COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1631-CR **Cir. Ct. No. 2013CM1107**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L. VICKERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] David L. Vickers appeals both from a judgment entered after he was found guilty of misdemeanor retail theft and bail jumping,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and an order denying his motion to reverse the judgment based on trial counsel having rendered constitutionally ineffective assistance. Vickers contends that trial counsel should have investigated if John Wright, a passenger in the vehicle with Vickers when Vickers was stopped, had stolen all the property found in Vickers' car, and that counsel should have moved to suppress that evidence. Vickers has failed to carry his burden of showing that trial counsel was ineffective; thus, we affirm.

¶2 Following a jury trial, Vickers was found guilty of misdemeanor retail theft of a wireless router and misdemeanor bail jumping, for which he received, in the aggregate, a sentence of seven months and ten days in jail.

¶3 Vickers then moved pursuant to WIS. STAT. § 974.06 to vacate the judgment of conviction, alleging that he was deprived of the effective assistance of counsel in two ways: First, trial counsel never moved to suppress the stolen property recovered from the stop of Vickers' vehicle and second, trial counsel did not investigate if Wright, a passenger in that vehicle, had stolen all the property. In support of the motion, Vickers submitted an affidavit from Wright stating that he had stolen all the items, not Vickers. No one from the public defender's office interviewed him, but, if he had been interviewed, he would have admitted that he had stolen all the items and testified to as much at Vickers' trial. The circuit court ordered a ***Machner***[2] hearing.

¶4 At the hearing, Michael Morell, a deputy with the Dodge County Sheriff's Department, testified that on May 20, 2013, he stopped a vehicle because

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

its windows were tinted and its lights unilluminated. Vickers was driving the vehicle, and Wright was a passenger. Vickers was taken into custody and placed in the backseat of Morell's vehicle because Vickers had an outstanding warrant with the Dane County Sheriff's Department, which, Morell believed, was for retail theft. Morell observed that in the backseat of Vickers' vehicle were two boxes, one contained an Acer computer, and the other, he later learned, contained a wireless router. Initially, Vickers told Morell that the computer belonged to Wright but then that it belonged to Vickers' wife. Morell asked Wright about the computer, and he said that the computer belonged to Vickers' wife. Morell asked Vickers if showing the computer to him would help him identify it and its origin. Morell retrieved the computer from the backseat to show Vickers, and he said it had been there "for ages." Morell did not believe Vickers. It was then that Morell began examining the box for a bar code or sticker in order to identify the store from where it had come. Morell then spoke with his supervisor, the authorities in Fond du Lac, and called several stores. The manager of the electronics department at a Wal-Mart in Fond du Lac said that the computer was supposed to be on the floor, and he was going to check to see if in fact it was there. Eventually, the computer was reported stolen. Once Morell discovered that the computer had been stolen, he thought that the other items in the car might also be stolen. It was then that Morell took the items out of Vickers' car and secured them.

¶5 Trial counsel, Laurel Munger, a staff attorney with the Wisconsin State Public Defender's Office, testified that after the prosecution provided her with discovery, she tried to discuss it with Vickers but he "never wished to make himself available to have an office meeting to go over the matter." They "touched base … before and after court," but he "made it clear he [was] very busy." The State provided Munger with discovery, including two police reports, which she

reviewed and forwarded to Vickers.[3] Vickers, however, was never willing to "go through everything" with Munger. After reviewing the police reports, Munger decided against filing a motion to suppress because "it was not appropriate." She explained that neither Vickers nor Wright claimed the electronics, that there were some variations in the story, and without any information to the contrary from Vickers, the police had probable cause to continue investigating whether the property was stolen.

¶6 As far as Wright, Munger believed she looked up his prior record and followed his current case, since he also had been charged with theft. However, neither she nor her investigator spoke with Wright. This was because video from the Wal-Mart in Fond du Lac was "clear," that the "bag was clearly taken out of the store without payment, whatever was in it, by Mr. Vickers and not by Mr. Wright."[4]

¶7 Wright testified that he had stolen everything that was in Vickers' vehicle. He had stolen two computers and a wireless router from Wal-Mart and also some cameras from Best Buy. Wright said he was "on the video … taking it." His attorney had shown him some paper copies of the video. He acknowledged during cross-examination that Vickers was with him at the time, but Vickers did not know Wright was stealing. Wright told Vickers that he was getting a discount from a friend who worked at the store.

[3] The police reports were never entered into evidence at the hearing and, thus, are not included in the record on appeal.

[4] Vickers admits in his brief that in security camera footage recovered from the Fond du Lac Wal-Mart "Vickers was observed selecting a wireless router from the shelf and carrying it to another part of the store where he was not observed on camera" and "[l]ater … observed leaving Wal-Mart with a grey plastic bag."

¶8 The circuit court denied Vickers' motion. The court, the same judge who presided over Vickers' trial, found "it hard to believe" Wright given that he had already been sentenced and had "nothing to lose." It was "sheer speculation" that Wright would have come forward at the beginning and acknowledged that he was the guilty party. In fact, the court asked rhetorically, why did Vickers not tell his attorney that it was Wright and not him who stole the items? Moreover, Wright's description of the videos, contradicting what Munger had said was clearly shown in them, was "convenient." Thus, the court concluded, it was reasonable for Munger not to contact Wright, and Vickers did not suffer any prejudice.

