**COURT OF APPEALS DECISION DATED AND FILED**

**January 28, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**

**NOTICE**

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**Appeal No. 2013AP843-CR**

**Cir. Ct. No. 2012CF202**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DANNY ROBERT ALEXANDER,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Danny Robert Alexander appeals the order denying his postconviction motion, following a guilty plea to one count of felony forgery, for a new sentence. We reverse.

## BACKGROUND

¶2 On January 13, 2012, Alexander was charged with one count of felony forgery. The complaint alleged that Alexander produced two checks for payment to two separate U.S. Bank locations—one in the amount of $1,749.13, and one in the amount of $1,456.23. Both checks were drawn out of the account of Silver Mill Management Company. Alexander received cash for both checks. Alexander committed the offenses while on extended supervision for another offense. Alexander pled guilty. The trial court accepted Alexander's plea and ordered a presentence investigation report (PSI).

¶3 Prior to the sentencing hearing, the sentencing court received copies of the PSI. The report was completed by a probation agent, but not the agent who had been supervising Alexander's most recent period of supervision. The PSI was compiled from Department of Correction (DOC) supervision file materials and interviews of collateral witnesses. The agent also attached a copy of two statements Alexander made to his probation agent as a part of a revocation in another case. Alexander described cashing the two checks involved in these charges, as well as cashing two other checks from the account of Dave's Machine Repair. The forms on which Alexander's statements appeared, DOC Forms 1305/1305A, indicated that Alexander was to "account in a truthful and accurate manner" for his activities and that the failure to do so would be a violation for which he could be revoked. The form states that "none of [the] information [in the DOC forms] can be used against me in criminal proceedings."

¶4 At Alexander's sentencing hearing, the sentencing court asked Alexander's defense counsel whether he reviewed the PSI with Alexander. Defense counsel responded, "Yes. You saw the pre-sentence, right?" Alexander

responded in the affirmative. No further questions were asked of Alexander or his defense counsel as to whether Alexander reviewed or understood the report.

¶5 Defense counsel told the sentencing court that the PSI author never actually interviewed Alexander. The sentencing court stated, in reliance on the PSI, that Alexander engaged in continued criminal activity and had been revoked multiple times. When the sentencing court gave Alexander an opportunity to speak, Alexander indicated concerns about the PSI report, telling the sentencing court that he was trying to get his life on track and that the PSI author included "false allegations" in the report.

¶6 Ultimately, the sentencing court sentenced Alexander to seven years, divided as three years of initial confinement and four years of extended supervision, stating that it was "going to follow the recommendation of the pre-sentence to some extent." The PSI author recommended a confinement term of three to four years, followed by three years of extended supervision.

¶7 Alexander filed a postconviction motion requesting a new sentence. Alexander argued that the PSI author wrongfully included DOC Forms 1305/1305A, which contained incriminating statements made to his probation agent. Alexander also alleged that his attorney never reviewed the PSI report with him. Specifically, Alexander argued that the DOC Forms contained statements potentially implicating Alexander in other criminal activity not before the sentencing court—namely, the cashing of two checks from Dave's Machine Repair. The sentencing court denied the motion. This appeal follows.

## DISCUSSION

¶8 On appeal, Alexander argues that he is entitled to resentencing by a different sentencing judge because the sentencing court considered protected statements made to Alexander's probation agent in rendering its sentencing decision. The inclusion of the statements in the PSI report, and the court's subsequent consideration of the statements, Alexander argues, constituted a violation of his right against self-incrimination. We agree.

¶9 "Both the Fifth Amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution provide that a person may not be compelled in any criminal case to be a witness against himself or herself." ***State v. Peebles***, 2010 WI App 156, ¶10, 330 Wis. 2d 243, 792 N.W.2d 212. "[T]he privilege against self-incrimination extends to persons on probation, even though they enjoy only a 'conditional liberty.'" ***Id.***, ¶13 (citation omitted).

