State v. Sellars

220 Wis.2d 716 (1998) | Cited 0 times | Court of Appeals of Wisconsin | June 11, 1998

Jerome Sellars appeals a judgment of convictions entered after a jury trial for possession of a controlled substance with intent to deliver contrary to Sections 161.41(1m)(cm)1 and 939.05, Stats.; knowingly keeping a building which was used for keeping and delivering controlled substances contrary to Section 161.42(1), Stats., (now Section 961.42(1)); combining with another for the purpose of delivering a controlled substance contrary to Sections 161.41(1)(cm)1 and 939.31, Stats.; and possession of drug paraphernalia in violation of Section 161.573, Stats. He also appeals from the trial court's order denying his motion for post-conviction relief. On appeal, Sellars contends that his trial counsel was ineffective for allowing the testimony of co-defendant Michael Duffy, given at Duffy's trial to be read at his trial; failing to call Police Chief Thomas Woods as a witness; failing to pursue a motion for a change of venue; and failing to call him, Sellars, as a witness, combined with the absence of a voluntary waiver of Sellars' right to testify on his own behalf. Sellars contends that the trial court erroneously denied his post-verdict motion for relief based on these claims of ineffective assistance of counsel without affording him an evidentiary hearing. Finally, Sellars argues that he is entitled to a new trial in the interests of Justice even if we decide he was not denied effective assistance of counsel.

We conclude that the trial court did not err in denying Sellars' post-conviction motion without an evidentiary hearing, and that Sellars is not entitled to a new trial in the interests of Justice. We therefore affirm.

BACKGROUND

The complaint alleged that on April 17, 1996, an individual, identified at trial as Barbara Emerson, called Thomas Woods, police chief of the City of Neillsville, and stated that she had personally observed Sellars possessing and delivering cocaine. Emerson told Woods and Officer Brad Lindner that she had recently been at Sellars' apartment and observed a large amount of white powder cocaine. She further reported that she was told by Sellars and Michael Duffy, who was also present, that they were just about to cook some of the powder into rock form and it was to be picked up later that day by Greg Coons. In subsequent telephone conversations with the officers on April 18, 1996, Emerson told them that Sellars and Duffy had been in her apartment that afternoon and cooked some cocaine into rock cocaine. They left two baggies of powder cocaine and she was to give them to Coons, who would arrive later to pick them up. When Sellars and Duffy left her apartment, they said they were going to the Twin Cities to buy more cocaine. When Coons called Emerson, in response to a message left by Sellars, she arranged for him to pick up $100 of cocaine that Sellars had left.

The complaint also alleged that Sergeant Ron Kramer and Officer Jerry Staniszewski of the West Central Drug Task Force assisted Police Chief Woods and Officer Lindner. They went to Emerson's apartment after Sellars and Duffy had left on April 18. She gave them two bags of powder cocaine and they gave her two plastic bags of cornstarch. Other officers followed Sellars' and Duffy's car and arrested them. Coons and Jamie Gilbert were arrested after they came to Emerson's apartment and picked up the baggies with the cornstarch. In a search of Sellars' apartment that same evening, officers discovered a powdered substance that tested positive for cocaine and various items, including a propane torch.

The trial testimony of Lindner, Kramer, Staniszewski and Emerson, and other police officers involved in the investigation and the arrest, was substantially consistent with the allegations of the complaint. Emerson testified that she met Sellars when she rented an apartment in a building he owned and moved in across the hall from his apartment in early April 1996. She acknowledged using cocaine with Sellars both before and on April 18, and having sex with him. She testified that she saw Sellars use some of the items recovered from Sellars' apartment on April 18 to cook cocaine. There was testimony that cocaine residue was on some of the items recovered from Sellars' apartment on April 18 and on other items recovered in a search of his apartment, with his consent, on April 9. There was also testimony that some of the items recovered on April 9 were commonly used to cook cocaine.

