COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2015AP538 **Cir. Ct. No. 2009CF42**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH D. GRADY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. Kenneth D. Grady, *pro se*, appeals an order denying his collateral postconviction motion to withdraw his guilty plea. Grady argues that his trial lawyer, Patrick Earle, provided him with constitutionally ineffective assistance by failing to review discovery materials with him before he

entered his plea. Grady also argues that the combined effect of the errors caused him prejudice. Finally, Grady asks for a new trial in the interests of justice. We affirm.

¶2 Grady was involved in a car accident in which his sister died. He pled guilty to homicide by intoxicated use of a motor vehicle. He was sentenced to five years of initial confinement and five years of extended supervision, to be served consecutively to a revocation sentence he was already serving. After his conviction, Grady moved to modify his sentence. The circuit court denied the motion. We affirmed the circuit court's order on appeal.

¶3 Grady then brought this motion to withdraw his plea *pro se*, arguing that he received ineffective assistance of trial counsel. Grady argued that he would not have entered the guilty plea if Attorney Earle had provided him with certain discovery materials and had adequately reviewed the information with him. Grady contended that he would have gone to trial instead, presenting his defense that he was not the driver; rather, he was sitting in the center front seat when the accident occurred. The circuit court held a hearing at which Attorney Earle, Grady, and Grady's mother testified. The circuit court then denied Grady's motion.

¶4 To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the 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.'" ***Id.***, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Strickland***, 466 U.S. at 697.

¶5 Whether counsel provided constitutionally ineffective assistance presents mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). "[W]e will not reverse the circuit court's findings of fact, that is, the underlying findings of what happened, unless they are clearly erroneous." ***Id.*** at 634. Whether "counsel's behavior was deficient and whether it was prejudicial to the defendant are questions of law." ***Id.*** We review questions of law independently of the circuit court. ***Id.***

¶6 Grady first argues that Attorney Earle did not show him the DNA report and did not explain why he believed the DNA results would not help Grady's defense; he simply told Grady the results were inconclusive. Grady also contends that Attorney Earle did not provide him with a copy of the report.

¶7 Attorney Earle testified that he reviewed the DNA report with Grady. Attorney Earle explained that the DNA analysis was not helpful to Grady's defense because it was inconclusive with regard to whether Grady's DNA was on the driver's side of the car, which would neither help nor hurt Grady's defense, but it *excluded* Grady as a source of the DNA on the center front windshield, which would work against Grady's defense. Grady's mother testified that Attorney Earle discussed the DNA evidence with her and Grady.

¶8 We agree with the State's analysis rejecting Grady's argument with regard to the DNA evidence:

> Grady failed to establish how Attorney Earle was deficient. Attorney Earle was aware of the report, he reviewed the

> report, and he communicated to Grady that the report was not helpful to the defense…. The *Machner* hearing revealed that Attorney Earle understood the legal insignificance of the report[;] [s]pecifically, that the report *did not* support Grady's claim that he was not the driver.

As for Grady's complaint that he did not receive a copy of the report, the State established that Grady received a copy from Robert Cole, the lawyer who represented him before Attorney Earle. Grady cannot show that he was prejudiced by Earle's failure to provide him with a copy of the DNA report because Grady already had a copy.

¶9 Grady next argues that Attorney Earle did not tell him that a private investigator, Scott Lange, gathered statements from witnesses who would have testified that Grady was not driving when the accident occurred. Grady contends that he would not have entered a plea if he had known this information.

¶10 Grady testified at the postconviction motion hearing that Attorney Earle never showed him Lange's report and did not investigate these potential witnesses. Grady admitted, however, that he knew the witnesses existed and might be able to assist in his defense because he was the person who provided the names to Attorney Cole, who hired Lange to investigate.

¶11 Attorney Earle testified that he was aware of Lange's report and the potential witnesses. He testified that he hired a second private investigator to determine whether the witnesses might provide helpful evidence at trial but ultimately concluded that the witnesses would not be helpful, based both on Lange's report and his own investigation.

