COURT OF APPEALS
DECISION
DATED AND RELEASED

August 15, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-3271-CR
No. 96-0638-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOM SWEENEY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed*.

EICH, C.J.[1] Tom Sweeney appeals from a judgment convicting him of misdemeanor disorderly conduct, and from an order denying his motion for postconviction relief. He argues for reversal of the conviction on grounds that (a) his trial counsel was ineffective and, alternatively, (b) he is entitled to a new sentencing hearing because of the existence of a "new factor." His position is, in sum, that his trial counsel's failure to raise his "competency" prior to trial,

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

and to pursue a "mental health defense" during trial, constituted ineffective assistance. He also argues that a later report from a psychiatrist who examined him in connection with another case, and which suggests that he is suffering from a mental illness, is a new factor warranting resentencing. We reject his arguments and affirm the judgment and order.

The underlying facts are not in dispute. After engaging in loud and abusive behavior at a state office in Madison, Sweeney was charged with disorderly conduct. Initially, the district attorney offered to amend the charge, lowering it from a misdemeanor to an ordinance violation in exchange for Sweeney's plea of guilty. By the time Sweeney accepted the offer, however, the trial date was too near for the court to accept the plea under its rules,[2] and his case went to trial on the misdemeanor charge.

The descriptions of Sweeney's behavior by the State's witnesses varied. Some described him as being simply "a little loud" but not "yelling," while others said he was "screaming" and "out of control." On one occasion during the trial, the court admonished Sweeney to refrain from "gesturing ... to the jury in response to testimony." At the close of the evidence, Sweeney made a rambling statement to the court attempting to explain his conduct at the state office. Sweeney asserted that he went there as a citizen seeking "redress" from the agency, which he said had maintained an incorrect file on him. A colloquy with the court ensued, during which the court remarked that because Sweeney's counsel was making "all of the arguments available to him," it "ma[de] no sense" for him to argue personally to the court with only a "limited understanding of the issues."

After the jury verdict was received, the court asked whether Sweeney was prepared to proceed with sentencing. His attorney, James Cooley, said he would prefer that the matter be set over so that he could "discuss ... with Mr. Sweeney in terms of sentencing and in terms of, you know, any type of counseling or medical treatment that he is in right now." The court recessed for approximately twenty minutes to permit Cooley to discuss "sentencing options" with Sweeney.

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[2] The trial court had a "Thursday Rule" which precluded pleas to reduced charges unless notification was received by the Thursday before the scheduled trial.

When the court reconvened, the district attorney was asked for his sentencing recommendation. He recommended that the court withhold Sweeney's sentence and place him on probation for two years, with counseling as a condition. Cooley responded that he was "unclear as to what options Mr. Sweeney would be wanting." He said Sweeney wanted the court to know that he was undergoing physical therapy for a leg injury which would "conflict if he were to be immediately sentenced." The court indicated that would not be a problem, and Cooley responded: "What is a concern to me is that I want to know what my client wants to do."

The sentencing proceeded. The district attorney argued in support of his recommendation, and when it was Cooley's turn to argue to the court, he stated: "I guess ... I'd like to ask you to recognize that Mr. Sweeney has somewhat appeared to have mental problems. I would ask that you be understanding of his behavior in that context." He then proceeded to argue for leniency.

Finally, Sweeney made a lengthy (and rambling) statement recounting his military service and attempting to justify his behavior at the state office. After questioning Sweeney about his background, the court accepted the district attorney's recommendation in part, withholding sentence in favor of two years' probation, conditioned on his receiving counseling, and adding a further condition of ten days in the county jail, based largely on Sweeney's prior disorderly conduct record and a perceived need for deterring similar conduct in the future.

Sweeney filed a motion asking that his conviction be vacated on grounds that Cooley was ineffective in failing to inform him of the court's "Thursday Rule" which, as we noted above, precluded acceptance of a reduced-charge plea at any time later than the Thursday prior to the scheduled trial date. He claimed that, as a result of this failure, he was "forced to go to trial" and was convicted. He also argued that he should be resentenced.

Cooley testified at the hearing, held on July 5, 1995, as to the "Thursday Rule" ineffective assistance claim. Sweeney's postconviction counsel also asked him about the sentencing--apparently in support of a claim that Sweeney should be resentenced because of Cooley's lack of preparation at the

original hearing. Cooley testified that he was unprepared for sentencing immediately after the verdict because he "felt there was a question as to ... Sweeney's mental health at that time." He said:

> I would have developed [sic] further into whether or not he had been seen by mental health professionals and -- I mean it is hard to speculate at this point. That is where I would have begun, and then I would have followed through on that.