¶10 A probationer's answers to an agent's questions prompted by accusations of criminal activity are "compelled," because a refusal to speak may be grounds for revocation. ***State v. Evans***, 77 Wis. 2d 225, 235-36, 252 N.W.2d 664 (1977), *abrogated on other grounds by* ***State v. Spaeth***, 2012 WI 95, 343 Wis. 2d 220, 819 N.W.2d 769. Accordingly, the supreme court has held that such admissions are inadmissible against a probationer in subsequent criminal proceedings. ***Evans***, 77 Wis. 2d at 235-36. The supreme court created a rule of immunity for probationers as an incentive for probationers to observe their obligation to keep their agents informed about their whereabouts and activities. ***Id.*** at 231-32. Under that rule, the State may compel the probationer to answer self-incriminating questions, or face the potential of revocation, only "if he [or she] is protected by a grant of immunity that renders the compelled testimony

inadmissible against [him or her] in a criminal prosecution." ***Id.*** at 235; *see also* ***State ex rel. Tate v. Schwarz***, 2002 WI 127, ¶20, 257 Wis. 2d 40, 654 N.W.2d 438 (recognizing that holding).

¶11 The State concedes that Alexander's statements to his probation agent about the multiple checks he cashed were compelled statements subject to immunity. However, the State contends that Alexander's defense counsel failed to object to the inclusion of the statements at the sentencing hearing, and, consequently, Alexander has forfeited his right to pursue this issue on appeal. Alternatively, the State contends that Alexander's statements were not actually incriminating, and the erroneous inclusion of the statements in the PSI was harmless.

¶12 The State correctly observes that Alexander's defense counsel did not object to the inclusion of the statements or attempt to correct the PSI.[1] Alexander, however, is entitled to seek sentencing relief on the grounds that his counsel performed ineffectively by submitting the allegedly inaccurate information to the court without correcting or objecting to it prior to sentencing. *See* ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999) (while appellate courts can ignore forfeiture, the "normal procedure" in criminal cases is to address forfeiture within the rubric of an ineffective assistance of counsel analysis).

¶13 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance and (2) prejudice. ***Strickland v.***

[1] Alexander himself attempted to discuss his concerns with the PSI with the sentencing court; however, Alexander's arguments are somewhat incoherent and we do not construe them as an objection to the inclusion of the protected statements.

***Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694.

¶14 We conclude that defense counsel's failure to call attention to the erroneous inclusion of protected statements was deficient performance. The sentencing court asked defense counsel if counsel wished to make any additions or corrections to the report and whether counsel reviewed the report with Alexander. Counsel only responded: "Yes. You saw the pre-sentence, right?"[2] Alexander indicated that he did read the report, but expressed concern that the PSI author did not interview him. However, Alexander never told the sentencing court that he reviewed the report with his counsel. The court asked whether the parties were ready to proceed with sentencing, to which Alexander's counsel responded in the affirmative. At no point did counsel address the erroneous inclusion of statements indicating additional potential criminal activity very similar to that charged in this

[2] Alexander argues that his counsel did not review the PSI with him; however, counsel responded affirmatively when asked by the sentencing court whether he reviewed the report with Alexander. The State does not assert that Alexander and his counsel did indeed discuss the PSI, but rather argues that a lack of consultation between the two does not excuse the lack of an objection. Because the record is vague as to whether defense counsel discussed the PSI with Alexander, we do not address the issue further. Rather, we conclude that the lack of an objection to the prohibited statements is sufficient to conclude that defense counsel acted deficiently.

case. Consequently, the sentencing court had before it protected statements not to be used against Alexander in a criminal proceeding. There is no strategic reason at a sentencing hearing which justifies such an oversight.

¶15 Moreover, counsel's failure to object was prejudicial. Alexander's statements to his probation agent referred not only to the checks involved in the charges before the sentencing court, but also to additional potentially criminal activity carrying the possibility of future criminal charges. The sentencing court made multiple references to the PSI, even stating that it was "going to follow the recommendation of the pre-sentence to some extent" instead of relying on the sentencing recommendations of the parties. The sentencing transcript indicates that the sentencing court relied heavily on the PSI when the court referenced Alexander's prior revocations, his previous opportunities for treatment, as well as his skills and education. In its decision denying Alexander's postconviction motion, the sentencing court wrote that the inclusion of Alexander's compelled statements was "harmless at best" because "[Alexander's] statement to his agent did not reveal anything not already known to the court." The record does not support this conclusion. Alexander's compelled statement included references to potential criminal activity with which Alexander had not been charged at the time of his sentencing. That activity (cashing large checks from an apparent corporate entity) is very similar to the conduct charged here. The fact that protected statements were included in the PSI, coupled with the substantial reliance that a sentencing court must, out of necessity, place on a PSI to which no objection has been raised, undermines our confidence that the sentence was based only on facts properly before the sentencing court. A busy court, in which the sentencing judge cannot possibly be personally familiar with the background of every defendant who appears, must rely on the information presented by others when a sentence is

