

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 2009

David R. Schanker
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 Nos. 2008AP2433-CR
2008AP2434-CR**

**Cir. Ct. Nos. 2007CM26
2007CT124**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. RUTKAUSKAS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

¶1 NEUBAUER, J.¹ Thomas J. Rutkauskas appeals from a judgment of conviction for two counts of disorderly conduct, contrary to WIS. STAT.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

§ 947.01 and a judgment of conviction for operating while under the influence (OWI) and operating after revocation, contrary to WIS. STAT. §§ 346.63(1)(a) and 343.44(1)(b). Rutkauskas additionally appeals from the trial court's order denying his motion for postconviction relief requesting a new trial on grounds of ineffective assistance of counsel and in the interest of justice. Based on our review of the record, we uphold the trial court's order and affirm the judgments.

BACKGROUND

¶2 The facts underlying Rutkauskas's conviction, as adduced at trial, are as follows. City of Oshkosh Police Officer Joey Konkle testified that on January 4, 2007, at approximately 4:30 p.m., she received a call regarding a reckless driver related to a disturbance at the Computer Corner on North Main Street. Konkle spoke with the reporting person, Computer Corner employee Ralph McHugh. McHugh reported that a male, later identified as Rutkauskas, was "causing a disturbance" in the store and was "highly intoxicated." When asked specifically whether he had seen Rutkauskas driving, McHugh indicated that he had witnessed Rutkauskas leave in a vehicle driving southbound on North Main Street. McHugh provided both the license plate number and vehicle model. The vehicle was registered to a Sheryl Scott who resided on Grove Street.

¶3 At approximately 5:10 p.m., Konkle and another officer, Officer Craig Johannes, went to the Scott residence, knocked on the door and received no answer. From the yard of the residence, Konkle and Johannes observed the reported vehicle coming towards Grove Street. Konkle testified that it was close enough for her to see the license plate number but she was unable to identify the driver. Konkle returned to her squad car to search for the vehicle. After an unsuccessful search lasting approximately ten minutes, Konkle returned to a

position where she could observe the Grove Street residence. As she pulled forward onto Grove Street, she observed a male, later identified as Rutkauskas, walking southbound on Grove Street. Konkle did not know Rutkauskas and so continued on to the parking lot of Shoreview Lanes where she found the reported vehicle. She then turned around to make contact with the person she had seen walking.

¶4 The person identified himself as Thomas Rutkauskas and was “very agitated.” When questioned, Rutkauskas admitted to being at Computer Corner, but denied having driven a vehicle. Rutkauskas was uncooperative and Konkle believed he was intoxicated as his speech was slurred, he had admitted alternately to drinking and/or smoking marijuana, and could not stand in one spot. Rutkauskas told Konkle that he was “drunk walking,” again denying he had driven the vehicle. Johannes, who had been at the Grove Street residence, confirmed with the owner of the vehicle, Scott, that Rutkauskas was driving. Konkle testified to her understanding that two witnesses observed Rutkauskas driving: Sheryl Scott and Ralph McHugh.

¶5 Johannes testified that he also searched for Rutkauskas’s vehicle, during which he encountered a woman, later identified as Scott, walking eastbound on Huron. He approached her at the door of her residence and asked her about the complaint regarding Rutkauskas. Johannes testified that in his initial contact with Scott, she confirmed that Rutkauskas was driving the vehicle. After leaving Scott to find Rutkauskas, Johannes returned to the Grove Street residence and again asked Scott if Rutkauskas had been driving. He testified: “I asked her again who had been driving the vehicle. She informed me that Mr. Rutkauskas had been driving the entire night. Asked her when the last time she saw him drive the vehicle was and she had stated approximately an hour prior to that.”

¶6 At trial, Scott, Rutkauskas’s girlfriend of seven or eight years, testified that she had been the one driving the vehicle. Scott additionally testified that she has two sets of keys to the car, contradicting Johannes’ statement in the police report that Scott had informed him that Rutkauskas was the only one who had keys to the vehicle. Rutkauskas’s testimony at trial was consistent with Scott’s, specifically, that Scott had driven the vehicle to and from the Computer Corner. He testified that when he left the Computer Corner he walked home, stopping in at a tavern for a couple of “stiff drinks” because he was upset following his conversation with McHugh.