The State presented evidence that in February and March 1996, Detective Sergeant Robert Powell of the Clark County Sheriff's Department assisted Lindner and Wood in using an informant, Dawn Anderson, to attempt to buy cocaine from Sellars. Anderson lived in the apartment across the hall from Sellars (apparently in the apartment that Emerson moved into). Anderson testified she used cocaine with Sellars once in his apartment and saw him use cocaine in his apartment about four or five times. She drove with him to Minneapolis once when he picked up cocaine, which he showed to her. Sellars did not sell Anderson any cocaine. Powell also testified that in 1993, Phyllis Orsborn, who was in a relationship with Sellars and was the mother of his child, approached Powell and told him that Sellars was selling crack. However, the information she provided was not enough for a search warrant, according to Powell, and Orsborn was not a good candidate for gathering more information against Sellars.

Coons, called by the State, testified that he met Sellars at work and Sellars asked him if he wanted to sell cocaine. Eventually Coons agreed and sold cocaine that Sellars gave him, with the agreement that Coons would sell one-half and keep the remainder. Coons testified that he went to Minneapolis on two occasions with Sellars. There they met with Duffy, tied up the cocaine in smaller bags, and took it back to Neillsville, where Sellars kept it in his apartment. Coons also testified that he had used cocaine with Sellars a number of times at Sellars' apartment.

A transcript of Duffy's testimony at his trial[2] was read in by the State. Duffy testified that he lived in Minneapolis. He had seen Sellars only a few times at his (Duffy's) apartment building when Sellars

was visiting someone else there, and he spoke to Sellars only briefly on those occasions. He agreed to drive with Sellars on April 18, 1996, from Minneapolis to Neillsville to help Sellars move some appliances in Neillsville. At Sellars' apartment on that date, he used cocaine with Sellars and Emerson, got confused as a result, and did not see or hear any evidence of Sellars bringing cocaine to Emerson's apartment to sell.

On cross-examination of the State's witnesses, Sellars' trial counsel challenged the motives and integrity of the investigation of Sellars, suggesting that the law enforcement officers were intent on getting Sellars because he was black and were not professional in their methods of using informants and getting information. The defense also challenged the credibility and reliability of Emerson and suggested, through cross-examination, that she had access to Sellars' apartment and that the cocaine she said Sellars brought to her apartment on April 18 for Coons to pick up was really hers. Anderson's reliability and credibility were challenged as well, through use of inconsistent statements and revelations of her motive for acting as an informant: she was being questioned at the time in connection with a burglary and was told that if she cooperated, citations for disorderly conduct and speeding could be worked out. Finally, on cross-examination of Coons, the defense emphasized his plea agreement with the district attorney and inconsistencies among his prior statements and his trial testimony.

The defense witnesses were relatives and friends of Sellars and an investigator for the defense. They presented testimony that Sellars had used drugs but did not sell them; that Sellars was ending his relationship with Emerson; that Sellars' wife had been in his apartment without his consent sometime shortly before the search of his apartment on April 9 and was angry with him; and that other persons might have had access to his apartment. Orsborn testified that she did not tell Powell that Sellars was selling drugs, only that she was concerned about his problem with drugs, and she refused law enforcement's request to try to get Sellars to sell drugs to her.

The jury returned a verdict of guilty on all four charges. In Sellars' post-conviction motion, he raised the claims of ineffective assistance of counsel that he raises on this appeal. The trial court denied the motion without an evidentiary hearing, concluding that there was no merit to the claims.

STANDARD OF REVIEW

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). There is a strong presumption that the attorney has rendered effective assistance and made all significant decisions exercising reasonable professional judgment. Id. at 689. To meet the prejudice test, the defendant must show that there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694; State v. Sanchez, 201 Wis.2d 219, 548 N.W.2d 69 (1996).

Claims of ineffective assistance of counsel present mixed questions of law and fact. State v. Pitsch, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). The trial court's findings of fact will not be disturbed unless clearly erroneous. Id. at 634, 369 N.W.2d at 714-15. However, the determinations of whether counsel's performance was deficient and whether the defendant was prejudiced are questions of law, which we review de novo. Id. Because the defendant must show both deficient performance and prejudice, a reviewing court may dispose of an ineffective assistance of counsel claim where the defendant fails to satisfy either element. State v. Johnson, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

A defendant is not automatically entitled to an evidentiary hearing on a post-conviction motion based on ineffective assistance of counsel. State v. Toliver, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). As with any post-conviction motion, such a motion must allege sufficient facts to support the claim that the defendant was denied effective assistance of counsel; conclusory allegations are not sufficient. State v. Washington, 176 Wis.2d 205, 214-15, 500 N.W.2d 331, 336 (1993). The facts alleged must be specific and must allow the court to meaningfully assess the claim. State v. Bentley, 201 Wis.2d 303, 314-15, 548 N.W.2d 50, 55 (1996).

