

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 14, 2015

Diane M. Fremgen
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. 2014AP2545-CR

Cir. Ct. No. 2012CF5538

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

YIA X. LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Yia X. Lee appeals a judgment convicting him of two counts of manufacturing or delivering cocaine, as a second or subsequent offense. He also appeals the circuit court's order denying his postconviction motion. Lee argues that he received ineffective assistance of counsel from

Attorney Robert D'Arruda. We reject this argument. Therefore, we affirm the judgment of conviction and order denying postconviction relief.

¶2 The State Public Defender's Office appointed Attorney Eric Hailstock to represent Lee in this case. On the day trial was scheduled, Hailstock informed the court that Lee wanted to retain D'Arruda to represent him, but D'Arruda had not appeared and was in another courtroom. On questioning by the court, Lee explained that he had retained D'Arruda two weeks prior and that his family had paid him. The court advised Lee that D'Arruda had not filed a notice of appearance or communicated with the court, but that the State would not be opposed to adjourning the trial to allow D'Arruda to represent Lee, even though the State was ready to proceed to trial. The court noted, however, that the trial would be put off for at least three months due to scheduling issues. The court then asked Lee, "If the case was adjourned till late July or August, did you still want Mr. D'Arruda to represent you?" Lee replied, "Your Honor, we can proceed today."

¶3 During the lunch break, Lee told a deputy sheriff that he wanted D'Arruda to represent him. After learning of this, the circuit court called D'Arruda to court directly after lunch to discuss the issue.

THE COURT: So I want to make a record where we stand regarding counsel. I'm ready to proceed with the trial, but with respect to proceeding, Mr. Hailstock, are you ready to proceed?

HAILSTOCK: Yes.

THE COURT: Mr. Lee, with Mr. Hailstock?

HAILSTOCK: Yes.

D'ARRUDA: I would note I'm partially retained, but not fully retained. But Mr. Lee does not wish to adjourn the case, he wishes to have Mr. Hailstock proceed with that.

THE COURT: And I'm fine with that, and you're free to go back to Judge Guolee's courtroom.

¶4 To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show 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.'" *Id.*, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Strickland*, 466 U.S. at 697.

¶5 Lee contends that he received ineffective assistance of counsel because D'Arruda had been retained to represent him, but then did not do so. Lee argues that he felt pressured into proceeding to trial with Hailstock because he did not wish to anger the court by causing a delay.

¶6 The record undercuts Lee's claim. The transcript establishes that Lee was given a choice about proceeding with Hailstock or waiting to go to trial with D'Arruda, and that Lee clearly chose at two different points in time to proceed to trial with Hailstock. The transcript also establishes that D'Arruda was willing to represent Lee at a later date, but Lee chose to continue with the trial rather than wait. D'Arruda did not fail to represent Lee. Lee *decided* to proceed with Hailstock. A party cannot claim that an attorney who did not represent him provided ineffective assistance of counsel. Therefore, we reject Lee's argument.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT.
RULE 809.23(1)(b)5. (2013-14).

