COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1757-CR **Cir. Ct. No. 2003CF6179**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOCARA D. MCCLELLAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN and DANIEL L. KONKOL, Judges.[1] *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

[1] The Honorable Jeffrey A. Conen imposed the judgment of conviction. The Honorable Daniel L. Konkol entered the order denying the postconviction motion.

¶1 PER CURIAM. Tocara D. McClellan appeals from a judgment of conviction for one count of armed robbery by use of force, as party to a crime, and from an order denying his postconviction motion alleging ineffective assistance of counsel and seeking resentencing. McClellan argues counsel failed to adequately investigate his background for possible mitigating factors. We reject McClellan's argument because the information he claims counsel should have discovered was information McClellan always had available to him and could have provided to counsel. We therefore affirm the judgment and order.

BACKGROUND

¶2 In October 2003, having planned their crime in advance, McClellan and three others broke into the home of Tammy Ealy and Barbara Hoyle. During the robbery, McClellan put a gun in Hoyle's mouth, "pistol-whipped" her sixteen-year-old son, and threatened to shoot her eight-year-old niece. In exchange for McClellan's guilty plea, the State agreed to forego other charges against McClellan and his accomplices.

¶3 At sentencing in April 2004, the court expressed its confusion as to why McClellan, who had only minor juvenile infractions in his past, would be involved in such a violent crime. Indeed, counsel called it "very uncharacteristic" of McClellan. McClellan had no good explanation for his actions, telling the court that his parents "did a dang good job" with him, he "just did something I shouldn't have done," and professing that he was "very sorry" and did not plan for anyone to get hurt. While the presentence investigation recommended a total of twenty-two to twenty-eight years' total imprisonment out of a maximum possible forty, the court sentenced McClellan to twelve years' initial confinement and eight years' extended supervision.

¶4 In May 2008, McClellan filed his postconviction motion.[2] He argued that counsel failed to adequately investigate his background for mitigating factors. If counsel had properly investigated, McClellan claims, he would have discovered various disturbing circumstances. To his motion, McClellan attached a report from psychologist Dr. Harlan Heinz, who diagnosed post-traumatic stress disorder based on those circumstances.

¶5 McClellan alleged that beginning when he was ten years old, family friend George Geres repeatedly fondled him. This abuse escalated to intercourse when McClellan was fourteen and continued into adulthood. In exchange, Geres purportedly gave McClellan drugs, alcohol, and employment.

¶6 McClellan also claimed that his mother, Mamie, ignored his complaints about Geres and refused to let McClellan's uncle intervene. Further, Mamie was allegedly a heavy drug user who permitted Geres to sell drugs from her home. McClellan stated he would stay home from school to keep an eye on Mamie, who suffered seizures. McClellan said he did not provide this information to the sentencing court because he was afraid Geres would find out and hurt Mamie, and because he did not want to embarrass family members who were sitting in court during sentencing. It is undisputed that McClellan also failed to offer any of this information to trial counsel or the PSI author.

¶7 The court denied McClellan's motion, stating that his decision to withhold relevant information from counsel and the PSI writer could not be attributed to counsel. Further, the court reasoned that it was unlikely any

[2] The delay is a result of McClellan's initial appellate counsel's failure to file anything on McClellan's behalf and various resulting motions.

investigation would have been fruitful; if McClellan's allegations were true, neither Geres nor Mamie could be expected to volunteer corroborating information.

DISCUSSION

¶8 McClellan contends he received ineffective assistance of counsel because of trial counsel's failure to adequately investigate his background and uncover his history, particularly the sexual abuse. To demonstrate ineffective assistance of counsel, McClellan must show that trial counsel's performance was deficient and that the deficiency prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. "Whether trial counsel's actions constitute ineffective assistance presents a mixed question of law and fact." ***State v. Pote***, 2003 WI App 31, ¶13, 260 Wis. 2d 426, 659 N.W.2d 82. We will not upset the trial court's factual findings unless clearly erroneous, although the ultimate determinations of whether counsel's performance was deficient or prejudicial are questions of law we determine *de novo*. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6. If McClellan fails to demonstrate either deficient performance or prejudice, we need not address the other prong. *See* ***Strickland***, 466 U.S. at 697.

¶9 To establish deficient performance, McClellan must show that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***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." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶10 The first question is thus whether counsel was obligated to conduct a background investigation and was therefore deficient for failing to do so. McClellan argues that under ***Wiggins v. Smith***, 539 U.S. 510 (2003), counsel is required to thoroughly investigate a defendant's background, because counsel cannot make a tactical decision on whether to present mitigation evidence unless counsel has investigated and discovered such information.