In reviewing a trial court decision to deny an evidentiary hearing on a post-conviction motion, we independently review the motion to determine whether the facts alleged, if true, entitle the defendant to relief. Bentley, 210 Wis.2d at 310, 548 N.W.2d at 53. If they do, then the trial court must hold an evidentiary hearing. Id. However, if the motion does not allege sufficient facts, the trial court may, in the exercise of its discretion, deny a post-conviction motion without a hearing on the basis that the motion does not raise a question of fact or presents only conclusory allegations, or the record conclusively demonstrates that the defendant is not entitled to relief. Id. at 310-11, 548 N.W.2d at 53-54. We review this decision by a trial court as we do other discretionary decisions of the trial court: we affirm if the trial court examined the relevant facts, applied the proper legal standard and engaged in a rational decision-making process. Id. at 318, 548 N.W.2d at 57.

Although the trial court in this case did not separately address the defendant's entitlement to a hearing, we understand from the decision that the court denied the motion without a hearing because it decided the motion did not allege facts, which, if true, entitled Sellars to relief on his claim of ineffective assistance of counsel, and that the record conclusively demonstrated that Sellars was not entitled to relief.

DUFFY'S TESTIMONY

Sellars' trial counsel did not object to the State reading the transcript of Duffy's trial testimony. When this issue arose at trial, trial counsel explained to the court that Duffy's lawyer had stated that if Duffy were called to testify, he would invoke his Fifth Amendment privilege against testifying; in trial counsel's view, the court would then find Duffy unavailable and the transcripts would come in. As to those transcripts, counsel stipulated that Duffy was unavailable and waived Sellars' hearsay and

confrontation objections, stating to the court that he had discussed this with Sellars. The court directly addressed Sellars and asked if that was satisfactory to him and Sellars said "yes."[3] The prosecutor wanted the jury told that Duffy was convicted of the charge that was tried-conspiring to possess cocaine with intent to deliver-but defense counsel objected and wanted the jury to be informed simply that Duffy had two prior criminal convictions. Defense counsel prevailed on this point, and the jury was informed that Duffy had two prior criminal convictions.

Sellars' motion for post-conviction relief was accompanied by the affidavit of post-conviction counsel, which averred that Sellars informed him, and would so testify at an evidentiary hearing, that trial counsel told Sellars there was nothing in Duffy's testimony that would hurt Sellars if the transcript were read, and also told Sellars that the law permitted that reading because Duffy had exercised his Fifth Amendment right not to testify. Sellars argued in his post-conviction motion, as he does on appeal, that even though Duffy's attorney stated that Duffy would assert his Fifth Amendment privilege not to testify in Sellars' case, that should not have been accepted by Sellars' trial counsel because Duffy had waived that privilege once he took the stand to testify in his own case. Thus, contends Sellars, Duffy was available within the meaning of Section 908.04(1), Stats., the prerequisite to the use of the exception to the hearsay rule that Sellars' trial counsel assumed applied to Duffy's trial testimony.[4] Sellars also argues that even if Duffy's testimony were admissible under Section 908.045(1), it violated Sellars' Sixth Amendment right to cross-examine and confront witnesses against him.

The trial court decided that the requirements for unavailability under Section 908.045(1), Stats., were met because, although Duffy was convicted, he had not yet been sentenced. The court also decided that there was meaningful cross-examination of Duffy by the district attorney, who was motivated to vigorously cross-examine Duffy in order to obtain a conviction. The court concluded there was no violation of Sellars' right of confrontation because Duffy's position and Sellars' position and interests were so similar. Finally, the court concluded that even if trial counsel were deficient in stipulating to the reading of the transcript, it was not prejudicial to Sellars because of Emerson's testimony, which supported Sellars' conviction. The court pointed out that she was the witness who "primarily convicted Duffy."