imposed. Both the State and counsel for the defendant share the obligation to ensure that the court considers only accurate, constitutionally admissible information. The DOC and its probation agents, as a part of the state government, share that responsibility. To hold otherwise would affirm a sentence imposed based on the State tending of constitutionally inadmissible evidence. Accordingly, we reverse and remand for a new sentencing hearing before a different sentencing court, with a PSI which does not contain the compelled, and thus constitutionally inadmissible, statements.

*By the Court*.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

**No. 2013AP843-CR(D)**

¶16 FINE, J. (*dissenting*). Although I agree with the Majority that this appeal must be decided under the ineffective-assistance-of-counsel rubric, I disagree with the Majority's conclusion that Danny R. Alexander has proven prejudice under the standard set out in ***Strickland v. Washington***, 466 U.S. 668 (1984). To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. This standard applies at sentencing as well as to trials. *See, e.g.*, ***State v. Pote***, 2003 WI App 31, ¶¶33–36, 260 Wis. 2d 426, 448–450, 659 N.W.2d 82, 93–94.

¶17 The Majority disbelieves the trial court's statement in its order denying Alexander's motion for postconviction relief, quoted in paragraph 15 of the Majority opinion, "[Alexander's] statement to his agent did not reveal anything not already known to the court." (Brackets by the Majority.) But the Majority's unwarranted disbelief is based on mere speculation, and, as we will see, ignores the trial court's full explanation. The Majority writes:

> In its decision denying Alexander's postconviction order, the sentencing court wrote that the inclusion of Alexander's compelled statements was "harmless at best" because "[Alexander's] statement to his agent did not reveal

> anything not already known to the court." *The record does not support this conclusion.* Alexander's compelled statement included references to potential criminal activity with which Alexander had not been charged at the time of his sentencing. That activity (cashing large checks from an apparent corporate entity) is very similar to the conduct charged here. The fact that protected statements were included in the PSI, coupled with the substantial reliance that a sentencing court must, out of necessity, place on a PSI to which no objection has been raised, undermines our confidence that the sentence was based only on facts properly before the sentencing court. *A busy court, in which the sentencing judge cannot possibly be personally familiar with the background of every defendant who appears, must rely on the information presented by others when sentence is imposed.*

Majority, ¶15 (emphasis added; brackets and parenthetical by the Majority). But in doubting the trial court's veracity, the Majority overlooks the trial court's complete explanation set out in its order denying Alexander's postconviction motion:

> [T]he defendant entered a guilty plea, and by doing so, agreed that the facts in the complaint were true. *This is also what the defendant admitted to doing in a portion of his statement that he gave to his agent during the revocation process and which the agent included with the presentence report.* Although the defendant's statement references other checks that were forged and cashed, *the body of the presentence report* <u>*also*</u> *refers to an amount of loss suffered by the victim much greater than the $3,210.32.* "[B]ut at sentencing the Defense Attorney will say, 'well, it's only a couple thousand dollars.' Well here, we (US Bank) have a total loss of $12,000 from Danny and his accomplices….["] (*Presentence Report, p. 2*). The Crime Victim Impact Statement also referenced a $9,626.50 loss by U. S. Bank from these transactions, indicating that the defendant had cashed two of the checks for $3,210.36. *Clearly the court and the parties were aware of the bigger picture of what had been going on,* <u>*and the defendant's statement to his agent did not reveal anything not already known to the court*</u>. The fact is that the defendant admitted to forgery activity when he entered his guilty plea and incriminated himself by doing so. The attachment of a statement also acknowledging that he did these things was harmless at best.

(Emphases added; parenthetical and italics in the parenthetical by the trial court.)

¶18 For the reasons fully set out in the trial court's order denying Alexander's motion for postconviction relief, Alexander has not come even close to proving ***Strickland*** prejudice. Accordingly, I respectfully dissent.