COURT OF APPEALS DECISION DATED AND FILED

December 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2017AP133

Cir. Ct. No. 2011CF1389

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEOFFREY A. HERLING,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: NICHOLAS MCNAMARA, Judge. *Affirmed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Geoffrey Herling was convicted of two counts of attempted first-degree intentional homicide and appeals from an order denying his second motion for a new trial. As with his first postconviction motion, Herling seeks to establish that he suffered from amnesia at the time of the attempted homicides. In this second motion filed under WIS. STAT. § 974.06 (2015-16), Herling also argues that he was denied effective assistance of counsel at trial and in his first appeal. We reject Herling's arguments and affirm.

BACKGROUND

¶2 Herling was charged with two counts of attempted first-degree intentional homicide after he engaged in a shootout with police officers at a motel. The following factual summary is drawn from the evidence and testimony introduced at trial.

¶3 Officers responded to a call of shots fired at a motel and attempted to contact Herling in order to talk to him. Herling refused to come out of his motel room, but then emerged shortly thereafter carrying a shotgun in his right hand and a semiautomatic pistol in his left hand. One of the officers ordered Herling to show his hands, and Herling responded by pointing the shotgun at the officer and also firing rounds from his pistol. The officers took cover, and Herling began to move toward them, still firing. When he was around 16 feet away from where the officers had taken cover, Herling fired a shotgun round directly toward the officers. The shooting stopped after one of the officers wounded Herling. While he was bleeding in the motel hallway, Herling told the officers that they should kill him.

¶4 At trial, Herling's defense was that his only intent was that the officers would kill him, which is known colloquially as "suicide by cop." The jury convicted Herling on both counts of attempted homicide.

¶5 Herling filed a postconviction motion for a new trial and resentencing, in which he argued that he suffered from amnesia and was therefore denied due process. Specifically, Herling contended that his amnesia prevented him from consulting with counsel, testifying on his own behalf, and presenting a defense. The circuit court denied relief after a hearing. The court concluded that Herling failed to meet his burden of presenting clear and convincing evidence that he suffered from amnesia. Herling appealed, and we affirmed.

¶6 Herling then filed a second postconviction motion for a new trial, in which he argued that he received ineffective assistance of counsel at trial and on appeal. Specifically, he contended that his postconviction counsel should have argued that his trial counsel was ineffective. Herling further contended that his first postconviction counsel should have presented additional evidence of his amnesia during the first postconviction hearing. Herling also presented a new expert report regarding his possible amnesia. The circuit court denied this second postconviction motion without a hearing. Herling appeals this denial.

DISCUSSION

¶7 This appeal centers on whether Herling received ineffective assistance of counsel at both trial and during his first postconviction proceedings due to his attorneys' mishandling of his claimed amnesia. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that this deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of

the analysis if a defendant makes an inadequate showing on one. ***Id.*** at 697. The determination of deficient performance and prejudice are questions of law that we review without deference to the circuit court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶8 The circuit court assumed without deciding that Herling's second postconviction motion presented clear and convincing evidence that Herling had amnesia at the time of trial.[1] Having made this assumption, the circuit court turned to the question of whether Herling's claimed amnesia meant that he did not receive a fair trial. If the record establishes that Herling received a fair trial notwithstanding his claimed amnesia, then the court may deny Herling's motion on the ground that he was not prejudiced by his attorneys' performance. *See* ***State v. Roberson***, 2006 WI 80, ¶¶43-44, 292 Wis. 2d 280, 717 N.W.2d 111 (circuit court may deny an ineffective assistance of counsel claim without a hearing if the record sufficiently establishes that the defendant was not prejudiced by his attorney's performance).