The State contends that the trial court properly decided that Sellars was not entitled to an evidentiary hearing on this claim because the motion did not allege any facts which, if true, showed deficient performance by stipulating to the reading of Duffy's testimony. We do not decide whether Sellars was entitled to an evidentiary hearing on trial counsel's performance, because we conclude that, accepting the assertions in Sellars' post-conviction counsel's affidavit as true, Sellars has not shown prejudice.

Much of Duffy's testimony was either helpful to Sellars or neutral. Duffy contradicted Coons' testimony that he and Sellars had previously met on two occasions in Minneapolis to divide up cocaine to sell, and Emerson's testimony that Duffy was Sellars' supplier in the Twin Cities.

According to Duffy, he had only a slight acquaintance with Sellars when Sellars came to his apartment on April 18 and asked him to drive back to Neillsville with him to help him move some appliances. Duffy denied seeing Sellars bring any cocaine to Emerson's apartment, he denied hearing what Sellars said in phone conversations from Emerson's apartment, and he denied knowing anything about Sellars bringing cocaine to Emerson's apartment for Coons to pick up. He testified that as far as he knew, all the cocaine on Sellars' table was smoked.[5]

Duffy did testify that he smoked cocaine with Emerson and Sellars on April 18, both at Sellars' apartment and Emerson's, and that Sellars cooked it. However, Emerson also testified to this, so Duffy's testimony added nothing to Emerson's testimony on this point. In addition, several other witnesses testified that Sellars used cocaine in his apartment. Coons testified that Sellars offered him cocaine in his apartment and smoked it with him on a number of occasions. Anderson testified that she used cocaine with Sellars once in his apartment and saw him use it there four or five times. When cross-examining Emerson and Anderson, defense counsel emphasized that they had used cocaine with Sellars. Sellars' own witness, Orsborn, testified on direct that Sellars used drugs but did not sell them, and his sister testified on direct that she thought he was "on something" in the time period between January and April 1996.

In view of Coons' and Emerson's testimony about Sellars selling cocaine, and their testimony and the testimony of others about his use of cocaine and his offering it to others to use in his apartment, we conclude there is no reasonable possibility that the outcome of Sellars' trial would have been different had Duffy's testimony not been read to the jury. The trial court did not erroneously exercise its discretion in denying the motion on this claim without an evidentiary hearing.

POLICE CHIEF WOODS' TESTIMONY

Emerson testified on cross-examination that in a conversation with Police Chief Woods before Sellars' arrest, he told her, referring to Sellars: "I have been waiting to get his black ass for a long time," and "he's just another black fucker to me." On redirect, the prosecutor did not challenge this testimony but instead referred to the "very derogatory and I guess reprehensible terms that Chief Woods used with respect to Mr. Sellars," and asked Emerson if those comments influenced her to make up something about Sellars or to assist Woods. She answered "no." Emerson also testified that when she told Woods she had used drugs with Sellars, Woods said, "we don't need to discuss that" and indicated she should not tell anyone that.

Sellars' trial counsel subpoenaed Woods, apparently for one day, and Woods apparently appeared but was not called that day. He did not return and so was unavailable on the day Sellars' trial counsel wished to call him. Apparently, the trial court was persuaded by the prosecutor that it could not issue a bench warrant since the subpoena was only for one day. Sellars' counsel did not pursue the issue and Woods did not testify. In his affidavit, Sellars' post-conviction counsel averred that Sellars informed him, and would so testify, that trial counsel told Sellars that Woods' testimony would be

helpful and that they needed him as a witness. Before the trial court, as on appeal, Sellars argued that examination of Woods would have been important to show his racial bias and lack of integrity and to persuade the jury that there was a concerted effort to "get" Sellars because of his race, regardless of the facts.

In denying this portion of Sellars' motion, the trial court concluded that there was not a reasonable possibility that Woods' testimony would have resulted in a different verdict. The court acknowledged the serious implications of the remarks on Sellars' race attributed to Woods and that, "if in fact he said them, it would have been therapeutically good for he and the community to have him on the stand and to be taken to task for it." However, the court concluded that Sellars was not prejudiced by the absence of Woods' appearance. The court noted that there was no evidence that the other officers, who were more involved in the case than Woods, harbored similar views. In addition, the court concluded it was the testimony of Emerson and Coons[6] that was most significant in convicting Sellars.

