

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 2008

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 Nos. 2007AP2733
2007AP2734
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2003CF493
2003CF798**

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH A. KOSTROSKI,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
DOROTHY L. BAIN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Keith Kostroski appeals an order denying his motion for a new trial on grounds of ineffective assistance of trial counsel.¹ Kostroski argues counsel was ineffective at the sentencing hearing by failing to retain a forensic social worker to testify regarding alternatives to incarceration. We reject Kostroski's argument and affirm the order.

BACKGROUND

¶2 In two Marathon County circuit court cases, the State charged Kostroski with a total of fourteen offenses, including two counts of first-degree sexual assault of a child, eight counts of second-degree sexual assault of a child, one count of sexual intercourse with a child, one count of exposing a child to harmful material, and two counts of prostitution by requesting to have non-marital sexual intercourse for anything of value. In exchange for his guilty pleas to four counts of second-degree sexual assault of a child, the State agreed to dismiss the remaining counts while maintaining the freedom "to argue the facts" of those counts at sentencing.

¶3 The court ultimately imposed concurrent sentences for each of the four convictions, consisting of four years' initial confinement and three years' extended supervision on two of the convictions, and twenty years' probation on the other two convictions. Kostroski filed a postconviction motion for a new trial, claiming he was denied the effective assistance of trial counsel. After a hearing, the court denied Kostroski's motion and this appeal follows.

¹ The November 16, 2007 order on appeal addressed Kostroski's motion arising from both Marathon County circuit court cases.

DISCUSSION

¶4 Kostroski argues he is entitled to a new trial on grounds he was denied the effective assistance of trial counsel. This court’s review of an ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The court’s findings of fact will not be disturbed unless they are clearly erroneous. *Id.* However, the ultimate determination whether the attorney’s performance falls below the constitutional minimum is a question of law that this court reviews independently. *Id.*

¶5 “The benchmark for judging whether counsel has acted ineffectively is stated in *Strickland v. Washington*, 466 U.S. 668 (1984).” *State v. Johnson*, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Kostroski must show both: (1) that his counsel’s representation was deficient; and (2) that this deficiency prejudiced him. *Strickland*, 466 U.S. at 694.

¶6 In order to establish deficient performance, a defendant must show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. However, “every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.” *Johnson*, 153 Wis. 2d at 127. In reviewing counsel’s performance, we judge the reasonableness of counsel’s conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the

circumstances, the omissions fell outside the wide range of professionally competent representation. *Strickland*, 466 U.S. at 690.

¶7 The prejudice prong of the *Strickland* test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. *Id.* at 694. We may address the tests in the order we choose. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). If Kostroski fails to establish prejudice, we need not address deficient performance. *Id.*

¶8 Kostroski claims his counsel's performance at sentencing was deficient. We disagree. At the sentencing hearing, counsel called Dr. Robert Gordon, a licensed psychologist, who testified that he reviewed the pre-sentence investigation report, administered a number of tests and rated Kostroski on different scales to assess his potential for recidivism. After describing each of the tests administered as well as his personal evaluation of Kostroski, Gordon concluded Kostroski had a low to moderate risk of reoffending and would benefit from either group or individual treatment, both of which were available in the community.

¶9 In turn, trial counsel emphasized that Kostroski had no history of violence, school problems, juvenile delinquencies or other antisocial behavior, and had only one misdemeanor conviction in his remote past. Counsel further argued that by entering guilty pleas, Kostroski showed he was on the road to rehabilitation. Counsel recommended lengthy probation, time in jail, registration, counseling, maximum supervision in the community and community service.

¶10 Citing *Wiggins v. Smith*, 539 U.S. 510 (2003), Kostroski nevertheless argues that by failing to call a forensic social worker to detail the

alternatives to incarceration, counsel's performance fell short of professional standards. *Wiggins*, a capital case, is distinguishable on its facts. There, the Court took issue with the scope of counsel's investigation into potential mitigating evidence for purposes of sentencing. Counsel did not expand his investigation beyond the PSI and the department of social services records. The Court concluded this fell short of the professional standards that prevailed in Maryland in 1989, as standard practice in capital cases at the time of *Wiggins*' trial included the preparation of a social history report. *Id.* at 524. Contrary to Kostroski's claim, we do not interpret this case to impose a blanket requirement for attorneys to hire a forensic social worker in order to comply with professional standards. As noted in *Wiggins*, the Supreme Court has declined to articulate specific guidelines for appropriate attorney conduct but, rather, measures attorney performance based on "reasonableness under prevailing professional norms." *Id.* at 521. We discern no deficient performance on the part of trial counsel.

¶11 Even were we to conclude, however, that counsel was somehow deficient for failing to call a forensic social worker, Kostroski was not prejudiced by this claimed deficiency. At the postconviction motion hearing, Kostroski presented Elton Louis, a psychotherapist and forensic social worker, who testified that he "would have provided several alternatives for the court to consider, all of them being to maintain [Kostroski] in the treatment program."² Louis further indicated he would not have recommended prison.

² Kostroski did not subpoena trial counsel to testify at the postconviction motion hearing. The court consequently determined the hearing would proceed only on the prejudice prong of Kostroski's ineffective assistance claim.

¶12 In denying Kostroski’s motion for a new trial, the court emphasized it was aware of the alternatives Louis alluded to, but considered this to be a “prison” case based on the severity of the offenses and the need to protect the public. The court indicated it could not ignore that the assaults were premeditated and planned, perpetrated by manipulating young, vulnerable victims. Ultimately, the court concluded Kostroski could not show prejudice because the sentence would not have changed had Kostroski’s attorney presented additional alternatives to incarceration. Because Kostroski has failed to establish either deficient performance or prejudice, we conclude Kostroski was not denied the effective assistance of trial counsel and the trial court properly denied his postconviction motion for a new trial.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