¶7 The jury ultimately found Rutkauskas guilty on all counts. Rutkauskas subsequently filed a postconviction motion for a new trial claiming ineffective assistance of trial counsel. Rutkauskas alleged that trial counsel was ineffective due to a litany of failures.² Following a *Machner*³ hearing on July 11, 2008, at which both Rutkauskas and his trial counsel, John Carroll, testified, the trial court issued an oral ruling denying Rutkauskas’s postconviction motion. The trial court, addressing each of Rutkauskas’s arguments in turn, found that Rutkauskas had not shown “that Attorney Carroll was deficient in any way on his

² Rutkauskas alleged that Carroll’s performance was deficient for: (1) stipulating to a joinder of the criminal traffic case and the disorderly conduct case without fully advising him; (2) failing to challenge the initial stop of Rutkauskas for lack of reasonable suspicion; (3) failing to preserve his rights via a pretrial motion to exclude prejudicial or irrelevant other acts evidence; (4) failing to properly investigate and verify he was in receipt of all evidence requested in the discovery demand, namely a 911 tape of McHugh’s call; (5) failing to properly investigate the nature of the State’s evidence; (6) failing to request a continuance at Rutkauskas’s request; (7) failing to object to leading questions; (8) failing to properly cross-examine McHugh; (9) proceeding on an improper theory of defense; (10) failing to move for a new jury when the district attorney referred to the prohibited blood alcohol concentration (BAC) as 0.02 percent, implying that this was not Rutkauskas’s first offense; and (11) failing to communicate a plea offer.

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W. 2d 905 (Ct. App. 1979).

representation of the defendant or shown any prejudice as to any of the allegations of ineffective assistance of counsel or any basis for a new trial in the interest of justice.” The trial court later entered a written order denying Rutkauskas’s postconviction motion. Rutkauskas appeals.

DISCUSSION

¶8 In order to prove an ineffective assistance claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel’s performance was deficient and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both prongs of the test if the defendant fails to make a sufficient showing on one of them. *Id.* at 697. As to prejudice, it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. *State v. Erickson*, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the defendant must show that, but for the attorney’s error, there is a reasonable probability that the result of the trial would have been different. *Id.*

¶9 An attorney’s performance is deficient if the attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (citing *Strickland*, 466 U.S. at 687). Stated differently, performance is deficient if it falls outside the range of professionally competent representation. *State v. Pitsch*, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See id.*; *Strickland*, 466 U.S. at 688. We indulge in a strong presumption that counsel acted reasonably within professional norms. *Pitsch*, 124 Wis. 2d at 637.

¶10 A claim of ineffective assistance of counsel presents a mixed question of fact and law. *State v. O'Brien*, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. *Id.* at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. *Id.* at 325. Bearing these standards in mind, we address each of Rutkauskas's complaints raised on appeal.

¶11 Rutkauskas first argues that Carroll failed to properly investigate the case and secure all relevant evidence for trial. Specifically, he complains that Carroll failed to obtain a copy of the recording of McHugh's 911 call. While Rutkauskas speculates that the absence of any outdoor noise such as traffic or wind on the tape could refute McHugh's testimony that he followed Rutkauskas outside and observed him drive, McHugh is heard on the tape providing the police with the make and license number of the vehicle driven by Rutkauskas. McHugh said that Rutkauskas is "drinking and driving." Moreover, the defense investigator testified that there were no windows or doors that would have allowed McHugh to see that from inside the store. Based on the testimony of the postconviction hearing, the trial court found that Carroll was not aware of the existence of a 911 tape until the middle of trial as it was not mentioned in the police reports and, after hearing the contents of the tape, additionally found that there was no evidence of prejudice resulting from the failure to obtain the tape. We agree with the trial court that Rutkauskas has failed to make a showing of either deficient performance or prejudice on this ground.

¶12 Next, Rutkauskas argues that Carroll was ineffective for failing to properly prepare for trial and for failing to obtain an adjournment. Again, the trial court found to the contrary, finding credible Carroll's testimony that he had met

with Rutkauskas and Scott prior to trial, had hired a private investigator and had visited the scene. The trial court additionally found that Rutkauskas had failed to provide any evidence as to what, if any, difference further preparation by Carroll would have made. Rutkauskas is correct that the trial court erred in finding that Carroll met with him five or six times; Carroll acknowledged that only two of those meetings were of any length. However, Carroll felt prepared for trial, testifying: “[W]e were prepared to go.” More significant is Rutkauskas’s failure to point to any prejudice resulting from Carroll’s trial preparation, or alleged lack thereof, or his failure to request an adjournment.⁴

¶13 Rutkauskas’s next challenge stems from his stipulation as to his blood- alcohol concentration in order to avoid the jury hearing that his prohibited alcohol concentration, as a repeat offender, was 0.02 percent. However, the State mentioned the 0.02 percent during voir dire and again in closing statements without any objection from defense counsel. Rutkauskas argues that as a result he was deprived of the benefit of his stipulation. At the postconviction hearing, Carroll testified that in his experience jurors know that a person charged criminally has had prior offenses. Carroll also testified that he entered into the stipulation in order to dispose of an issue which was immaterial to his defense strategy—namely, that Rutkauskas was drinking but that he had not operated the vehicle. Finally, the trial court found it entirely possible that the jury was not aware of the significance of the 0.02 percent prohibited BAC and nevertheless

⁴ Rutkauskas makes much of the fact that, just prior to trial, Carroll appeared not to know whether Rutkauskas’s certified driving record indicated that he had been revoked. We have reviewed the transcript and Carroll did indeed ask to review the certified driving record. However, Rutkauskas was revoked, and he stipulated to the revocation prior to trial. Rutkauskas does not allege any prejudice resulting from this exchange, but rather cites it as contributing to an accumulation of errors which, as a whole, result in prejudice.