We conclude that the trial court correctly denied the motion on this ground without an evidentiary hearing. The averments in the affidavit did not show grounds for relief and the record conclusively demonstrated that Sellars was not entitled to relief because he did not show prejudice.

Emerson testified to the racist remarks attributed to Woods and to other comments which, if Woods made them, arguably suggest a lack of integrity. The district attorney did not challenge the truthfulness of Emerson's testimony on these points. Emerson also testified that Sellars felt that law enforcement was out to get him because of his race. And there was evidence, either presented or emphasized by the defense, of prior efforts to obtain evidence against Sellars. The defense theme that Sellars was set up because of his race was therefore developed for the jury. Sellars' motion does not state what Woods would say if he had testified. If Woods denied the comments Emerson attributed to him, that would not be an improvement for the defense: the record as it stands now suggests no basis for disbelieving Emerson. If he admitted them, that would be cumulative to Emerson's testimony. Either way, as the trial court pointed out, it is not reasonably possible that more emphasis on a possible improper or racist motive by the police chief in initiating the investigation would overcome the testimony of Emerson and Coons. Sellars does not present any facts in his motion that indicate that the results of the investigation were compromised by a lack of integrity or a racist motive on the part of Woods.

CHANGE OF VENUE

Sellars filed a motion for a change of venue on the ground that there were very few African-Americans or other racial or ethnic minorities in Clark County, with a statement that statistical data would subsequently be provided. That motion was not pursued. The affidavit accompanying the motion for post-conviction relief avers that Sellars informed his post-conviction counsel that trial counsel told Sellars "it was best to not move for a change of venue because he had

heard that people in Clark County are against the police, but Sellars continuously expressed his concerns and desires to have a jury that would include some African-American individuals." The trial court denied this portion of the post-conviction motion without a hearing because no evidence was presented to support a change of venue.

We agree with the trial court. Without some facts that show a basis for a possibly successful motion for a change of venue, Sellars is not entitled to an evidentiary hearing on the claim that his trial counsel performed deficiently in failing to pursue the motion.

SELLARS' TESTIMONY

We reach the same result with respect to Sellars' claim that counsel was ineffective for failing to call him in his own defense or have him waive that right on the record. The post-conviction motion and affidavit do not state whether Sellars wanted to testify, why he did not, or what he would have said in his testimony. Sellars was not entitled to an evidentiary hearing on this claim.

NEW TRIAL IN THE INTERESTS OF JUSTICE

Sellars asks that, even if we conclude that he was not denied effective assistance of counsel, we grant a new trial. Presumably Sellars is referring to our discretionary power of reversal under Section 752.35, Stats. Sellars devotes a brief conclusory paragraph to this argument. We have already concluded that the trial court properly denied Sellars' motion for post-conviction relief based on ineffective assistance of counsel without an evidentiary hearing. Sellars has presented us with no additional argument or information that would warrant a new trial under Section 752.35.

By the Court. -- Judgment affirmed.

Not recommended for publication in the official reports.

1 Circuit Judge Michael Nowakowski is sitting by special assignment pursuant to the Judicial Exchange Program.

2. Duffy was originally charged as a co-defendant in the same case with Sellars, but a separate trial was conducted. At his trial, Duffy waived his Fifth Amendment right to remain silent and testified.

3. Sellars' counsel did object to admission of a taped statement that Duffy gave to Powell, which Powell testified to at Duffy's trial. The taped statement was not admitted at Sellars' trial, although portions of the statement were referred to in Duffy's testimony.

4. Section 908.045(1), Stats., provides: FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination,

with motive and interest similar to those of the party against whom now offered.

5. On cross-examination, the district attorney attempted to show the implausibility of this testimony and to impeach Duffy's credibility by pointing out that at the time of arrest, he denied that he had used any cocaine with Sellars that day.

6. Although the trial court said "Ms. Emerson and Mr. Duffy," we assume the trial court was mistaken and meant to refer to Coons rather than Duffy. It was Coons, not Duffy, who testified to arrangements with Sellars for getting cocaine from Sellars to sell and to the arrangements with Sellars for him to pick up cocaine from Emerson's apartment on April 18.