¶9 Herling argues, correctly, that in deciding whether to hold a hearing, the circuit court must take the factual allegations in his postconviction motion as true. *See* ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62. Herling further argues that the allegations in his motion demonstrate that he was

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[1] Despite this assumption, the circuit court indicated that the new evidence submitted by Herling was probably insufficient as a matter of law to establish that Herling suffered from amnesia. *See* ***State v. Leach***, 124 Wis. 2d 648, 675, 370 N.W.2d 240 (1985) (rejecting defendant's due process claim because the defendant did not show by clear and convincing evidence that he suffered from amnesia that prevented him from receiving a fair trial). In this appeal, Herling argues that the new evidence is sufficient. However, we need not address this issue because we agree with the circuit court that, even if Herling could demonstrate that he suffered from amnesia, this condition did not prevent him from receiving a fair trial.

prejudiced by his attorneys' performance. To establish prejudice, Herling must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. In the context of this appeal, Herling must convince us that there was a reasonable probability of a different result if his first postconviction counsel had properly handled the issue of his amnesia. Here, the different result that Herling seeks is a new trial.[2]

¶10 Having assumed that Herling did suffer from amnesia, the circuit court proceeded to the dispositive question of whether Herling nonetheless received a fair trial. To answer this question, the circuit court turned to ***State v. McIntosh***, 137 Wis. 2d 339, 404 N.W.2d 557 (Ct. App. 1987), in which a defendant claimed he was denied a fair trial due to his amnesia. ***Id.*** at 346-47. In ***McIntosh***, we noted that it is not usually possible for a circuit court to determine in advance the effect that a defendant's amnesia will have on a trial. ***Id.*** at 349. Instead, the question must often be resolved after the trial. ***Id.*** Specifically, the circuit court must make written findings about the effect that the defendant's amnesia had on the trial. ***Id.*** at 349-51. In making these findings, the circuit court should consider six factors:

> (1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
> (2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf.

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[2] The circuit court noted that if Herling does in fact suffer from amnesia, a new trial would raise identical due process issues. Thus, Herling's request for a new trial appears to be, in effect, a request for dismissal. Herling clarifies on appeal that he believes that he should be tried for recklessly endangering safety instead of attempted intentional homicide. Herling does not cite any legal authority for the proposition that a defendant with amnesia can never be fairly tried for an intentional crime, and this assertion strikes us as patently unreasonable.

> (3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi.
> (4) The extent to which the Government assisted the defendant and his counsel in that reconstruction.
> (5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.
> (6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

Id. at 349-50. The circuit court must then determine "whether, under applicable principles of due process, the conviction should stand." ***Id.*** at 350.

¶11 The circuit court made detailed factual findings on each of these six factors. The court found that the first factor weighed in Herling's favor: assuming that Herling suffered from amnesia, this condition negatively affected Herling's ability to consult with and assist his lawyer. That said, the court concluded that the negative impact was not substantial and was not in itself a denial of due process. The court also found in Herling's favor on the second factor, because his amnesia precluded him from testifying about his subjective intent.

¶12 However, the circuit court determined that the four remaining factors supported the conclusion that Herling had received a fair trial. Regarding the third and fourth factors, the court noted the volume of physical evidence introduced at trial, including a videotape, coupled with hours of testimony from evidence recovery officers and crime scene reconstruction experts. All of this evidence was shared with Herling in a timely manner before trial, which assisted Herling and his attorney in reconstructing the events.

¶13 Regarding the fifth factor, the circuit court concluded that the case against Herling was "exceedingly strong." The court recounted the evidence

presented at trial, which included a two-page reconstruction of the events that was received into evidence without objection. The court concluded that even if Herling had been able to testify that he lacked the intent to kill the officers, it was "practically inconceivable" that a jury would have acquitted him. This is because the jurors were instructed that they should convict Herling if they found that he "was aware that his conduct was practically certain to cause the death of another human being." *See* WIS JI—CRIMINAL 1010. Here, the court determined that a jury could not reasonably reach any other conclusion based on the undisputed fact that Herling fired a shotgun directly at officers at close range. Thus, even if the jury agreed that Herling lacked the subjective intent to kill the officers, and that his only intent was to die through "suicide by cop," the jury would still have to find him guilty. In other words, Herling cannot show that his inability to testify about his intent affected the outcome.