Rutkauskas had failed to show how the mention of the 0.02 percent prohibited BAC prejudiced his defense. Based on our review of the record, we agree.

¶14 Also related to the reasonableness of the defense strategy are Rutkauskas's contentions that (1) Carroll's reference to his drinking during the opening statements was prejudicial⁵ and (2) Carroll was deficient for failing to object to Konkle's testimony that Rutkauskas informed her that he had a "grow operation" in his basement. Based on Carroll's testimony at the postconviction hearing, the trial court found that the theory of defense was that Rutkauskas "was most certainly drinking but that he did not drive." The trial court found that Rutkauskas failed to raise any issue with Carroll at the *Machner* hearing as to this theory of defense and, therefore, he made no showing of deficient performance. We agree.

¶15 First, as to the statement regarding marijuana or a "grow operation," Carroll testified that he believed Konkle's testimony reflected that Rutkauskas had made the "grow operation" statement in jest and that any objection would bring unnecessary attention to it. The trial court found these explanations to be reasonable, and we find no basis in the record to disagree. Next, Rutkauskas relies on *State v. Jorgensen*, 2008 WI 60, ¶31, 310 Wis. 2d 138, 754 N.W.2d 77, in support of his argument that Carroll prejudiced the defense by informing the jury that Rutkauskas drinks every day. In *Jorgensen*, an OWI case, the court held that it was prejudicial for the State to call a defendant an alcoholic in opening

⁵ In his opening statements, Carroll stated: "I'm just going to just briefly tell you what I believe the evidence in this case is going to show. First of all, we're going to prove to you that Thomas Rutkauskas and [Scott], his live-in girlfriend, pretty much drink every day, that they get up, they drink every day. And that's a big part of their life. And the evidence in this case is going to show that."

statements or closing arguments because it essentially invites the jury to convict for OWI on grounds that the defendant is an alcoholic. *Id.* However, here, Carroll testified that part of his strategy at trial was that “the defendant ha[d] nothing to hide.” Rutkauskas admitted to drinking, but denied driving the vehicle. Stated differently, the defense strategy was to be honest about the fact that Rutkauskas drinks every day in hopes that the jury would believe Rutkauskas when he testified that he did not drive. Rutkauskas now doubts this approach.

¶16 “[I]n considering alleged incompetency of counsel, one should not by hindsight reconstruct the ideal defense. The test of effectiveness is much broader and an accused is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation.” *State v. Harper*, 57 Wis. 2d 543, 556-57, 205 N.W.2d 1 (1973). Based on our review, we cannot conclude that Carroll’s defense was not a reasonably effective approach.

¶17 Finally, Rutkauskas challenges Carroll’s cross-examination of McHugh and his failure to advise as to the disadvantages of joining the disorderly conduct and OWI cases. As to these two issues, the trial court found that Rutkauskas had failed to provide Carroll with an opportunity at the *Machner* hearing to address the cross-examination of McHugh and that Carroll’s testimony that Rutkauskas had made the decision to join the cases for financial reasons was credible. Based on our review of the transcript, we see no reason to disturb these findings. *See O’Brien*, 223 Wis. 2d at 324-25 (we will affirm the trial court’s findings of historical fact concerning counsel’s performance unless those findings are clearly erroneous).

¶18 In sum, defense counsel was faced with testimony from more than one police officer and two witnesses that Rutkauskas was very intoxicated. He was also faced with testimony from McHugh, an eyewitness, that Rutkauskas had been driving while intoxicated and statements that Scott, Rutkauskas's girlfriend, made on the date of the incident that twice confirmed that Rutkauskas was driving. While Rutkauskas raises numerous challenges to Carroll's representation and advises as to how Carroll should have proceeded, we are disinclined to engage in "Monday-morning quarterbacking." See *State v. Byrge*, 225 Wis. 2d 702, 720, 594 N.W.2d 388 (Ct. App. 1999). As has often been observed, the problem with judging counsel's performance in hindsight is that "in many instances, these arguments are made in a vacuum and with little regard to the circumstances actually existing at the time counsel made his or her decisions." *Id.*

¶19 Furthermore, even if Carroll's performance was deficient at times during the proceeding, we agree with the trial court that Rutkauskas has failed to demonstrate how these individual errors prejudiced its outcome. See *Erickson*, 227 Wis. 2d at 773. As to prejudice, the defendant must show that, but for the attorney's error, there is a reasonable probability that the result of the trial would have been different. *Id.* Rutkauskas failed to do so.

CONCLUSION

¶20 For the reasons stated, we conclude that Rutkauskas has failed to demonstrate that Carroll's performance fell so far outside the range of professionally competent representation as to deny him the effective assistance of counsel. See *Pitsch*, 124 Wis. 2d at 636-37. We further conclude that he failed to demonstrate prejudice as a result of Carroll's alleged errors. We therefore affirm the judgments of conviction and order denying postconviction relief.

By the Court.—Judgments and order affirmed.

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

