

SUPREME COURT OF WISCONSIN

State v. McDowell, 2004 WI 70, 272 Wis. 2d 488

681 N.W.2d 500 (2004) · No. 02-1203-CR · Decided June 11, 2004

SUMMARY

The Supreme Court of Wisconsin reviewed Derryle S. McDowell's claims of ineffective assistance of trial counsel and the denial of his request for new counsel. The court held that defense counsel may use narrative questioning instead of the traditional question-and-answer format only when counsel knows the client intends to testify falsely, ordinarily based on the client's unambiguous admission. Although counsel performed deficiently by switching to narrative questioning without adequate notice and without concluding that McDowell intended to lie, the court found no prejudice and affirmed the court of appeals.

CASE DETAILS

COURT	Supreme Court of Wisconsin
WRITING FOR THE COURT	Ann Walsh Bradley, J.; Patience D. Roggensack, J.; Diane S. Sykes, J. (did not participate)
JURISDICTION	Wisconsin
DECIDED	June 11, 2004
DOCKET	02-1203-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Review of a published court of appeals decision affirming McDowell's judgment of conviction and the circuit court's order denying postconviction relief.
STANDARD OF REVIEW	Ineffective-assistance claims present mixed questions of fact and law: factual findings are reviewed for clear error, while whether counsel's performance was constitutionally deficient and prejudicial is reviewed independently as a question of law. Appointment of new counsel is reviewed for erroneous exercise of discretion.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Derryle S. McDowell v. State of Wisconsin

TOPICS

ineffective assistance

right to counsel

criminal procedure

post-conviction relief

appellate procedure

PRACTICE AREAS

criminal defense

constitutional criminal procedure

legal ethics

postconviction relief

appellate procedure

QUESTIONS PRESENTED

1. When may criminal defense counsel replace ordinary question-and-answer examination with narrative questioning because counsel believes the defendant intends to commit perjury?
2. Did trial counsel provide ineffective assistance by switching to narrative questioning without advising McDowell beforehand and despite believing that McDowell intended to testify truthfully?
3. Did the circuit court erroneously exercise its discretion by refusing to appoint new counsel or conduct a more extensive inquiry into McDowell's dissatisfaction with counsel?

HOLDINGS

1. Defense counsel may not substitute narrative questioning for traditional question-and-answer examination unless counsel knows that the client intends to testify falsely. Absent the most extraordinary circumstances, that knowledge must be based on the client's unambiguous, directly expressed admission of an intent to testify untruthfully. Counsel must advise the defendant, opposing counsel, and the circuit court of the change before using the narrative format, and the court must make a record concerning the basis for counsel's conclusion, the defendant's right to testify, and the nature and limitations of narrative questioning.
2. Counsel performed deficiently by switching to narrative questioning without advising McDowell beforehand and by using narrative questioning despite believing that McDowell intended to testify truthfully. McDowell nevertheless failed to establish prejudice because there was no reasonable probability that the result would have been different.
3. The circuit court did not erroneously exercise its discretion in refusing to appoint new counsel. Applying the Lomax factors, the lack of a clear request or evidence of an untenable conflict, the eleventh-hour timing, and the absence of a total breakdown in communication supported retaining existing counsel.

KEY QUOTATIONS

“Accordingly, we determine that an attorney may not substitute narrative questioning for the traditional question and answer format unless counsel knows that the client intends to testify falsely.” (514)

“If, however, the motion to withdraw is denied and the defendant insists in committing perjury, we conclude that counsel should proceed with the narrative form, advising the defendant beforehand of what that would entail.” (516-517)

“By the Court. — The decision of the court of appeals is affirmed.” (527)

FACTUAL BACKGROUND

The victim was sexually assaulted and robbed near a building in Milwaukee, and police recovered a saliva-and-semen sample from the scene containing DNA from the victim and McDowell. McDowell's defense theory was that he had engaged in oral sex with his girlfriend at the same location the night before, accounting for his DNA. During trial, counsel changed from question-and-answer examination to narrative questioning after receiving advice from the public defender's office, although counsel had told the court McDowell intended to testify truthfully and did not advise McDowell of the change beforehand. McDowell was convicted, and the court concluded that although counsel's performance was deficient, the overwhelming DNA evidence and the limited narrative testimony established no prejudice.

PROCEDURAL HISTORY

McDowell was convicted by a jury of robbery, kidnapping, and five counts of first-degree sexual assault while using a dangerous weapon, all as party to a crime. The circuit court denied his postconviction motion alleging ineffective assistance of counsel and error in refusing to appoint new counsel. The Wisconsin Court of Appeals affirmed, and the Wisconsin Supreme Court granted review and affirmed the court of appeals.

DISPOSITION

affirmed

CASES CITED

- Strickland v. Washington, 466 U.S. 668 (1984)
- Nix v. Whiteside, 475 U.S. 157 (1986)
- State v. Erickson, 227 Wis. 2d 758, 596 N.W.2d 749 (1999)
- State ex rel. Flores v. State, 183 Wis. 2d 587, 516 N.W.2d 362 (1994)
- State v. Pitsch, 124 Wis. 2d 628, 369 N.W.2d 711 (1985)
- State v. Lomax, 146 Wis. 2d 356, 432 N.W.2d 89 (1988)
- State v. Kazee, 146 Wis. 2d 366, 432 N.W.2d 93 (1988)
- State v. Wanta, 224 Wis. 2d 679, 592 N.W.2d 645 (Ct. App. 1999)
- Cuyler v. Sullivan, 446 U.S. 335 (1980)
- State v. Kaye, 106 Wis. 2d 1, 315 N.W.2d 337 (1982)
- State v. Zielke, 137 Wis. 2d 39, 403 N.W.2d 427 (1987)
- People v. Johnson, 62 Cal. App. 4th 608, 72 Cal. Rptr. 2d 805 (1998)
- State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)
- North Carolina v. Alford, 400 U.S. 25 (1970)
- State v. McDowell, 2003 WI App 168, 266 Wis. 2d 599, 669 N.W.2d 204