¶11 ***Wiggins*** involved a defendant sentenced to death for drowning a seventy-seven-year-old woman. ***Id.*** at 514-16. In post-sentencing proceedings, it came to light that Wiggins, who lacked a "record of violent conduct," ***id.*** at 537, suffered repeated physical and sexual assault at the hands of his mother and various foster families; was left at home by his alcoholic mother for days at a time, forcing him to beg for food and eat paint chips and garbage; and was sexually assault by a supervisor on a job as an adult. ***Id.*** at 516-17.

¶12 The Supreme Court concluded Wiggins' two attorneys failed to meet professional standards. The standard practice in Maryland at the time required preparation of a "social history report" in capital cases, and American Bar Association guidelines for death penalty cases required "efforts to discover all reasonably available mitigating evidence …." ***Id.*** at 524 (emphasis and citation omitted). Wiggins' attorneys did neither, and thus failed to discover "the kind of troubled history … relevant to assessing a defendant's moral culpability." ***Id.*** at 535. The Supreme Court reversed the sentence.

¶13 Although ***Wiggins*** did not explicitly limit itself to death penalty cases, the professional norms in that case—the Maryland state rules and the ABA guidelines—do not apply in this case to establish the professional standard to which we should hold McClellan's attorney. While McClellan would have us

mandate that defense attorneys conduct their own investigations, hire private investigators, "gather records, interview family members, hire experts when necessary, and ask clients difficult questions designed to elicit information," we do not believe such an edict is necessary.

¶14 "In assessing the reasonableness of an attorney's investigation … a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." ***Id.*** at 527. Further, the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." ***Strickland***, 466 U.S. at 691. In ***Wiggins***, the attorneys had available to them a presentence investigation referencing Wiggins' "misery as a youth" and "disgusting" upbringing. ***Wiggins***, 539 U.S. at 523. In McClellan's case, even if counsel had asked "difficult" questions, probing for evidence of sexual assault in McClellan's past, there is no reason to believe that McClellan would have provided any information that would lead his attorney to further investigation.

¶15 McClellan represented to the court and the PSI investigator that he had a good upbringing and that his mother raised him well. He declined to tell the court and the PSI author about the sexual abuse to avoid embarrassing his family and to protect his mother. However, McClellan would have faced those same concerns during his attorney's interrogation. It is also worth noting that McClellan does not indicate why, four years after sentencing, he no longer feared for his mother's safety or worried about embarrassing his family.

¶16 There was no basis for counsel to conclude he should delve into McClellan's past and no reason to believe there was any relevant evidence to be found. As the trial court noted, it was not likely that Geres or Mamie would

volunteer incriminating information about McClellan's youth. "This court will not find counsel deficient for failing to discover information that was available to the defendant but that defendant failed to share with counsel." ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325.

¶17 Even if counsel were deficient, we cannot say McClellan was prejudiced. To prove prejudice, McClellan must show that counsel's errors had an actual, adverse effect on his defense. *See* ***Pote***, 260 Wis. 2d 426, ¶16. He must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

¶18 First, while McClellan claims his background might make him less culpable, *see* ***Wiggins***, 539 U.S. at 535, we disagree. This is not a situation where, for example, McClellan was presented with a sexual situation that triggered some memory of Geres' abuse, causing McClellan to respond in a passing fit of rage. *Cf.* ***McKinney v. Idaho***, 772 P.2d 1219, 1221 (Idaho 1989) (defendant, who planned murder and robbery, claimed victim's homosexual advances were mitigating factor given defendant's childhood sexual abuse by father). Instead, McClellan's crime was a calculated, preplanned event involving three accomplices. *See* ***id.*** ("[T]his court finds completely untenable petitioner's contention that childhood sexual abuse … should justify his actions where a concerted plan to commit those actions had been formulated prior to the time the [allegedly mitigating homosexual] advances were made.").

¶19 McClellan has not shown he would have received a lighter sentence because of these revelations. Heinz's report indicates that McClellan liked the safety of prison. Further, the fact that this background information surfaced after

sentencing suggests that McClellan's post-traumatic stress and other mild disorders had never been treated and that McClellan was never counseled about his abuse. Thus, it is possible that the court would have considered McClellan's untreated issues to be an aggravating factor, necessitating longer incarceration to meet McClellan's treatment needs.

¶20 The trial court also considered several other mitigating factors. It knew McClellan had attended special classes in school and received social security benefits for his learning disability. It knew McClellan admitted past drug use, including use during the time of the robbery, which may have impaired his judgment. The court was also able to consider McClellan's strong employment history, his lack of gang ties, and the fact that he had no significant criminal record prior to the robbery.

¶21 However, these factors still had to be weighed against the forethought and particularly chilling violence that went into the robbery, participation in which McClellan freely admitted. Yet even in light of these aggravating factors, the court sentenced McClellan to less time than the PSI recommended. We are therefore unconvinced that the court would have sentenced McClellan to anything less than half of the maximum, even had it known about his unfortunate childhood.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).