¶14 Finally, the sixth factor requires the court to consider any other facts and circumstances that would indicate whether the defendant received a fair trial. For this factor, the circuit court considered the extensive evidence presented to the jury on the defense of "suicide by cop." This defense was central to the case and included testimony from an expert witness regarding the mental state of individuals who engage in suicide by cop. The jury also heard from several witnesses who testified that Herling told officers to kill him and told paramedics to let him die. The court explained that, in light of the extensive evidence presented on Herling's suicide by cop theory, it would have been a sensible strategic decision not to have Herling testify even if he were able to recall the events. Moreover, as explained above, the jury could have convicted Herling even if it accepted that his intent was to commit suicide by cop. Accordingly, the court

concluded that the possibility of additional testimony about Herling's intent would not have changed the outcome.

¶15 On appeal, Herling argues that he was entitled to a hearing to demonstrate that he suffered from amnesia and to show how it affected his right to a fair trial. This argument misses the point of the circuit court's careful analysis of the six ***McIntosh*** factors: rather than conducting a hearing to make factual determinations about Herling's claims, the court simply assumed that Herling's claims were true and then determined that Herling nonetheless received a fair trial. Here, the circuit court's analysis of the record demonstrates that Herling's claimed amnesia did not undermine his right to a fair trial, which in turn means that he was not prejudiced by any error relating to his amnesia.

¶16 Herling argues that the circuit court's reasoning was wrong. However, his brief does not make any real effort to show how the court erred. Specifically, Herling does not directly challenge any of the court's determinations under the six ***McIntosh*** factors, nor does he challenge the manner in which the circuit court weighed these factors in concluding that Herling received a fair trial. That said, Herling does make several arguments that bear on the first and second factors. We address each of these arguments in turn.

¶17 First, Herling contends that he was unable to give trial counsel any information about the shooting. However, as the circuit court pointed out, there was extensive physical evidence regarding the shooting, including a videotape. Given this evidence, Herling does not suggest any way in which Herling's subjective recollection of events might have changed the outcome, and we see none.

¶18 Second, Herling contends that his attorney advised him not to testify due to his memory problems. However, as explained above, there was extensive evidence about Herling's suicide by cop defense, such that Herling's own testimony was unnecessary. Indeed, as the circuit court noted, "showing rather that saying may very well have been Mr. Herling's best chance for persuading" the jury.

¶19 Third, Herling argues that he wanted to testify that the episode "was completely contrary to his personality, history and values." This assertion makes little sense given that Herling claims amnesia, because by definition he does not know his "complete" history. As the circuit court pointed out, "there is no due process right for a defendant to testify falsely." *See* ***Nix v. Whiteside***, 475 U.S. 157, 173 (1986).

¶20 Fourth, Herling argues that his amnesia prevented him from helping his attorney rebut three facts that he claims the State relied on at trial: phone calls that Herling made to police in the days before the shooting; the fact that shortly before the incident, Herling withdrew money from his bank accounts and purchased a shotgun; and evidence that Herling was with another person when the first shot was fired, before police had arrived on the scene. However, the circuit court did not mention any of these facts in its lengthy recitation of the "exceedingly strong" case against Herling. Moreover, the first two facts appear to us to bear equally on a defense of suicide by cop, so it is possible that Herling's inability to rebut these facts may have actually strengthened his defense. As for the fact that someone else may have been present before officers arrived on the scene, we do not see how this fact relates to his intent at the time he shot at officers, and Herling does not explain the relevance either.

¶21 Finally, most of these arguments appear to us to be addressed to the first factor of the ***McIntosh*** test, which is whether Herling's amnesia prevented him from consulting with and assisting his attorney. As explained above, the circuit court agreed that this factor weighed in Herling's favor. However, the court determined that any negative effect was not substantial and did not, in itself, amount to a denial of due process. Nothing in Herling's brief convinces us that this determination was incorrect.

¶22 The remainder of Herling's arguments pertain to whether counsel on direct appeal was ineffective for neglecting to pursue an ineffective assistance of counsel claim based on the trial attorney's performance, and for failing to properly support Herling's amnesia claim in the first postconviction motion. However, we have already concluded that even if Herling did suffer from amnesia, Herling was not prejudiced by his trial attorney's failure to raise the issue. Likewise, Herling was not prejudiced by his appellate attorney's failure to properly raise and support these claims.

CONCLUSION

¶23 For the reasons stated above, we affirm the circuit court's order denying a new trial without a hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).