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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2017AP000871-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TANYA LYNN SCHMIT,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A MOTION
FOR POSTCONVICTION RELIEF ENTERED IN
ST. CROIX COUNTY CIRCUIT COURT,
THE HONORABLE R. MICHAEL WATERMAN,
CIRCUIT JUDGE, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF
AND APPENDIX

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PLAINTIFF-RESPONDENT'S BRIEF

STATEMENT OF THE ISSUE

Was trial counsel constitutionally ineffective when he failed to investigate witnesses his client told him had exculpatory information?

The trial court determined that trial counsel was not constitutionally ineffective.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will adequately address the issue presented, and oral argument will not significantly assist the court in deciding this appeal.

The State takes no position on publication of this Court's decision and opinion.

STATEMENT OF THE CASE

As plaintiff-respondent, the State exercises its discretion to not present a statement of the case. See Wis. Stat. § (Rule) 809.19(3)(a)2. The State cites to relevant facts in the Argument section below.

ARGUMENT

TRIAL COUNSEL'S DECISION TO NOT INVESTIGATE AND PRESENT TWO WITNESSES AT TRIAL DOES NOT PRESENT A CASE FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

STANDARD OF REVIEW.

There is a two-part test used to determine whether or not counsel was ineffective. The defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's performance gives rise to a reasonable probability that if counsel had performed adequately, the result would have been different. Strickland v. Washington, 466 U.S. 668 (1984). The defendant must show that counsel's performance was deficient and that counsel's errors were so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Id. Furthermore, the deficient performance must be so serious as to deprive the defendant a fair trial. Id.

A. Trial counsel's performance did not fall below an objective standard of reasonableness.

“A failure to call a key witness, however, does not always necessarily constitute deficient performance.” State v. Jenkins, 355 Wis. 2d 180, 188 (2014).

“The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.” Strickland at 691. “Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.” Id. “In particular, what investigation decisions are reasonable depends critically on such information.” Id. “For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.” Id. “And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.” Id.

The trial court evaluated the ineffective assistance of counsel claim during the Machner post-conviction motion hearing. (R. 89:1-58). It further evaluated the failure to call a potential witness and how that would constitute deficient performance. (R. 66:1-5). The trial court discussed how Schmit revealed Korn and Chad Schmit only shortly before the trial was scheduled to begin even though her case had been pending for years and had been previously scheduled for trial on two different dates. (R. 66:3). It further noted that Schmit failed to provide Nelson with anything substantive about their anticipated testimony. (R. 66:3).

In Jenkins, the Wisconsin Supreme Court held that counsel's performance was deficient by failing to call a key witness. Jenkins at 197. “The defense trial counsel's deficient performance is clear from the record [because] he knew of Jones, he knew she was an eyewitness and could testify about the shooting, he knew her statements would contradict or impeach the eyewitness upon whom the prosecution's entire

case relied, and he knew that Jones had not identified the defendant on the night of the shooting and that she did not identify him when she examined a photo array.” Id.

In Schmit’s case, unlike Jenkins, trial counsel was not aware of what the testimony of the witnesses would entail, nor was he made aware of the witnesses in a timely manner to perform an investigation into what their testimony would entail. Therefore, trial counsel’s performance was not deficient.

B. The defendant was not deprived of a fair trial and the result would not have been different if the witnesses testified.

“It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” Strickland at 693. “Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims.” Id. at 694. “The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged.” Id.

The trial court opined that if Nelson’s performance was deficient, Schmit must show prejudice and demonstrate that there was a reasonable probability that the errors had an adverse effect on the defense. (R. 66:4). The trial court ruled that Schmit failed to prove prejudice. (R. 66:4). The trial court explained that, had Nelson called Korn and Chad Schmit to testify at trial, the trial court probably would have excluded them because their disclosure was untimely, and not untimely because of Nelson’s inaction, but because of Schmit’s. (R. 66:4). And had the disclosure been timely, the trial court opined that the testimony of Korn and Chad Schmit would not have cast doubt on the verdict due to the limited probative value of Korn’s statement. (R. 66:5). Korn never saw Aumer exit the vehicle after it had been parked for an unknown duration, nor did she see the vehicle in operation much less see Aumer in control of it. (R. 66:5). And finally, Chad Schmit’s testimony would have never been heard by the

jury because the statement made to him by Aumer was inadmissible hearsay. (R. 66:5).

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm the circuit court's decision and deny Schmit's ineffective assistance of counsel claim and further deny Schmit's request for a remand for a new trial as it relates to the conviction for OWI 3rd.

Dated this 9th day of October, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 996 words.

Dated this 9th day of October, 2017.

Signed:

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**CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of October, 2017.

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CERTIFICATE OF MAILING

I certify that this brief was deposited into the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on October 9, 2017.

I further certify that on October 9, 2017, I served three copies of this brief via United States mail upon all opposing parties.

I further certify that the brief was correctly addressed and postage was prepaid.

Dated this 9th day of October, 2017.

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