COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP1850-CR
2008AP1851-CR

Cir. Ct. Nos. 2004CF147
2004CF298

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY S. AKRIGHT,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

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

¶1 ANDERSON, P.J. Jeffrey Akright pled guilty to one count of third-degree sexual assault and one count of causing a child older than thirteen to view sexually explicit conduct. He appeals from the trial court judgments of conviction

and orders denying postconviction relief. Akright makes two arguments to support his appeal: First, he argues that the sentencing court erred in independently obtaining and considering his juvenile record; and second, if we decline to address his argument due to waiver, he alternatively argues that his trial attorney's failure to object to the alleged trial court errors denied him the effective assistance of counsel. We hold that even if the trial court erred, Akright waived this argument by failing to object at his sentencing. Further, though the State concedes that Akright's trial attorney's performance was deficient, Akright has failed to show that his attorney's deficient performance prejudiced his defense. Thus, Akright was not denied the effective assistance of counsel. We affirm the judgments and orders.

¶2 In October 2004, after Akright pled guilty to the two sex-related crimes, the court ordered a presentence investigation. In March 2005, at the sentencing hearing, the court noted that it had obtained "a number of files of the defendant which date back to his juvenile years." The court explained that it had previously advised the attorneys that it had obtained these records and had made them available to the attorneys. It proceeded to cite to portions of Akright's juvenile record throughout the hearing, stating that the "detail[s]" of Akright's offense history were not in the PSI and were "very, very important because [they suggest] a pattern of activity on the part of the defendant which would go towards a very significant factor in the defendant's sentencing, obviously, and that is bad behavior, quite frankly." Akright's attorney did not object when the trial court described the information from Akright's juvenile records and the way it was obtained, nor did the attorney object when the court relied on the information in imposing the sentence.

¶3 The court sentenced Akright to sixteen years, with eight years of initial confinement and eight years of extended supervision. The eight-year initial confinement term was four times that recommended by the presentence investigation report (PSI) and twice that recommended by the alternative PSI.

¶4 Akright brought a postconviction motion, arguing that it was improper for the court to obtain and consider his juvenile record and that his trial counsel was ineffective for failing to object. The trial court held a postconviction hearing on June 26, 2008. Akright's trial attorney testified that he did not have a specific awareness of the contents of the WIS. STAT. §§ 938.35(1) or 938.396(2) (2007-08)[1] confidentiality statutes at the time of the sentencing and, thus, unaware of a possible basis to object, he did not object to the court's use of Akright's juvenile record. The trial court concluded that Akright's trial attorney did not remember whether he had been aware of the statutes. The court denied the motion. Akright appeals from both judgments of conviction and the orders denying postconviction relief. By order of July 31, 2008, this court consolidated the appeals.

¶5 On appeal, Akright acknowledges that his trial attorney's failure to object constitutes waiver, but urges this court to ignore the waiver rule in order to reach the merits of his argument that the sentencing court erred in obtaining and considering Akright's juvenile record because WIS. STAT. § 938.35(1)[2] renders the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] WISCONSIN STAT. § 938.35 provides in relevant part:

(continued)

record inadmissible except for the purpose of a presentence investigation, and WIS. STAT. § 938.396(2)[3] requires an order of the juvenile court to release the record. In the alternative, if this court declines Akright's request to ignore waiver, Akright argues that his trial attorney was ineffective for failing to object to the trial court's actions.

> **(1)** … The disposition of a juvenile, and any record of evidence given in a hearing in court, is not admissible as evidence against the juvenile in any case or proceeding in any other court except for the following:
>
> (a) In sentencing proceedings after conviction of a felony or misdemeanor and then only for the purpose of a presentence investigation.

[3] WISCONSIN STAT. § 938.396(2) provides in relevant part:

> **(2)** COURT RECORDS; CONFIDENTIALITY. Records of the court assigned to exercise jurisdiction under this chapter and ch. 48 and of municipal courts exercising jurisdiction under s. 938.17(2) shall be entered in books or deposited in files kept for that purpose only. Those records shall not be open to inspection or their contents disclosed except by order of the court assigned to exercise jurisdiction under this chapter and ch. 48 or as permitted under sub. (2g) or (10).
>
> **(2g)** CONFIDENTIALITY OF COURT RECORDS; EXCEPTIONS. Notwithstanding sub. (2), records of the court assigned to exercise jurisdiction under this chapter and ch. 48 and of courts exercising jurisdiction under s. 938.17(2) may be disclosed as follows:
>
> ….
>
> (dr) *Presentence investigation*. Upon request of the department of corrections or any other person preparing a presentence investigation under s. 972.15 to review court records for the purpose of preparing the presentence investigation, the court shall open for inspection by any authorized representative of the requester the records of the court relating to any juvenile who has been the subject of a proceeding under this chapter.

¶6 In ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999), our supreme court acknowledged that appellate courts can ignore waiver but the "normal procedure" in criminal cases is to address waiver within the rubric of an ineffective assistance of counsel analysis. This issue is exactly the kind of issue that an objection would have easily cured. Akright's counsel did not make a contemporaneous objection to the sentencing court independently obtaining Akright's juvenile record, nor did he object to the court's reliance upon it for sentencing. That said, we decline Akright's invitation to ignore waiver and hold that he has waived this argument. However, we choose to follow the normal procedure of addressing waiver within the rubric of an ineffective assistance of counsel analysis.