¶9 As for the suppression issue, the stop of the vehicle for unilluminated headlights and tinted windows was valid, the court said. Vickers was subject to arrest because of an outstanding warrant and was placed in the back of Morell's vehicle. The objects in the backseat were in plain view—"you can plainly see them"—and Morell investigated whether they were stolen. Vickers and Wright told Morell different stories and, "probably rightly so," he did not believe them. After making a few calls, Morell learned that the computer was stolen, leading him to seize it and the router, which is usually associated with a computer. In short, the court held, the stolen items would not have been suppressed. A written order was entered denying Vickers' motion. He now appeals from the judgment of conviction and the order denying his postconviction motion.

¶10 Under both the Wisconsin and United States Constitutions, in order for a court to find that counsel rendered ineffective assistance, a defendant must show that counsel's performance was deficient and that, as a result of that deficient performance, the defendant was prejudiced. ***Strickland v. Washington***,

466 U.S. 668, 687 (1984); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Counsel's performance is "constitutionally deficient if it falls below an objective standard of reasonableness." ***Thiel***, 264 Wis. 2d 571, ¶19. Counsel's deficient performance is constitutionally prejudicial if "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." ***Id.***, ¶20 (citation omitted). The defendant bears the burden on both of these elements. ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111.

¶11 A claim of ineffective assistance of counsel is a mixed question of law and fact. The circuit court's findings of fact will be upheld unless they are clearly erroneous. ***Thiel***, 264 Wis. 2d 571, ¶21; ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. "Findings of fact include 'the circumstances of the case and the counsel's conduct and strategy.'" ***Thiel***, 264 Wis. 2d 571, ¶21 (citation omitted). The determination of counsel's effectiveness, in contrast, is a question of law, which is reviewed de novo. ***Kimbrough***, 246 Wis. 2d 648, ¶27.

¶12 The "[f]ailure to call a potential witness may constitute deficient performance." ***State v. Jenkins***, 2014 WI 59, ¶41, 355 Wis. 2d 180, 848 N.W.2d 786. Here, while Munger knew of Wright, she had no reason to believe that he alone had taken the property. Munger testified that Vickers was unwilling to meet with her and review the case. They only "touched base … before and after court." In other words, Vickers never told Munger that Wright committed the theft. *See* ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325 (stating that counsel is not deficient for failing to discover information that was available to the defendant but which the defendant did not share with counsel).

This was uncontradicted in the record, since Vickers never testified. *See* ***Roberson***, 292 Wis. 2d 280, ¶24 (defendant bears the burden on an ineffective assistance claim).

¶13 In addition, Munger, whom the circuit court implicitly credited, had reviewed the video from the Wal-Mart in Fond du Lac and found that it clearly showed Vickers leaving the store with a bag without having paid. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (stating that the circuit court when acting as fact finder is the ultimate arbiter of credibility). In contrast, the circuit court found Wright to be incredible. He had already been convicted and sentenced for his part in the theft, leaving him "nothing to lose." As the circuit court concluded, it would be speculative to conclude that Wright would have come forward at the beginning and taken sole responsibility for the theft. In short, there is no basis to disturb the circuit court's credibility findings. Thus, Munger did not render constitutionally deficient performance in failing to investigate Wright and call him as a witness.

¶14 As for the claim that Munger was ineffective for failing to move to suppress the evidence recovered from Vickers' vehicle, ordinarily we would consider whether such a motion would have been granted, for counsel is not ineffective for failing to bring a motion that would have been denied. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Vickers, however, never established what Munger knew or should have known regarding the search of Vickers' vehicle, particularly the sequence of events that ultimately led Morell to seize the computer and router. In deciding whether counsel's performance was deficient, "the reasonableness of counsel's challenged conduct" must be judged "on the facts of the particular case, viewed as of the time of counsel's conduct." ***Strickland***, 466 U.S. at 690. In other words, a court "must

take into account all the information counsel knew or should have known." ***Roe v. Flores-Ortega***, 528 U.S. 470, 480 (2000).

¶15 But, here, the only proof of what counsel knew came from Munger's testimony that she reviewed two reports Morell prepared, and that after doing so she did not think it was appropriate to make a suppression motion. The police reports are not contained in the record. Munger testified that neither Wright nor Vickers claimed the electronics, and there were some variations in the story. Vickers, who was provided with copies of the police reports, did not provide Munger with "any information to the contrary." Again, counsel is not deficient for failing to discover information that was available to the defendant but which the defendant did not share with counsel.

¶16 On this record, Munger knew that both Vickers and Wright disclaimed ownership of the electronics; there is no information as to what she knew beyond that. It has not been shown that the facts as presented in Morell's testimony were contained in the police reports that Munger and Vickers reviewed. We will not speculate as to what information Munger considered when she decided not to file a suppression motion. In short, Vickers has not established that Munger had a meritorious basis for making such a motion. Vickers has failed to meet his burden of proof to show that Munger was ineffective. *See* ***Roberson***, 292 Wis. 2d 280, ¶24 (defendant bears the burden on an ineffective assistance claim).

¶17 Accordingly, we affirm the judgment and the order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.