COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP291-CR **Cir. Ct. No. 2007CF855**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN F. MCGOWAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Shawn McGowan appeals an order denying his postconviction motion. McGowan argues his trial counsel was ineffective for failing to advise him he had a right to request substitution of the sentencing judge. We affirm.

BACKGROUND

¶2 On February 22, 2008, McGowan pled no contest to one count of child enticement for sexually assaulting his six-year-old daughter. The Honorable Peter J. Naze accepted McGowan's plea, found him guilty, and scheduled a sentencing hearing. Prior to McGowan's sentencing, his case was transferred to the Honorable Marc A. Hammer. On May 20, 2008, Judge Hammer sentenced McGowan to ten years' initial confinement and twelve years' extended supervision.

¶3 McGowan moved for postconviction relief, arguing, as relevant here, that his trial counsel was ineffective for failing to inform him of his right to substitute another judge when the case was transferred to Judge Hammer. Following a ***Machner*** hearing,[1] the court denied McGowan's motion, concluding McGowan did not show there was a reasonable probability his sentence would have been different had he substituted a different judge.

DISCUSSION

¶4 The only issue in this appeal is whether McGowan's trial counsel was ineffective for not informing McGowan he had a right to request substitution of a different judge when a new judge was assigned to his case. Whether a defendant received ineffective assistance of counsel presents a mixed standard of review. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We defer to the circuit court's findings of fact unless clearly erroneous. ***Id.*** But

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1995).

whether counsel's conduct was deficient and prejudicial are questions of law we review independently. ***Id.*** at 128.

¶5 A claim of ineffective assistance of counsel requires a defendant to show his or her attorney's performance was both deficient and prejudicial. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). An attorney's deficient performance is prejudicial if the attorney made errors "so serious as to deprive the defendant of a fair trial, a trial whose result[s are] reliable." ***State v. Damaske***, 212 Wis. 2d 169, 198, 567 N.W.2d 905 (Ct. App. 1997) (quoting ***Strickland***, 466 U.S. at 687.).

¶6 McGowan argues his trial counsel's performance was deficient because it caused him to lose his right to request substitution of a new judge. He contends this right is provided by WIS. STAT. § 971.20(5)[2]:

> If a new judge is assigned to the trial of an action and the defendant has not exercised the right to substitute an assigned judge, a written request for the substitution of the new judge may be filed with the clerk within 15 days of the clerk's giving actual notice or sending notice of the assignment to the defendant or the defendant's attorney.

¶7 McGowan's argument, however, is contrary to our interpretation of WIS. STAT. § 971.20(5) in ***State v. Wisth***, 2009 WI App 53, 766 N.W.2d 781. At issue in ***Wisth*** was whether the statute's opening language—"[i]f a new judge is assigned to the trial of an action"—means that a defendant may only request

[2] References to the Wisconsin Statutes are to the 2007-08 version.

substitution before the issue of guilt is determined. ***Wisth***, 766 N.W.2d 781, ¶6. We concluded it does.

¶8 In ***Wisth***, we observed that a criminal "trial" is the process by which a court finds facts and applies the law to those facts to determine whether a defendant is guilty or not guilty. ***Id.***, ¶7. A criminal trial is therefore complete "[w]hen the issue of guilt or lack of guilt is resolved …." ***Id.*** Thus, we concluded that the plain language of WIS. STAT. § 971.20(5)—permitting substitution only when a new judge is assigned to *the trial* of an action—only allows a defendant to request substitution *prior* to the resolution of guilt or lack of guilt. ***Id.***, ¶14. After the issue of guilt has been resolved, a defendant may no longer request substitution under the statute.

¶9 Here, McGowan's criminal trial was complete before Judge Hammer was assigned to the case because the issue of his guilt had already been resolved. McGowan therefore had no right to request substitution under WIS. STAT. § 971.20(5). *See* ***id.*** McGowan's counsel cannot have been deficient for failing to advise McGowan of a right he did not have.

¶10 Even if it could be assumed McGowan had a right to request substitution, he fails to show any prejudice as a result of his attorney's conduct. McGowan contends the only prejudice he needs to show is that he lost the chance to request a different judge. That is not the law. Rather, to show prejudice McGowan must show the sentence he received was fundamentally unfair. *See* ***Damaske***, 212 Wis. 2d at 200-01 ("inquiry into whether another judge would have been more lenient … is beyond the pale of an ineffective-assistance-of-counsel analysis"). McGowan neither shows nor alleges the sentence he received was unfair.

¶11 In any event, McGowan has conceded this issue because he does not respond to the State's argument that his attorney's conduct was not prejudicial as long as he received a fair sentence. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed conceded).

By the Court.—Order affirmed.

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