**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

June 11, 1996



Nos. 95-3613-CR, 95-3614-CR
95-3615-CR, 95-3616-CR

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**DALE W. REPINSKI,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

MYSE, J. Dale Repinski appeals an order denying his motion to vacate his sentence. Repinski contends that he was denied the effective assistance of counsel at sentencing because defense counsel failed to: (1) object to the district attorney's sentence recommendation which Repinski now contends was in violation of a plea agreement; (2) secure a copy of an addendum to the presentence investigation prior to the sentencing hearing; (3) request a recess or continuance when the addendum was presented to counsel at the sentencing hearing; and (4) explain the possible consequences of consolidating a series of misdemeanors for sentencing in a single proceeding.

This court concludes that: (1) Repinski waived his claim that his counsel failed to object to the district attorney's sentence recommendation because the matter was not raised at the ***Machner***[1] hearing; (2) Repinski was not prejudiced by counsel's failure to obtain a copy of the addendum to the presentence investigation in advance of the sentencing hearing; (3) Repinski's counsel was not deficient and Repinski was not prejudiced by counsel's failure to request a recess or continuance; and (4) Repinski's counsel did discuss the consequences of consolidation with Repinski and made a reasonable strategic decision to consolidate the offenses for sentencing. Therefore, this court affirms the order.

Pursuant to a plea agreement, Repinski pled guilty to one count of disorderly conduct as a repeater, one count of resisting an officer as a repeater and one count of bail jumping as a repeater. The offenses were consolidated for sentencing purposes. One aspect of the plea agreement provided that, on the disorderly conduct charge, Repinski would be able to choose whether the district attorney would recommend one year in prison consecutive to the other charges or three years' probation with a withheld sentence consecutive to the other charges. At the sentencing hearing, the district attorney recommended one year of prison consecutive to the sentence imposed on the other charges. Repinski expressed no preference and did not object to the district attorney's recommendation.

The original sentencing hearing was adjourned to obtain additional information regarding Repinski's opportunity to participate in alcohol treatment and counseling programs. At the adjourned hearing, the State presented an addendum to the presentence investigation and Repinski's counsel requested a copy of the addendum because he had not seen the document. Counsel and Repinski studied the addendum for a short period of time and the sentencing proceeded.

The trial court sentenced Repinski to three years in prison on the disorderly conduct charge as a repeater, three years consecutive on the resisting

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

an officer charge as a repeater, and three years concurrent on the bail jumping charge as a repeater. The trial court also ordered the two concurrent eight-month sentences imposed for a probation revocation to run concurrent with the sentences ordered. Repinski brought a motion to vacate his sentence based on his contention that he was denied effective assistance of counsel at the sentencing hearing. After a ***Machner*** hearing, the trial court denied the motion. Repinski appeals.

To prevail on his claim of ineffective assistance of counsel, Repinski must show that his counsel's performance was deficient and the deficient performance prejudiced him at the sentencing hearing. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Review of an ineffective assistance of counsel claim involves a mixed question of law and fact. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The trial court's findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions of whether the performance was deficient and prejudicial based on the established facts, however, are questions of law that this court reviews de novo. ***Id.*** at 128, 449 N.W.2d at 848.

Counsel's representation is deficient if it fell below an objective standard of reasonableness. ***Strickland***, 466 U.S. at 688. There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions. ***Id.*** at 690. Further, counsel's strategies and performance must be reviewed from counsel's perspective at the time of the hearing. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847-48. A strategy rationally based on fact and law will not be found ineffective. *See* ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992).

To show prejudice, Repinski must demonstrate that the alleged errors actually had an adverse effect on the outcome. *See* ***Johnson***, 153 Wis.2d at 129, 449 N.W.2d at 848. The defendant cannot meet the burden by showing that the errors had some conceivable effect on the outcome. ***Id.*** The question is whether there is a reasonable probability that, but for counsel's errors, the result of the proceeding would be different. ***Id.*** A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

First, Repinski contends that he was denied effective assistance of counsel because his counsel, Lester Liptak, failed to object to the district attorney's sentence recommendation. Repinski, however, did not raise this issue at the ***Machner*** hearing and thus did not give counsel the opportunity to explain his failure to object. Because Repinski failed to make this inquiry at the ***Machner*** hearing, this claim of ineffective assistance of counsel has been waived and will not be reviewed by this court. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979).

Next, Repinski claims that he was denied effective assistance of counsel when Liptak failed to obtain a copy of the addendum to the PSI in advance of the sentencing hearing and further failed to request a recess or continuance when he was presented with the addendum. At the ***Machner*** hearing, Liptak testified that he believed he reviewed the addendum with Repinski for a brief period after receiving it. In addition, the record at the sentencing hearing reflects that Repinski reviewed the materials of the addendum with Liptak for a brief period of time. Liptak testified that he had sufficient time to review the addendum with Repinski and a further adjournment was not necessary because the addendum merely confirmed the original PSI.

The trial court found that there was no new information contained in the addendum other than Repinski's performance while on probation and his failure to undergo alcohol treatment. Liptak testified that he chose not to subpoena and cross-examine the probation agents who provided information for the addendum because he feared the live testimony would be more damaging than the information already before the court. Instead, Liptak addressed the information in the addendum by having Repinski testify to his version of events. This was a reasonable strategic decision under the circumstances. Based on the testimony and the trial court's findings of fact, this court concludes that counsel made reasonable strategic decisions and his failure to request a recess or a continuance was not deficient performance.

Repinski claims that he was prejudiced by Liptak's failures because he was denied the opportunity to address and rebut the information contained in the addendum. Repinski, however, does not identify any specific

evidence which he believes would have rebutted the addendum or any information that was inaccurate in the addendum other than what he testified to at the sentencing hearing. In the absence of any evidence that meaningful rebuttal was available but not offered by counsel, this court can find no prejudice to Repinski's rights by counsel's failure to secure a copy of the addendum before sentencing or his failure to request a recess or continuance.

Finally, Repinski contends that Liptak was ineffective because he failed to explain to Repinski the consequences of consolidating the various charges before a single judge. Repinski argues that there is a strong likelihood that he would have received a lesser sentence if the charges had not been consolidated and he had been sentenced by a separate judge on each charge. This contention is mere conjecture and devoid of any merit. It was reasonable for Liptak to conclude that the consolidation would effectively assure Repinski of the opportunity to reduce the danger that there would be a series of consecutive sentences imposed for the offenses. Counsel's strategic decision to recommend consolidation and to avoid serial sentencing hearings was a sound strategic choice. Therefore, this court concludes that Liptak was not deficient by recommending that these misdemeanor cases be consolidated for sentencing purposes.

As to Repinski's claim that Liptak did not discuss the consolidation with him, this court need only note that the record reflects the contrary. At the ***Machner*** hearing, Liptak on two occasions testified that he believed he consulted with Repinski regarding consolidating the charges for sentencing. To counsel's recollection, Repinski consented to the consolidation of the charges.

Based upon the foregoing, this court concludes that Repinski was not denied effective assistance of counsel at the sentencing hearing. Therefore, the order is affirmed.

*By the Court.*—Order affirmed.

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