COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP901 **Cir. Ct. No. 2003CF189**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY PHILLIP DUPUIS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Randy DuPuis appeals orders denying his WIS. STAT. § 974.06[1] postconviction motion and three other motions. He argues ineffective assistance of trial counsel in numerous respects, prosecutorial misconduct, errors in the sentencing proceedings and that the judgment is void because it was signed by the clerk of the circuit court. Because we conclude that some of these arguments are procedurally barred and all of them lack merit, we affirm the trial court's orders denying the motions without a hearing.

¶2 DuPuis, his brother Michael, Roy Owens and Walter Taylor were charged in the shooting death of Antwain Dixon. DuPuis drove Owens and Taylor, the other participants, to and from Dixon's home. It appears DuPuis believed Josh Ellerman lived at that location. Because of recent threats from Ellerman, DuPuis drove Owens and Taylor to the scene believing they would threaten or intimidate Ellerman. Using a gun provided by DuPuis' brother Michael, Owens and Taylor went to the residence and shot and killed Dixon, apparently mistaking him for Ellerman. DuPuis gave Owens and Taylor a total of $110 and five pounds of marijuana for what he thought was their role in scaring Ellerman.

¶3 Pursuant to a plea agreement, DuPuis pled no contest to an amended information charging one count of first-degree reckless homicide as a party to a crime. At the sentencing hearing, the prosecutor played a song, apparently written and performed by DuPuis, that favorably depicted violence. The song came to light as a result of DuPuis intercepted telephone conversation from the jail in

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

which he asked his girlfriend to conceal the song from the police because he would be in bigger trouble if they found it. DuPuis testified at the sentencing hearing and called several witnesses. DuPuis' attorney, noted that DuPuis' brother was sentenced to forty-two months' initial confinement and forty-eight months' extended supervision. He asked the court to impose a nine-year sentence, consisting of forty-two months' initial confinement and five-and one-half years' extended supervision. The court sentenced DuPuis to twelve years' initial confinement and five years' extended supervision.

¶4 Because the time expired for filing a postconviction motion under WIS. STAT. RULE 809.30, DuPuis' motion is necessarily construed as a postconviction motion under WIS. STAT. § 974.06. DuPuis is entitled to only one postconviction motion. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994). To justify a second postconviction motion, DuPuis must establish "sufficient reason" for not asserting his claims in the initial motion. *See* WIS. STAT. § 974.06(4). Because DuPuis did not establish any reason for his failure to raise all of the issues in his initial postconviction motion, issues raised for the first time in the "supplementary motion" and the motion for reconsideration are procedurally barred.

¶5 The trial court denied the postconviction motion without a hearing under WIS. STAT. § 974.06(3). A postconviction motion may be denied without a hearing in three situations: (1) if the facts alleged in the motion, assuming them to be true, do not warrant relief; (2) if any key factual allegation is conclusory; or (3) if the record conclusively demonstrates that the moving party is not entitled to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). We conclude that each of the issues raised in DuPuis' motions are not sufficiently supported by facts or are conclusory or establish no ground for relief.

¶6 DuPuis argues ineffective assistance of trial counsel in numerous respects, particularly regarding the sentencing hearing. He argues that his counsel should have retained a different private investigator after DuPuis' brother accepted a plea agreement and turned State's evidence. He also argues that his counsel failed to review the presentence investigation report (PSI) with him, inappropriately requested a greater sentence for DuPuis than for his brother, failed to warn DuPuis of the dangers of cross-examination if he testified at the sentencing hearing and failed to inform him that he could apologize while exercising his right of allocution rather than by testifying, failed to object to the prosecutor's use of the song at the sentencing hearing, failed to familiarize himself with the facts of the case and did not object to the prosecutor's version of the facts.

¶7 To establish ineffective assistance of counsel, DuPuis must show deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential, and this court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. ***Id.*** at 689. Strategic choices made after thorough investigation of the law and facts relevant to plausible actions are virtually unchallengeable. ***Id.*** at 690. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. ***Id.*** To establish prejudice, DuPuis must establish a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** at 694.

¶8 None of DuPuis' claims of ineffective assistance of counsel establish deficient performance and prejudice. DuPuis' argument that his counsel should have hired a new private investigator, in addition to being procedurally barred

because it was not raised in his initial postconviction motion, is conclusory and does not identify any actual prejudice. DuPuis does not allege any specific facts that would establish how retention of the initial private investigator affected his decision to plead no contest or the outcome of the sentencing hearing.

¶9 DuPuis next argues that his trial counsel was ineffective by failing to discuss the PSI with DuPuis and failing to correct errors in the PSI. DuPuis indicates that he has never reviewed the PSI and does not know its contents, but does not allege that he attempted to obtain access through the procedures set out in ***State v. Parent***, 2006 WI 132, ¶43, 298 Wis. 2d 63, 725 N.W.2d 915. To establish prejudice, DuPuis must identify errors in the PSI that could have been corrected before sentencing. DuPuis does not identify any significant error in the PSI that the trial court relied upon in determining the sentence. Citing ***State v. Skaff***, 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989), DuPuis argues that he is not required to show prejudice when he is denied access to the PSI. ***Skaff*** did not establish any affirmative duty on the trial court to insure that a copy of the PSI is timely delivered to the defendant. *See* ***State v. Flores***, 158 Wis. 2d 636, 642, 462 N.W.2d 899 (1990). Rather, DuPuis must allege sufficient facts to establish that the sentencing court had a blanket policy that denied him access to the PSI and that he sought access but was denied timely access by the court or its staff. ***Id.*** at 643.

