COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP407 **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 an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Kessler and Brennan, JJ., Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Richard Lee Morens appeals an order denying his collateral postconviction motion. Morens contends that he received ineffective assistance of appellate counsel. We affirm.

¶2 Morens was convicted of possession of heroin with intent to deliver, possession of cocaine with intent to deliver and six counts of felon in possession of a firearm. He appealed the conviction, and we affirmed. In this collateral challenge to the conviction, Morens argues that he received ineffective assistance of appellate counsel. The circuit court denied his motion.

¶3 At the outset, we address the parties' dispute about whether the issues Morens raises are properly before us in the context of this appeal. The State contends that Morens should have first brought his arguments to this court, rather than the circuit court, because he is challenging the actions of his appellate counsel. *See* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). Morens argues that the issues he raises are properly before us because he has taken an appeal from the circuit court's order denying his motion for postconviction relief.

¶4 Regardless of whether Morens should have first brought his claim in this court, we apply a *de novo* standard of review to the issues Morens raises, the same standard of review we would have applied had the issues first been raised directly in our court. *See* ***State v. Balliette***, 2011 WI 79, ¶19, 336 Wis. 2d 358, 805 N.W.2d 334 (whether a defendant received ineffective assistance of counsel based on the facts is a question of law that we review *de novo*). Therefore, the parties' disagreement about the procedural posture of this case has no practical impact on our resolution of the issues. We need not address it further.

¶5 To establish ineffective assistance of counsel, a defendant must show that his lawyer's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The "test for prejudice in the context of an ineffective assistance of counsel claim is … whether 'there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.'" ***Balliette***, 336 Wis. 2d 358, ¶24 (citation omitted). A defendant must also show that the unraised claims he contends his lawyer should have brought were clearly stronger than the claims his lawyer raised on appeal. ***State v. Starks***, 2013 WI 69, ¶6, 349 Wis. 2d 274, 833 N.W.2d 146.

¶6 Morens argues that his appellate lawyer provided ineffective assistance by failing to argue on direct appeal that the weapons and drugs charges against him were improperly tried together. The State initially brought the two drugs charges and one count of possession of a firearm against Morens. Shortly before trial, the State was granted permission to amend the complaint to include five additional counts of felon in possession of a firearm. Morens then moved to sever the drugs and weapons charges. The circuit court initially granted Morens' motion, but on the State's motion to reconsider, it decided that the charges could be tried together.

¶7 "Two or more crimes may be charged in the same complaint … if the crimes charged … are based on the same act or transaction." WIS. STAT. § 971.12(1) (2013-14).[1] "Whether the initial joinder was proper is a question of law that we review without deference to the trial court, and the joinder statute is to be construed broadly in favor of the initial joinder." ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (Ct. App. 1993).

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶8 The police found the drugs and the guns that led to all of charges against Morens at the same time and in the same place during the execution of a single search warrant looking for evidence of Morens's drug-dealing activities. Because the charged crimes stemmed from the "same act or transaction," Morens's drug bust pursuant to execution of a search warrant, they were properly joined as an initial matter under WIS. STAT. § 971.12(1). Morens's appellate attorney did not perform deficiently by failing to argue that the charges should not have been initially joined. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996) (failing to raise a meritless argument does not constitute ineffective representation).

¶9 Morens next argues that even if the cases were properly joined as an initial matter, his appellate counsel should have argued that the circuit court misused its discretion in denying his motion to sever the drugs charges from the weapons charges after the State brought additional weapons counts against him. Where cases are joined as an initial matter, a circuit court may order separate trials if it appears that the defendant is prejudiced by joinder. *See* WIS. STAT. § 971.12(3). The circuit court must balance the potential prejudice to the defendant "against the interests of the public in conducting a [single] trial on the multiple counts." ***Locke***, 177 Wis. 2d at 597. The decision to sever charges based on prejudice to the defendant is committed to the circuit court's discretion. ***Id.***

¶10 In denying the motion to sever the charges, the circuit court considered the parties' arguments and the suggestion that the jury be asked to make a factual finding on whether Morens possessed the weapons, without being told that Morens was a felon, in order to prevent prejudice to Morens. The circuit court rejected that course of action and concluded the charges were properly joined, explaining:

> All right. In looking at this matter, what you really have to look at is what the jury sees, what they don't see.
>
> It wouldn't make sense to have a hearing where the jury made findings on the drug charge and also have the jury make findings as to whether he possessed guns.
>
> The second step, that being whether he's a convicted felon, if I eliminated that step and asked the jury does he – did he have guns? They would wonder why are you asking whether he has guns because it's not illegal to have guns unless you're a felon. So that portion really couldn't be separated out.
>
> So the whole question then comes down to how prejudicial this is regarding the jury finding out that he's got a felony record versus the state's ability to tie it all together because of the guns found on the premises.
>
> ….
>
> Based on the arguments in the motion for reconsideration, the court is going to allow the state to present those cases together. I did weigh the potential prejudice to the defendant versus how tied together all of these matters were. The fact that the search warrant was executed and all the evidence was found at one time. The fact that the state can bring in all of the gun evidence itself at the trial based on that ***Wedgew*[*orth*] decision.[2]
>
> And in weighing that, the court will allow the state to bring all of the counts together and proceed to trial on all of those counts.

This excerpt of the circuit court's decision shows that the court carefully considered the facts of this case, applied the correct legal standard to the facts, and reached a reasonable decision. When we review a discretionary determination, the question is not what decision we would have made; the question is whether the circuit court acted within the wide scope of its discretion in ruling as it did. ***State***

[2] The decision to which the circuit court refers is ***State v. Wedgeworth***, 100 Wis. 2d 514, 302 N.W.2d 810 (1981).

v. Gallion, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. We must sustain a discretionary act of the circuit court if "the court examined all the relevant facts, applied the proper standard of law, and reached a conclusion that a reasonable judge could reach." ***Brethorst v. Allstate Prop. & Cas. Ins. Co.***, 2011 WI 41, ¶21, 334 Wis. 2d 23, 798 N.W.2d 467. Morens's appellate lawyer would not have been able to show that the circuit court misused its discretion had he raised this issue on appeal. Therefore, we reject Morens's argument that his appellate lawyer was ineffective for failing to argue on direct appeal that the circuit court misused its discretion in denying the motion to sever the charges.

¶11 Morens next argues his lawyer should have argued on direct appeal that his trial lawyer was ineffective for failing to object to Police Officer Bodo Gajevic's opinion testimony. Officer Gajevic testified that the amount of cocaine and heroin found in Morens's possession exceeded amounts that would have been consistent with possession of drugs for personal use. He compared the cocaine and heroin seized to what he said were equivalent doses that a person would consume of cigarettes or liquor to illustrate that the number of doses, 1250 by his estimation, far exceeded what an individual person would use.

¶12 Morens defended the charges against him by arguing that the drugs the police found were not his drugs. Because he argued that the drugs were not his, he has not explained how he was prejudiced by Officer Gajevic's opinion testimony about drugs in general or his testimony about the number of doses recovered. Gajevic's opinion testimony did not undermine Morens's defense. We reject Morens's argument that his appellate lawyer was ineffective for failing to challenge Gajevic's testimony on direct appeal. *See* ***Reynolds***, 206 Wis. 2d at 369 (a lawyer does not provide ineffective assistance of counsel by failing to raise a meritless argument).

By the Court.—Order affirmed.

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