Cooley testified that Sweeney's "general behavior" was sometimes "difficult to understand," and this led him to feel that Sweeney was "paranoid and delusional."

The trial court denied Sweeney's retrial and resentencing requests.

Several months later, when Sweeney was charged with criminal damage to property in connection with a separate incident, his competency to stand trial was evaluated by a psychiatrist, Dr. John Marshall, who concluded that he had a mental illness that rendered him incompetent in that he neither understood the nature of the proceedings nor was able to assist in his defense. Sweeney then filed a second postconviction motion in this case, asking for a new trial on grounds that Cooley was ineffective for failing to raise his competency prior to trial. He also sought resentencing based on the "new factor" of his purported incompetency. The trial court denied the motions and Sweeney appeals. Other facts will be discussed in the body of the opinion.

I. Ineffective Assistance of Counsel

For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish that counsel's actions constituted deficient performance, *and* that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Representation is not constitutionally ineffective unless both prongs of the test are met. ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992), *aff'd*, 176 Wis.2d 845, 500 N.W.2d 910 (1993). Thus, we may dispose of an ineffective assistance of counsel claim when

the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

On appeal, the question is one of both fact and law. ***Strickland***, 466 U.S. at 698. The trial court's findings as to what the attorney did, what happened at trial, and the grounds for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). However, whether counsel's actions were deficient and, if so, whether they prejudiced the defense are questions of law the reviewing court determines independently. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992), *cert. denied*, 510 U.S. 830 (1993).

In order to prevail on a claim of ineffective assistance, a defendant must show that his or her counsel

> "made errors so serious that counsel was not functioning as the `counsel' guaranteed ... by the Sixth Amendment." Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight.... [T]he case is reviewed from counsel's perspective at the time of trial, and the burden is ... on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.

Johnson, 153 Wis.2d at 127, 449 N.W.2d at 847-48 (quoted source omitted) (footnote omitted). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***State v. Pitsch***, 124 Wis.2d 628, 637, 369 N.W.2d 711, 716 (1985) (quoting ***Strickland***, 466 U.S. at 690). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Strickland***, 466 U.S. at 689.

As noted above, "Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense. `This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d 848 (quoted source omitted). The defendant must show the particular errors of counsel actually had an adverse effect on the defense, for not every error that conceivably could have influenced the outcome undermines the reliability of the result in the proceeding. There must be "`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***. at 129, 449 N.W.2d at 848 (quoted source omitted).

Applying those considerations to the facts of this case, we do not believe Cooley's performance was defective--and we reject his claim that ***State v. Johnson***, 133 Wis.2d 207, 395 N.W.2d 176 (1986), requires reversal. ***Johnson*** held that

> where defense counsel has a reason to doubt the competency of his client to stand trial, he must raise the issue with the trial court [and] failure to raise the issue of competency makes the counsel's representation "[fall] below an objective standard of reasonableness" ... and, hence, was deficient.

Id. at 220, 395 N.W.2d at 182 (alteration in original).

Not every doubt, of course, is a "reasonable" doubt within the meaning of ***Johnson***. ***State v. Weber***, 146 Wis.2d 817, 828, 433 N.W.2d 583, 587 (Ct. App. 1988). In ***Johnson***, prior to trial, defense counsel had letters from two doctors who had evaluated the defendant's competency, both indicating that they had "serious concerns" and "serious doubts" as to the defendant's competency to stand trial; the court relied on those letters as "creat[ing] a reason to doubt Johnson's competency to stand trial." ***Johnson***, 133 Wis.2d at 220, 395 N.W.2d at 183. Here, of course, the only evidence relating to Sweeney's status at the time of his trial and sentencing is comprised of Cooley's observations and Sweeney's own actions and statements; there was no medical or other evidence in existence at that time, as there was in ***Johnson***.

In a later case, ***State v. Weber***, we held that evidence comprising counsel's statement that he had "some question" as to his client's competency and the client's rather bizarre actions in court, including a statement that he was "hear[ing] several different voices all the time," was insufficient to establish "reason to doubt [the defendant's] competency." ***Weber***, 146 Wis.2d at 824, 825-26, 433 N.W.2d at 586. In so ruling, we noted that: (1) "an attorney's statement that he questions his client's competence is not a controlling factor for initiating competency proceedings"; and (2) the trial court, having observed the client's demeanor in the courtroom, did not consider that conduct as indicative of incompetency. ***Id***. at 826, 433 N.W.2d at 586. With respect to the latter point, the court stated that "[a]ssessment of a witness' demeanor is peculiarly within the province of the trial court, which, unlike the appellate tribunal, actually sees and hears the witnesses," and then quoted as follows from ***Maggio v. Fulford***, 462 U.S. 111, 118 (1983):

> Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth.... How can we say the judge is wrong? We never saw the witnesses.

