

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 16, 2007

David R. Schanker
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. 2006AP1176-CR

Cir. Ct. No. 2004CF124

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL L. GRIMES,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Green Lake County: WILLIAM M. McMONIGAL, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Randall L. Grimes appeals from judgments convicting him of homicide by intoxicated use of a motor vehicle contrary to WIS.

STAT. § 940.09(1)(a) (2003-04)¹ and operating while intoxicated (3rd offense) contrary to WIS. STAT. § 346.63(1)(a) on his no contest pleas. He also appeals from the circuit court order rejecting his postconviction claims that trial counsel was ineffective at sentencing and that the circuit court misused its sentencing discretion. We reject both claims and affirm the judgments and the order.

¶2 On September 11, 2004, Grimes, who had been released from an in-patient alcohol treatment program two days before, struck and killed a motorcyclist. At the time Grimes killed the motorcyclist, he had a blood alcohol concentration in excess of .24 percent, two prior operating while intoxicated convictions, a suspended license, and was released on bond in misdemeanor cases. At his initial appearance on November 22, 2004, and while released on bond in this case, Grimes was allegedly found with alcohol in his blood. He was then charged with bail jumping. On February 9, 2005, while released on bond in this case, police responded to a disturbance at Grimes' house and allegedly found Grimes with a blood alcohol concentration of .28 percent.

¶3 In April 2005, Grimes entered his no contest pleas. Four other charges and the bail jumping charge were dismissed but read in for sentencing, and the State agreed not to charge Grimes with bail jumping for the February 2005 incident. In August 2005, the circuit court sentenced Grimes for the homicide to a twenty-five-year term consisting of fifteen years of initial incarceration and ten years of extended supervision and imposed a concurrent one-year term for operating while intoxicated.

¹ All subsequent references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Postconviction, Grimes alleged numerous failings by his trial counsel relating to release on bond and sentencing. Grimes also claimed that the court misused its sentencing discretion. The circuit court rejected Grimes' claims.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *State v. Kimbrough*, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). We may dispose of a claim of ineffective assistance of counsel on either ground. *Id.* We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶6 The denial of an ineffective assistance claim presents a mixed question of fact and law on appeal. *Kimbrough*, 246 Wis. 2d 648, ¶27. We will uphold the circuit court's factual findings unless they are clearly erroneous. *Id.* However, whether counsel's performance prejudiced Grimes is a question of law that we decide independently of the circuit court. *See id.*

¶7 We begin our analysis of whether Grimes was prejudiced by counsel's performance by reviewing the sentencing transcript. At sentencing, the State focused on the fact that the alcohol-related homicide occurred shortly after Grimes was released from in-patient alcohol treatment, Grimes failed in alcohol treatment on four occasions before the crash, Grimes was repeatedly arrested for driving and crashing his vehicle while intoxicated, and Grimes appeared in court with a blood alcohol concentration of .06 percent. The State emphasized Grimes'

decision to drink and drive on numerous occasions and the need to protect the public from Grimes.

¶8 In his sentencing remarks, trial counsel spoke about Grimes' character and his contributions to the community. Counsel also spoke realistically about Grimes' failure in treatment, drinking while released on bond, and the danger he poses to the community. Counsel rightly recognized that Grimes' history and conduct all but assured a prison sentence in the case. Counsel referred to a defense psychological and neuropsychological evaluation prepared by Dr. Jonathan Lewis. Counsel suggested a sentencing range of one to five years of incarceration followed by extended supervision, along with other safeguards for the community.

¶9 In its sentencing remarks, the circuit court stated that it found part of the presentence investigation report deficient and that it placed greater weight on a letter from Grimes' former wife and Dr. Lewis' evaluation. The court considered the gravity of the offense, Grimes' character and his alcoholism. The court observed that Grimes' alcohol-related interactions with law enforcement were rapidly increasing. The court noted that Grimes failed in treatment and, within hours of leaving treatment, drank, drove and killed someone. The court found this conduct very aggravating. The court downplayed the goal of rehabilitating Grimes in the community because of Grimes' repeated drinking and driving. The court found a need to deter Grimes and others from drinking and driving. Ultimately, the court decided that the need to protect the public was paramount under all the circumstances, and the court gave the greatest weight to this factor.

¶10 Postconviction, the sentencing court heard the testimony of Grimes and trial counsel. The court found that trial counsel handled the case appropriately

and that counsel's strategy was to protect Grimes from himself, given that Grimes repeatedly operated his vehicle while intoxicated and failed in treatment programs. The court referred back to its view that rehabilitation would have to be addressed via incarceration because, given Grimes' conduct, he was not a candidate for probation. The court concluded that Grimes was not prejudiced by counsel's performance at sentencing because the court would not have imposed a lesser sentence.

¶11 On appeal, Grimes reiterates his complaints about trial counsel. Grimes contends that trial counsel was ineffective because he did not seek release on bond for in-patient alcoholism treatment, did not communicate with Grimes sufficiently, failed to retain an alcohol abuse expert, failed to order a defense sentencing memorandum, failed to submit character letters, failed to submit written argument on sentencing, and failed to argue Grimes' rehabilitative needs at sentencing.

¶12 With regard to release on bond for in-patient treatment, trial counsel testified at the postconviction motion hearing that Grimes was originally released on bond with a recommendation for in-patient treatment. Grimes then rejected two treatment programs, appeared at his initial appearance with alcohol in his system, was disruptive at a treatment center counsel had arranged for him, and left the treatment center without permission to cause a disturbance at home, leading to an arrest and the detection of a blood alcohol concentration of .28 percent. The State sought an increase in bond, and trial counsel suggested that Grimes not oppose the motion given his conduct while released. It stretches credulity to suggest that the court would have released Grimes on bond to an in-patient treatment program under these circumstances. Grimes was not prejudiced by trial counsel's approach to the bond issue.

¶13 We need not address in detail each of Grimes' complaints about counsel's performance in relation to sentencing. At the postconviction motion hearing, the sentencing court heard the evidence and argument Grimes derides trial counsel for omitting at sentencing. The court held that such evidence would not have changed the outcome at sentencing. At sentencing, the circuit court's paramount concern was to protect the public by incarcerating Grimes for a sufficient period of time. The court reiterated this rationale at the postconviction motion hearing. Had trial counsel conducted the sentencing in the manner suggested by Grimes and submitted the evidence offered by Grimes postconviction, the result would not have been different. Essentially, Grimes' conduct forced trial counsel to exercise damage control in relation to bond and sentencing. Trial counsel was faced with a client who repeatedly drank and drove and had failed in treatment. Grimes was not prejudiced by trial counsel's performance.

¶14 Grimes challenges the circuit court's exercise of sentencing discretion on several grounds: the court failed to consider probation, the court failed to state sufficient facts to support its goal to protect the community, and the court failed to consider other sentencing factors. We disagree. The court discussed why probation was not an option in light of the episodes of drinking and driving, Grimes' failure in treatment programs, and his violation of bond conditions. The court also rightly found that in the last several years, Grimes had become a menace to the community because he continued to drink and drive. The weight of the sentencing factors was within the circuit court's discretion. *State v. Spears*, 147 Wis. 2d 429, 446, 433 N.W.2d 595 (Ct. App. 1988).

¶15 Finally, Grimes contends that sentences for homicide by intoxicated use are generally lower, and that his trial counsel should have informed the circuit

court about the range of sentences gleaned from public court records. The court was obligated to exercise its discretion and impose an individualized sentence. *State v. Gallion*, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. It did so and stated its reasons for the sentence imposed.

By the Court.—Judgments and order affirmed.

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

