

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 19, 2007**

David R. Schanker  
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. 2004AP3096-CR**

**Cir. Ct. No. 2002CF5689**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DEMETRIS S. SIMMONS,**

**DEFENDANT-APPELLANT.**

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. A jury found Demetris S. Simmons, a convicted felon, guilty of possessing a firearm, a violation of WIS. STAT. § 941.29(2) (2003-

04).<sup>1</sup> After sentencing, Simmons moved the circuit court for a new trial, contending that his trial counsel's performance was deficient for failing to call as a trial witness one of the police officers involved in his stop. Simmons maintained that he was prejudiced by that failure because trial counsel essentially "forced [him] to proceed to trial in violation of his right to confront his accuser, namely the missing police officer." Simmons also argued that the circuit court erroneously exercised its discretion by denying his request for adjournment of the trial so that he could subpoena the missing police officer. The circuit court denied the postconviction motion, and Simmons appeals. Because Simmons failed to establish that his trial counsel was ineffective and because the record demonstrates that the circuit court properly exercised its discretion in denying the adjournment, we affirm.

¶2 The facts are undisputed. Simmons was driving his car and was carrying four passengers. For reasons not relevant to this appeal, two Milwaukee police officers, Ryan Lemke and David Sturma, stopped the car. According to the criminal complaint, both officers saw the driver, Simmons, "[lean] forward in a manner suggesting that he was placing something underneath his seat." When the officers approached the car, they observed a loaded gun magazine on the front seat of the car. They ordered the occupants of the car out of the vehicle and, upon further investigation, found a loaded handgun under the driver's seat.

¶3 On the day before the scheduled jury trial, Simmons, who was represented by counsel, personally addressed the court and complained that

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Officer Lemke was not present. Simmons, who had also requested a speedy trial, stated that while he wanted “to see both officers here,” he also wanted no delay in the trial. Simmons was informed that Officer Lemke had been off work due to injury and might be unavailable on the day of trial. Defense counsel then told the court that even though Officer Lemke had been subpoenaed to appear, the subpoena had not been served. The State then explained that due to Officer Lemke’s injury, it planned to proceed with only one officer. Defense counsel stated that he had “explained that to Mr. Simmons and he wants to proceed.”

¶4 Simmons apparently spoke to defense counsel, who then stated, “My client is indicating in whispered tones to me that he really wants the police officer here and he doesn’t want to proceed unless he is here.” The circuit court responded:

No, no. I just let the other trial go so we could try this one. We are going to go ahead with this trial now. We’ve been horsing around with this all day. It’s now 3:30 in the afternoon. We are going to go to trial. All this wavering back and forth, fooling around. That’s too bad. [I] gave him a chance to have an adjournment before. Now these other folks who wanted a speedy trial got their case adjourned so Mr. Simmons can go to trial.

The case then proceeded to trial, and Simmons was convicted. Only Detective Sturma testified regarding the circumstances of Simmons’s arrest and the discovery of the gun.

¶5 In his postconviction motion, Simmons argued that his trial counsel’s performance was deficient for failing to request an adjournment so that he could procure the testimony of Detective Lemke at trial. He contended that he was prejudiced by counsel’s performance because he was denied his constitutional right to confront his accuser at trial. *See* U.S. CONST. amends. 6 & 14; *see also*

WIS. CONST. art. I, § 7. Finally, he argued that the circuit court erroneously exercised discretion when it declined to adjourn the trial “when it knew that the defendant wanted both police officers present to testify ... and it was clear” that Officer Lemke would not be present at the scheduled trial.

¶6 In denying the motion, the circuit court noted first that when the prosecution informed the court that Officer Lemke would not be present for trial, Simmons indicated that he wished to proceed to trial nonetheless. The court noted that it was not until it had adjourned another trial scheduled for that day so that Simmons’s case could go forward that Simmons indicated he had changed his mind. The court held that it had not erroneously exercised its discretion in going forward because “there was no indication when [Officer Lemke] would have been available.” In addition, the court held, in regard to Simmons’s contention that trial counsel was ineffective for failing to seek an adjournment, that Simmons could not show prejudice because even if counsel had sought an adjournment, the “motion simply would not have been successful.” Finally, the circuit court held that Simmons waived the right to confront Officer Lemke “when he insisted on going to trial before the court released the other jury.” Simmons appeals.

¶7 In analyzing issues relating to counsel’s effectiveness, this court uses the two-element test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The first element is whether counsel’s performance was deficient—that is, whether counsel’s performance was at a level of representation at or above an objective standard of reasonableness. See *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986). The second element requires the defendant to demonstrate that the deficient performance prejudiced the defendant such that the proceeding cannot be said to have been reliable. See *State v. Pitsch*, 124 Wis. 2d 628, 640, 369 N.W.2d 711 (1985). “Unless a defendant makes both showings, it

cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.” *Strickland*, 466 U.S. at 687.

¶8 Simmons first argues that trial counsel’s performance was deficient for failing to seek an adjournment of the trial when it became clear Officer Lemke was unlikely to appear. We disagree. Simmons had requested a speedy trial and, at one point, counsel had sought dismissal of the case because it had “started to age.” Then, on the eve of trial, Simmons indicated that he wished to ensure Officer Lemke’s presence at trial, but also wished to proceed to trial as scheduled. Once it was clear that Simmons himself did not want an adjournment of his case, the circuit court adjourned another jury trial in reliance on Simmons’s representation. It is apparent that once this occurred, the circuit court would have denied any further delay of the trial. Given Simmons’s own representations regarding his desire to proceed to trial, we cannot conclude that defense counsel’s failure to seek an adjournment was below an objective standard of reasonableness.<sup>2</sup>

¶9 Moreover, Simmons has not established that he suffered any prejudice as a consequence of counsel’s performance. Although he contends that “there is a reasonable probability that Officer Lemke’s trial testimony would have been at odds with the testimony provided by Officer Sturma,” his contention is completely unsupported. In addition, as the State points out, Simmons’s contention that Officer Lemke would have given testimony that would have contributed to acquittal is not supported by anything Simmons has presented.

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<sup>2</sup> As the State notes, Simmons might have argued that trial counsel was ineffective for failing to subpoena Officer Lemke successfully. Simmons did not raise this argument in the circuit court, however, and has therefore waived it.

¶10 In regard to Simmons’s contention that the circuit court erroneously exercised discretion in denying his implied *pro se* request for adjournment of the trial, we disagree. See *State v. Williams*, 2000 WI App 123, ¶15, 237 Wis. 2d 591, 614 N.W.2d 11 (whether to grant or deny adjournment motion left to circuit court’s discretion). In deciding an adjournment request, a circuit court “should consider ‘whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located.’” *Id.* (quoting *Elam v. State*, 50 Wis. 2d 383, 390, 184 N.W.2d 176 (1971)). “A defendant’s failure to make a satisfactory showing on one or more of the three considerations is grounds for denying” the adjournment request. *Id.*

¶11 Simmons has not presented anything to show that Officer Lemke’s testimony would have been helpful to his defense. The circuit court properly exercised discretion in declining to adjourn the trial.

¶12 Finally, we turn to Simmons’s contention that, by the State’s failure to call Officer Lemke and Officer Lemke’s subsequent absence at trial, deprived him of his right to confront a key witness against him. Here, Simmons’s constitutional right to confront his accuser was not impaired because Officer Lemke was never called as a witness. Thus, Simmons had no constitutional right to confront him.

*By the Court.*—Judgment and order affirmed.

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