¶7 The waiver rule exists to cultivate timely objections. ***Id.*** Such objections promote both efficiency and fairness. ***Id.*** A significant purpose of the waiver rule is to encourage a party to raise his or her objection at a time when the opposing party or the court can avoid error and avoid the necessity of an appeal or a new sentencing. By objecting contemporaneously, "both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." ***State v. Agnello***, 226 Wis. 2d 164, 173, 593 N.W.2d 427 (1999); s*ee also*, ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717 ("The purpose of the contemporaneous objection is to allow the trial court to correct any alleged error with minimal disruption."). Judicial resources, not to mention the resources of the parties, are not best used to correct errors on appeal that could have been addressed during the trial. ***Erickson***, 227 Wis. 2d at 766.

¶8 Waiver is well suited to the case at bar because a timely objection would have afforded the sentencing court the opportunity to correct any potential error and, if so corrected, would have resulted in the sentencing court obtaining and relying upon the same information. At the postconviction hearing, the trial court explained that, if Akright had objected at sentencing, the court would have continued the sentencing and ordered the PSI writer to supplement the PSI report with more details from the juvenile record or to append the juvenile record to the report.

¶9 For this same reason, Akright does not succeed on his alternative argument that his trial counsel was ineffective. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient. ***Id.*** This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. ***Id.*** Second, the defendant must show that the deficient performance prejudiced the defense. ***Id.*** This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. ***Id.*** Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. ***Id.*** The standard of review we apply to each of these questions is that "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." ***Id.*** at 698. Thus, we will not reverse the trial court's findings of fact, that is, the underlying findings of what happened, unless they are clearly erroneous. WIS. STAT. § 805.17(2). The questions of whether counsel's behavior was deficient and whether it was prejudicial to the defendant are

questions of law, and we do not give deference to the decision of the circuit court. ***State v. Pitsch***, 124 Wis. 2d 628, 715, 369 N.W.2d 711 (1985).

¶10 For the purpose of this appeal, the State concedes to deficient performance on the part of Akright's trial counsel based on the trial counsel's admission that, at the time of sentencing, he was not aware of the confidentiality statutes regarding juvenile records. We, therefore, move directly to the prejudice prong of the ***Strickland*** test.

¶11 Here, prejudice does not lie because the sentencing court relied on accurate information that it could have obtained by proper means, *even if* there had been a contemporaneous objection by Akright's trial counsel. Akright does not contend that the information the trial court relied upon was objectionable or inaccurate. Prior to the sentencing, the trial court advised the parties that it was going to obtain Akright's juvenile records and additionally made these records available to all parties. Further, the trial court explained at the postconviction hearing that, if Akright had objected at sentencing, it would have continued the sentencing and ordered the PSI writer to "go out and get the whole file and append it so we make sure we get the details. I want a complete presentence investigation."

¶12 Akright not only takes issue with the sentencing court independently obtaining and relying upon his juvenile records, he also claims that the proffered alternative given by both the State and sentencing court—i.e., instructing the PSI writer to append the juvenile records to the PSI—was not an alternative under Wisconsin's juvenile confidentiality statutes. As such, he seems to reason, if appending the record is prohibited, then a PSI author providing in the PSI report a detailed summation of his juvenile record is also prohibited. Accordingly, he

seems to reason, the details of his juvenile record could not have been properly before the sentencing court in any case.[4] We disagree.[5]

¶13 Akright makes much ado about nothing. Assuming, without deciding that Akright is correct in his interpretation of WIS. STAT. § 938.396(2g)(dr), i.e., that the sentencing court can not ask the PSI author to attach a copy or original of a juvenile's record to the PSI in a criminal case, it does not follow that the sentencing court would have been barred from obtaining the information from Akright's juvenile record by other means. In fact, rather than seek out the juvenile record itself or ask the PSI writer to append it to the PSI, the sentencing judge could have simply ordered the PSI writer to go back and include

[4] Specifically Akright states:

> The state also suggested that instead of obtaining the juvenile record on its own, the sentencing court could simply have ordered the PSI author to obtain the record and append it to the PSI. [] This is simply incorrect. WIS. STAT. § 938.396(2g)(dr) directs the juvenile court to open the juvenile records "*for inspection* by any authorized representative of the (PSI preparer)." (Emphasis added). This language allows the PSI author to view, consider, and base the PSI upon the records, but it plainly does not authorize the PSI author to take or copy the records and then disclose them to the sentencing court or anyone else. Other exceptions in the statute specifically state that in certain circumstances, *other* requesters may disclose the records to various parties. *See* §§ 938.396(2g)(k), (L), (m)6. If the legislature had wanted to allow the PSI author to share juvenile records with the sentencing court, it could easily have said so.

[5] We want to make clear that our application of the waiver rule and affirmance should not be interpreted as approval of the trial court's independent gathering of Akright's juvenile records. We emphasize that "[j]udges are generally prohibited from independently gathering evidence by the rules of judicial ethics." ***State v. Vanmanivong***, 2003 WI 41, ¶34, 261 Wis. 2d 202, 661 N.W.2d 76. Here, the sentencing judge had some familiarity with Akright's juvenile record and, upon discerning that the PSI was incomplete, he could have ordered the PSI author to provide a more complete recitation of Akright's juvenile record. This approach is an accepted way to supplement the PSI report and would have been beyond rebuke.

a more thorough summary or recitation of Akright's juvenile record. In Akright's own words, the language of § 938.396(2g)(dr) "allows the PSI author to view, consider, and base the PSI upon the [juvenile] records." Consequently, whether the sentencing court erred or not does not change the fact that it had another, proper way to access the details of Akright's juvenile record. In short, there was no prejudice in the sentencing court having before it too much accurate information—information it could have had before it even if a contemporaneous objection had prompted it to access it differently. We are confident the result is reliable.

By the Court.—Judgments and orders affirmed.

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