¶12 The circuit court found that Grady knew before he entered his plea about the witnesses. The circuit court also found that Attorney Earle concluded

that the witnesses would not be helpful to Grady's case. We will not reverse the circuit court's factual findings unless they are clearly erroneous. ***Id.*** The circuit court's factual findings are based on Attorney Earle's testimony, which the trial court found to be credible, and thus not clearly erroneous. Because Grady was aware of the witnesses before he entered the plea, Grady's claim of ineffective assistance of counsel is unavailing.

¶13 Grady next argues that Attorney Earle failed *to show* him cell phone records that the State provided the defense that suggest that Grady sent an incriminating text message indicating that he was the driver of the car at the time of the accident.

¶14 In his postconviction motion, Grady contended that Attorney Earle failed *to review* the cell phone records with him. Attorney Earle testified that he made a special trip to the prison to discuss the cell phone record with Grady. Grady admits now, contrary to his ***Machner***[1] hearing testimony, that Attorney Earle reviewed the cell phone report with him, but contends that Attorney Earle never *showed* him the actual records. Grady cannot establish that he was prejudiced by Attorney Earle's purported failure to show him the cell phone records because Grady has admitted that Earle reviewed the records with him. We reject Grady's claim that Attorney Earle performed deficiently with regard to the cell phone records.

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

¶15 Grady next argues that Attorney Earle did not tell him that Robert Sackett, a disinterested eyewitness, provided statements to the police and in court hearings that Grady characterizes as contradictory.

¶16 At the postconviction motion hearing, Grady testified that he knew of only one statement by Sackett, in which he told the police that he heard a car crash, he ran to his window, and then he saw a black man get out of the driver's side door of the car. Grady admitted, however, that he was present at the preliminary hearing, during which Sackett testified that he heard the crash, looked out his window, and saw a black male standing by the open driver's door.

¶17 Attorney Earle testified that he reviewed Sackett's statements with Grady before Grady entered the plea. Attorney Earle also testified that Sackett's statements had only small inconsistencies.

¶18 The circuit court found that Attorney Earle was aware that Sackett had been interviewed by a police officer and a detective, and had then testified at the preliminary hearing and Grady's revocation hearing. The circuit court found that Attorney Earle found some small inconsistencies in the testimony but felt these inconsistencies would have been inconsequential because a number of people had seen only Grady and the victim at the scene. The circuit court also found that Attorney Earle discussed these matters with Grady before he entered his plea.

¶19 As we previously explained, we will not reverse the circuit court's factual findings unless they are clearly erroneous. ***Pitsch***, 124 Wis. 2d at 634. Moreover, we will not overturn the circuit court's credibility determinations about the witnesses. *See* ***State v. Oswald***, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238. The circuit court found Attorney Earle's testimony more credible

than Grady's testimony. Based on the circuit court's finding of fact that Attorney Earle discussed Sackett's statements with Grady before he entered his plea, we reject Grady's argument that Attorney Earle performed deficiently.

¶20 Grady next argues that Attorney Earle's errors, considered collectively, prejudiced him. As previously explained, we have rejected each of Grady's claims that Attorney Earle performed deficiently. Because there was no deficient performance, the acts, considered together, were not prejudicial. *See* ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305 (each allegedly deficient act or omission of counsel "must fall below an objective standard of reasonableness … in order to be included in the calculus for prejudice."). We reject this argument.

¶21 Finally, Grady contends that he is entitled to a new trial because the real controversy was not fully tried. *See* WIS. STAT. § 752.35 (2013-14). He contends that the jury should have heard the discovery evidence at trial. We disagree. Grady decided to waive his right to trial by entering a guilty plea. Because his lawyer provided him with effective representation in choosing that course of action, he is not entitled to withdraw his plea. A new trial in the interest of justice is not warranted.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).