNA was found on the heroin recovered from the home. According to Morens' postconviction motion, Sanders would have testified that the house was a party house, that he "crashed" at the home from time to time, and that the home was owned by Charles Crump.

[4] It is not clear what purpose Griggs' additional testimony would have served other than to simply reinforce the notion that Hawthorne lived at the residence. This lack of reinforcement, however, takes on a particular urgency only through hindsight in light of the State's closing.

[5] The circuit court also ruled there was no prejudice from failing to call Griggs to the stand in light of the DNA evidence. Specifically, Morens' DNA was found on the inside of the dust mask—implicitly indicating that Morens had worn the mask—which trial counsel noted presented a particular difficulty.

¶18 Both trial attorneys testified about why Sanders was not called. First, he would have testified that Morens did not live at the residence, which would have been wholly inconsistent with the theory that defense counsel was putting to the jury.[6] More notably, however, Sanders had four open felony matters at the time, including charges related to the contraband seized in this matter. The trial attorneys were convinced that Sanders would not cooperate, as they were certain that they would never get past Sanders' attorney. As Pecora testified, "[T]here's no way we would have been able to get [Sanders] on the stand."

¶19 The circuit court agreed with trial counsel, finding that Morens could never have gotten to Sanders because he would have had to incriminate himself to testify on Morens' behalf. Accordingly, the circuit court concluded that there had been no deficient performance because a strategic decision had been made in light of the fact that there was "no reasonable way to expect Sanders to testify."

¶20 Morens evidently does not believe that it would have been difficult to get Sanders' testimony, noting that Sanders "willingly spoke to postconviction counsel and her investigator." But counsel's strategy is evaluated at the time of trial, *see* ***Johnson***, 153 Wis. 2d at 127, not at the time of a postconviction hearing. The fact that Sanders spoke willingly to Morens at the postconviction stage or that Sander was willing to testify at a postconviction hearing does not mean the trial strategy was faulty.

¶21 Further, while Morens asserts that "[t]here was no necessity for Sanders to incriminate himself to be helpful to Morens' defense," we are hard-

[6] Morens acknowledges this point but asserts that Sanders' testimony establishing the house as a party house was crucial and would have been more compelling.

pressed to agree. Sanders may not have needed to directly incriminate himself, but he would have necessarily been called upon to give testimony about facts and circumstances directly related to charges pending against himself. We thus conclude that Morens' trial attorneys fairly inferred that Sanders' attorney would have prevented him from testifying until his own case relating to the contraband in this matter was resolved. Accordingly, the circuit court properly concluded it was not deficient performance to leave Sanders off the witness list.

By the Court.—Judgment and order affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).