COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP429-CR **Cir. Ct. No. 1997CF973910**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDDIE D. NASH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE SYKES and MEL FLANAGAN, Judges. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Freddie Nash appeals a judgment convicting him of first-degree reckless homicide and possession of a firearm by a felon, as well as

an order denying his postconviction motion. The issues are whether Nash was denied effective assistance of counsel and whether his sentences were unduly harsh. We affirm for the reasons discussed below.

BACKGROUND

¶2 Nash was initially charged with being party to the crime of first-degree reckless homicide by use of a dangerous weapon, being party to the crime of second-degree recklessly endangering safety by use of a dangerous weapon, and being a felon in possession of a firearm, all as a repeat offender. The charges were largely based on witness statements and Nash's own confession to police that he had shot one man during an altercation outside a bar and had fired shots at another man.

¶3 Nash filed two suppression motions. Before the motions were heard, however, he entered guilty pleas to the homicide and firearm counts in exchange for the dismissal of the reckless endangerment count and the habitual criminality enhancers. The court imposed the maximum available sentence on each count under the pre-truth-in-sentencing (TIS) scheme, totaling forty-seven years in prison.

¶4 Nash filed a notice of intent to pursue postconviction relief, but postconviction counsel failed to timely seek relief on his behalf. This court eventually reinstated Nash's lapsed postconviction rights by a writ of habeas corpus. Nash then moved to withdraw his plea, or in the alternative, have his sentence reduced. The trial court denied the requested relief after a hearing, and Nash appeals.

DISCUSSION

Plea Withdrawal

¶5 In order to withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice such as ineffective assistance of counsel, evidence that the plea was involuntary or unsupported by a factual basis, or failure of the prosecutor to fulfill the plea agreement. ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991).

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

¶6 Nash contends that trial counsel provided ineffective assistance by not following through on the suppression motions he had filed. However, trial counsel testified that he had filed the motions as a matter of course, and that subsequent investigation led him to believe they were without merit. He further testified that Nash had not made any of his postconviction allegations regarding the conditions of his confession during his pre-plea discussions with counsel. The trial court found trial counsel's testimony to be credible, and credibility determinations are not reviewable by this court. *See* ***State v. Marty***, 137 Wis. 2d 352, 359, 404 N.W.2d 120 (Ct. App. 1987) (*overruled on other grounds*, ***State v. Sanchez***, 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996). Based on those findings, we agree with the trial court's conclusion that counsel did not perform deficiently because he had no factual basis to pursue the suppression motion and that negotiating the plea deal was a reasonable strategic decision to minimize his client's sentence exposure from seventy-two to forty-seven years.

Sentence

¶7 Sentence determinations are accorded a presumption of reasonableness and will not be set aside unless the trial court has erroneously exercised its discretion. ***State v. Schreiber***, 2002 WI App 75, ¶7, 251 Wis. 2d 690, 642 N.W.2d 621. In order to properly exercise its discretion, the trial court should discuss relevant factors such as the severity of the offense and character of the offender and relate them to sentencing objectives such as the need for punishment, protection of the public, general deterrence, rehabilitation, restitution, or restorative justice. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court may decide what weight to give each factor, however, and a sentence may be considered unduly harsh or unconscionable only when it is "so excessive and unusual and so disproportionate

to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***Schrieber***, 251 Wis. 2d 690, ¶8; ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

¶8 Nash argues that it was unduly harsh to impose consecutive maximum sentences in this case because he was charged as party to the crime in which others were involved, was relatively young at the time of the offense, and grew up in a dysfunctional household. However, the record shows that the court discussed the relevant factors and explained why it was imposing the maximum sentences.

¶9 First, the court did recognize that others were involved in the incident, which it characterized as a shoot-out. Rather than viewing this as a mitigating factor, however, the court saw the need for a substantial sentence to deter young men in the community from "resorting to gunfire to settle their disputes." The court also viewed the homicide as aggravated because Nash's desire for revenge for something the victim had done a year before provided the motive for the confrontation, Nash should never have been carrying a weapon around, the victim was unarmed, and the victim left behind an infant daughter and other loved ones.

¶10 The court acknowledged that Nash had grown up in a dysfunctional household, but stated that did not excuse his behavior. Although Nash was only twenty-one years old at the time of the incident, the court detailed his already lengthy and violent criminal history and concluded that Nash was "a dangerous individual" who had engaged in a "lifestyle of crime" and "gang culture" and

posed "an extreme risk to the community." The court further concluded that Nash needed to be removed from society for the maximum allowable time.

¶11 Given the court's comments, we are not persuaded that the maximum sentences given in this case were so excessive as to shock the conscience or were disproportionate to the crimes. This is particularly true in light of the original sentence exposure Nash faced and the fact that Nash will eventually be eligible for parole under the pre-TIS sentencing structure.

By the Court.—Judgment and order affirmed.

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