Id. at 826, 433 N.W.2d at 586-87.

In deciding Sweeney's postverdict motions, the trial court (the same court presiding at his trial), characterized Cooley's testimony--that he "felt there was a question as to Mr. Sweeney's mental health," and that it "seemed to [him] that Mr. Sweeney was rather paranoid and delusional"--as inadequate to "paint[] a picture of a defendant who lacked a substantial ... capacity to assist in his own defense." The trial court, having observed Sweeney both prior to, during and after the proceedings, reasoned as follows in concluding that Cooley was not ineffective: (1) the post-sentencing report of Dr. Marshall contained no references as to what effect, if any, Sweeney's later-diagnosed "mental illness" might have had on his competency at the time of the plea; (2) Cooley's testimony as to his "feelings" about Sweeney's mental health was, as just indicated, insufficient on the point--especially in light of Cooley's other testimony discussing in detail how Sweeney "consulted with him frequently and enthusiastically," and how "they arrived at a mutually agreeable and

rational trial strategy which squared with the facts of the State's case...;" and (3) while "[Sweeney]'s trial behavior appears ... to have been somewhat disjointed or odd, there's no showing that meaningful assistance from [Sweeney] was lacking or [that his condition or demeanor] in any manner actually impacted on the presentation of the defense."

We agree with the trial court's statement that ineffective-assistance-of-counsel cases often become exercises in hindsight or, in the trial court's words, "Monday-morning quarterbacking." "In considering alleged incompetency of counsel," however, "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, 9 (1973).

Sweeney has not persuaded us that Cooley's representation constituted a denial of his right to counsel with respect to either raising the issue of his competency at the plea hearing, or considering a "mental health" defense (presumably a "not guilty by reason of mental disease or defect" plea) to the charge.

II. Resentencing

Sweeney claims that his mental illness, as discussed in Dr. Marshall's after-the-fact report in the other case, constitutes a "new factor" which entitles him to resentencing. Before resentencing will be ordered on such a motion, the defendant must show the existence of a "fact or set of facts highly relevant to the imposition of sentence, not known to the trial court at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***State v. Prince***, 147 Wis.2d 134, 136, 432 N.W.2d 646, 647 (Ct. App. 1988) (citation omitted). And if such a new factor is shown to exist, its existence must "frustrate[] the purpose of the original sentencing"--it must "strike[] at the very purpose of the sentence selected by the trial court"-- in order for relief to be granted. ***State v. Michels***, 150 Wis.2d 94, 97, 99, 441 N.W.2d 278, 279, 280 (Ct. App. 1989). Finally, the burden of proof is on the defendant to show the existence of such a "new factor" by clear and convincing evidence. ***State v. Franklin***, 148 Wis.2d 1, 8-9, 434 N.W.2d 609, 611 (1989).

Sweeney argues that the ten-day county jail commitment, established by the court as a condition of his probation, was imposed for the purpose of deterrence, based on his prior record, and he claims his mental problems "strike at the heart" of what he presumes was the court's intention to "punish" him for his behavior at the state office.

As we discussed above, Sweeney's counsel stated to the court that because Sweeney "has somewhat appeared to have mental problems," he was asking the court, in sentencing him, "to be understanding of his behavior in that context." In response, the court questioned Sweeney at some length, asking him first if he had ever undergone any "mental health or psychological treatment." Sweeney responded that he had suffered from "posttraumatic stress disorder" while in military service some eight years earlier, and received "some counseling from military hospitals" at that time. When asked whether he had received any other mental health treatment since that time, he responded in the negative. Then, in response to the court's questions, Sweeney discussed his employment status, the details of his prior disorderly conduct conviction and sentence, and his living arrangements. He was responsive to the court's questions throughout.

In withholding sentence and placing Sweeney on probation, the court did, in fact, respond to counsel's request that it consider Sweeney's behavior in light of "somewhat" of an "appearance" of "mental problems." The court recognized that Sweeney did indeed have a "problem" with his self-control and ordered that, as a condition of his probation, he receive "aggression and/or psychological counseling." When presented with Dr. Marshall's report, the court stated:

> Nothing in [the] report suggests a need to sentence your client any differently than I did .... You will note that as a condition of probation your client was ordered to receive aggression and psychological counseling....

We agree with the State that Sweeney has not established the existence of a new factor that would warrant resentencing under the rules and authorities discussed above.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.