COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1879-CR **Cir. Ct. No. 2006CF577**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES MONTGHUE MCDOWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Charles Montghue McDowell pled guilty to felony murder as a party to a crime. *See* WIS. STAT. §§ 940.03 and 939.05 (2003-04).[1] The circuit court imposed a twenty-three-year prison sentence and ordered McDowell to serve a minimum of thirteen years in initial confinement and a maximum of ten years on extended supervision. McDowell sought postconviction relief, arguing that the circuit court relied on incorrect information contained in the presentence investigation report, thereby erroneously exercising its sentencing discretion. The circuit court denied the motion, and McDowell appeals. We conclude that McDowell, who was aware of the allegedly erroneous statements at sentencing and failed to object, waived further challenge. Similarly, McDowell's claim that trial counsel was ineffective for failing to call the sentencing court's attention to the allegedly incorrect statements fails because it is undisputed McDowell did not notify counsel of the alleged inaccuracies.

¶2 Three men, including McDowell, were involved in the armed robbery of a Milwaukee restaurant. During the robbery, a person behind the service counter of the restaurant was shot and killed. McDowell admitted to police that he took part in the robbery, but it is undisputed that McDowell did not shoot the victim. McDowell indicated that he had agreed to participate in the robbery because he needed money to support his daughter.

¶3 The probation agent that drafted the presentence investigation report stated that McDowell reported he had been "supporting himself by working as a

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

drug dealer," who sold "marijuana, cocaine, heroin, and pills such as Ecstasy, Vicodin, and Percoset [sic]." The agent stated that McDowell reported earning $2000-$3000 per week dealing drugs.

¶4 At sentencing, the circuit court mentioned McDowell's history of drug dealing, as set forth in the presentence investigation report. Although the circuit court did not specifically mention the amount of money McDowell was reportedly "earning" through his drug sales, the court noted that McDowell had a spotty employment history. It noted that McDowell's dealing of a "substantial amount of heroin and cocaine in addition to marijuana and Ecstasy" was "really frightening" due to the "havoc, the harm, [and] the destruction" drugs cause families. The circuit court also mentioned in a discussion with McDowell's grandmother the drug dealing described in the presentence investigation report.

¶5 In his postconviction motion, McDowell argued that the information about his drug dealing in the presentence investigation report was incorrect, that the circuit court had relied on that incorrect information at sentencing, and that he should be resentenced on the basis of accurate information. The circuit court held an evidentiary hearing where it took testimony from McDowell and trial counsel. The circuit court then denied McDowell's motion. It first rejected McDowell's argument that his statement that he took part in the robbery because he needed money was obviously and inherently contradictory to the statements that he was receiving $2000-$3000 per week from his drug dealing. The court noted that even drug dealers run out of money and have hard times. The court also noted that, even if McDowell had not been earning much money by dealing heroin and cocaine, he had admitted "selling weed." The court reasoned that the "bottom line" was still the same: McDowell was a drug dealer who "knowingly, voluntarily, [and] intentionally" took part in a robbery that resulted in a person's

death. The circuit court noted that, as part of the plea bargain, an auto-theft charge had been dropped, but was to be considered at sentencing, and McDowell had received a substantially lesser sentence than one of his co-defendants. The circuit court also found that trial counsel had not been ineffective for failing to object to the allegedly inaccurate information in the presentence investigation report. Trial counsel testified that, although McDowell was literate and had read the presentence investigation report, McDowell had not told him that the drug-dealing information was inaccurate. The circuit court found that trial counsel's testimony was truthful and that "nothing in the testimony today [suggested] that he dropped the ball at any point in the representation." McDowell appeals.

¶6 There is no question but that a defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

> Several safeguards have been developed which effectively protect the due process right of a defendant to be sentenced on the basis of true and correct information. The defendant and defense counsel are allowed access to the presentence investigation report and are given the opportunity to refute what they allege to be inaccurate information. Second, both the defendant and defense counsel are present at the sentencing hearing and have a chance to make a statement relevant to sentencing. Finally, the defendant may file his or her own presentence memorandum with the court presenting what the defendant believes to be true and correct information the court should rely upon in sentencing.

State v. Mosley, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Ct. App. 1996) (citations omitted). A defendant can, however, waive this right by failing to contest the accuracy of information presented at the sentencing hearing, even if the circuit court subsequently relies on the inaccurate information. ***Id.*** at 46.

¶7 At the postconviction evidentiary hearing, McDowell testified that he was confident in his reading abilities and that he read the presentence investigation report. McDowell testified that in his review of the report he focused on representations regarding the crime itself, however, and did not focus on representations regarding his employment or criminal history. McDowell told trial counsel about an inaccuracy relating to one of his co-defendants, and counsel raised the issue at sentencing. McDowell conceded, however, that he had not told trial counsel that the allegations he was a "big-time drug dealer" were incorrect. He testified that when the circuit court commented on the allegedly inaccurate information, he was surprised, but he admitted that he did not say anything to the circuit court or to trial counsel. McDowell testified that he had difficulty focusing on the circuit court's sentencing comments because he was "wishing [he] was somewhere else," and "thinking about the regret [he] felt for this case." McDowell admitted, though, that he heard the circuit court question his grandmother about his alleged drug dealing, was concerned about it, but never said anything to the sentencing court.

¶8 Given McDowell's own testimony, the court concludes that McDowell, by his silence, waived any objection to the circuit court's use of the allegedly incorrect information in the presentence investigation report. McDowell had access to the presentence investigation report and the opportunity and ability to read and understand it. He told the circuit court he had read the report, but despite numerous opportunities to advise the court of the "employment" errors, he never hinted at the report's inaccuracies. In addition, we note that the circuit court, in denying McDowell's postconviction motion, indicated that it had not relied at sentencing on the extent or amount of McDowell's drug dealing, but simply on the fact that McDowell was an admitted drug dealer.

¶9 Similarly, McDowell's claim that trial counsel was ineffective for failing to notice the alleged mistake and bring it to the sentencing court's attention fails. The two-pronged test for ineffective assistance of counsel requires the defendant to prove deficient performance of counsel and prejudice to the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687, (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. ***Pitsch***, 124 Wis. 2d at 636-37. When evaluating counsel's performance, courts are to be "'highly deferential' and must avoid the 'distorting effects of hindsight.'" ***State v. Thiel***, 2003 WI 111 ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting ***Strickland***, 466 U.S. at 689). "'Counsel need not be perfect, indeed not even very good, to be constitutionally adequate.'" ***Id.***, 264 Wis. 2d 571, ¶19, 665 N.W.2d 305 (citation omitted). We indulge in a strong presumption that counsel acted reasonably within professional norms. ***Pitsch***, 124 Wis. 2d at 637.

¶10 On the record before us, we have no difficulty concluding that McDowell failed to establish that counsel's performance was deficient. McDowell did not inform his counsel of the alleged inaccuracies in the presentence investigation report, although when he did inform counsel of some concerns, counsel stated them to the court. McDowell's suggestion that effective counsel would have noted the supposedly clear contradiction between McDowell's motive for participating in the robbery and his apparent admission to the presentence investigation report writer that he had been making substantial amounts of money through drug dealing is without merit. As the circuit court noted, there is nothing inherently contradictory about the two statements, and

counsel's failure to question his client about the apparent contradiction is within the range of reason, especially in light of McDowell's own failure to mention it.

By the Court.—Judgment and order affirmed.

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