¶10 DuPuis faults his trial counsel for recommending a greater sentence for Randy than for his brother, Michael. Counsel recommended the same term of initial confinement and eighteen months greater extended supervision than Michael received. His counsel's recommendation constituted a reasonable strategy under the circumstances. Michael was convicted of a lesser offense punishable by twelve-and one-half years' in prison. DuPuis was convicted of an

offense punishable by sixty years in prison. DuPuis also conceded he was a leader, and his witnesses at the sentencing hearing confirmed his leadership role over his brother. His counsel's acknowledgment that he should receive a longer term of extended supervision was reasonably designed to maintain credibility with the court for consideration of the recommended sentence.

¶11 DuPuis argues his counsel was ineffective for failing to explain the consequences of testifying at his sentencing hearing and subjecting him to cross-examination. DuPuis indicates that he merely wanted to apologize to Dixon's family and could have done so exercising his right of allocution without subjecting himself to cross-examination. This issue was not raised in DuPuis' initial postconviction motion and is therefore procedurally barred. In addition, DuPuis cannot show deficient performance or prejudice. Much of the information DuPuis provided in his testimony was already established by other witnesses at the sentencing hearing or was contained in the "Offender's Version" and the "Prior Record" portions of the PSI.

¶12 DuPuis argues his counsel was ineffective for not challenging the State's version of the crime at the sentencing hearing. He argues that the prosecutor and the court erroneously believed Randy instructed Michael to give the gun to Taylor and Owens. DuPuis contends this version of the crime is not supported by Michael's statement to the police. However, as DuPuis notes, immediately before the shooting "everyone looked at Michael and he assumed he was to give Taylor and Roy Owens the gun." In this context, "everyone" would include DuPuis. His role in inducing Michael to provide the gun did not have to be established by specific words. In addition, when he testified, DuPuis was offered an opportunity to give his version of the crime. His counsel would not have had any basis for objecting to the prosecutor's version of the events. The

most appropriate way to challenge the prosecutor's version was to allow DuPuis to testify and correct any incorrect impression left by the prosecutor. DuPuis cannot fault his counsel for his own failure to correct any discrepancies when he was given the chance.

¶13 DuPuis also argues his counsel should have corrected the prosecutor's erroneous statement that Dixon did not know Taylor or Owens. DuPuis offers no reason to believe he received a greater sentence based on whether Dixon knew Taylor or Owens.

¶14 DuPuis' complaints that the prosecutors played the song at the sentencing hearing do not establish any prosecutorial misconduct or ineffective assistance of trial counsel for failure to object to the song's introduction. The prosecutor learned of the song's existence through a monitored jail telephone call. A sign in the jail notified inmates that the telephone calls were monitored. Use of the telephone in that circumstance constitutes consent to intercept the communication. *See* ***State v. Riley***, 2005 WI App 203, ¶13, 287 Wis. 2d 244, 407 N.W.2d 635.

¶15 DuPuis argues that the prosecutor was required to disclose the seizure of the song pursuant to ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). ***Brady*** requires the prosecution to disclose exculpatory and mitigating evidence. The song is not exculpatory and does not mitigate DuPuis' involvement in the crime.

¶16 DuPuis next argues the court sentenced him based on incorrect information. The only information he identifies is the prosecutor's incorrect assertion that he was convicted of domestic abuse in 1999 and a statement in the PSI that he was sentenced to six months in jail. DuPuis correctly notes that the domestic abuse charge was dismissed when he pled guilty or no contest to

disorderly conduct. DuPuis denies without any embellishment that he served six months in jail on a marijuana charge. Against the background of this crime and DuPuis' prior record, these alleged errors are de minimis. DuPuis postconviction motion describes correction of these errors as a "new factor" justifying a reduced sentence. A new factor is a fact highly relevant to the sentence that frustrates the purpose of the sentence imposed. *See* ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (1989). The reasons the court gave for imposing the sentence are not frustrated by correction of these insignificant errors. DuPuis also argues his sentence resulted from the court's erroneous belief that he had multiple convictions for dealing drugs. The transcript shows that the court considered his "dealing with drugs," not multiple convictions for "dealing drugs." By his own admission, DuPuis sold and gave away large quantities of drugs in addition to the offenses identified in the PSI.

¶17 Finally, DuPuis argues the judgment of conviction is invalid because it was signed by the clerk of the circuit court. WISCONSIN STAT. § 972.13(4) specifically allows a clerk to sign criminal judgments.

By the Court.—Orders affirmed.

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