

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 18, 2002

Cornelia G. Clark
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 No. 01-2225-CR

Cir. Ct. No. 98-CF-2318

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FREDERICK B. ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Fredrick Rogers appeals the judgment of conviction for second-degree sexual assault of a person who has not attained the age of sixteen years, and the order denying his motion for sentence modification on two grounds: (1) that a “new factor” existed because his mental health problems were greater than those anticipated by the trial court; and (2) that he did

not receive effective assistance of counsel. We conclude that his mental health is not a new factor and that he received effective assistance of counsel. We therefore affirm.

¶2 Rogers pleaded no contest to one count of second-degree sexual assault of a person who had not attained the age of sixteen years in violation of WIS. STAT. § 948.02(2) (1999-2000).¹ Pursuant to the joint recommendations of both parties, the court placed Rogers on seven years' probation, with nine months in the county jail as a condition of probation. Approximately six months later, the court revoked his probation because Rogers was involved in several violent altercations. During the sentencing hearing, the court heard testimony from Dr. Gordon. Dr. Gordon ran a group counseling session for sex offenders, and testified that Rogers actively and willingly participated in the group. The court also examined evidence, including a court-ordered presentence report, and Rogers' independent presentence report. Both reported incidents involving Rogers' emotional and mental health, including prior suicide attempts. In his closing argument, Rogers' counsel made explicit reference to Rogers' mental health history, but argued that Rogers' violent conduct occurred only because Rogers was not properly medicated during those times, and that with proper medication Rogers was able to control his behavior. He also pointed to Dr. Gordon's testimony to show that Rogers was making active steps toward rehabilitation. Upon hearing all of the evidence, the court sentenced Rogers to eight years' imprisonment. The court stated that it believed that this sentence was appropriate

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

because it would allow Rogers to obtain the treatment necessary for his rehabilitation, and protect society from him until he became rehabilitated.

¶3 Rogers filed a postconviction motion contending that he was entitled to a new sentencing hearing based on the existence of a new factor and upon ineffective assistance of counsel at sentencing.² The trial court denied Rogers' motion. We affirm.

New Factor

¶4 A court may modify a defendant's sentence if the defendant can show, by clear and convincing evidence, both that a new factor has arisen since sentencing and that this new factor justifies a modification of the sentence. *State v. Crockett*, 2001 WI App 235, ¶13, 248 Wis. 2d 120, 635 N.W.2d 673, *review denied*, 2002 WI 2, 249 Wis. 2d 581, 638 N.W.2d 591 (Wis. Nov. 7, 2001) (No. 00-3053). A new factor is:

a fact or set of facts highly relevant to the imposition of sentence but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Id. Whether a new factor exists presents a question of law, which the court of appeals reviews de novo. *State v. Johnson*, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997). If the defendant presents a new factor, the trial court exercises its discretion to determine whether the new factor justifies a sentencing modification. *Id.*

² Rogers also sought to vacate the order of revocation; however, the court concluded it did not have jurisdiction to vacate the order of revocation, which Rogers does not appeal.

¶5 Rogers argues that a new factor exists because the trial court did not know the extent of his mental illness when it sentenced him. Consequently, Rogers argues the trial court improperly sentenced him because it did not understand the reasons for his violent conduct; if the court had understood the degree of his mental problems, it would have given him a lighter sentence.

¶6 We conclude that Rogers' mental health history is not a new factor. First, the court did know that Rogers had mental health problems. To the extent the court did not know the full extent of Rogers' mental health history, that is due to a choice Rogers made. At the hearing on his postconviction motion, Rogers testified that during his presentence investigation evaluations, he covered up and hid his mental health problems because he did not want to be labeled mentally ill. Thus, the extent of Rogers' mental health history was not unknowingly overlooked by all of the parties. *See Crockett*, 2001 WI App 235 at ¶13.

Ineffective Assistance of Counsel

¶7 Rogers also contends he received ineffective assistance of counsel because his counsel did not adequately research the extent of his mental health problems and thus failed to disclose this to the court, which prejudiced him. In order to determine whether a defendant received ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. 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. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because the reviewing court has the hindsight that the attorney lacked when evaluating the relevant conduct, the reviewing court should make "every effort ...

to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstance, the challenged action 'might be considered sound trial strategy.'" *Id.* In overcoming the presumption the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690.

¶8 Whether trial counsel's actions constitute ineffective assistance presents a mixed question of fact and law. *State v. Koller*, 2001 WI App 253, ¶10, 248 Wis. 2d 259, 635 N.W.2d 838, *review denied*, 2002 WI 2, 249 Wis. 2d 580, 638 N.W.2d 589 (Wis. Nov. 27, 2001) (No. 99-3084-CR). We will not reverse the trial court's factual findings regarding counsel's actions unless they are clearly erroneous; however, whether trial counsel's performance was deficient, and whether that behavior prejudiced the defense, are questions of law which we review de novo. *Id.*

¶9 In this case, Rogers' counsel argued at sentencing that Rogers could be a productive member of society when he was on the proper medications, and that his brief lapses were due to improper medication. The trial court found that this was a sound strategy and that counsel's decision not to investigate all of the possible evidence on Rogers' mental health condition was consistent with that strategy. The trial court also found that Rogers took an active part in this strategy. For example, during his sentencing hearing, Rogers testified that under the proper medication he could become a proper member of society, and because of this he

did not feel that a long prison sentence was necessary. Finally, the trial court found that Rogers did not disclose all of his mental health problems to his counsel.

¶10 Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment support the limitations on investigation. *Strickland*, 466 U.S. at 690-91. A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgment. *Id.* at 691. The reasonableness of counsel’s actions is usually based, quite properly, on informed strategic choices made by the defendant and upon information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. *Id.*

¶11 We conclude the strategy adopted by Rogers’ counsel at sentencing was reasonable. As the State points out, presenting Rogers’ mental health condition as more severe could have worked against the shorter prison sentence for which Rogers was arguing. In addition, it was not unreasonable for counsel to rely on Rogers’ report of his mental health problems. Therefore, counsel’s performance was not deficient and Rogers has not shown ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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

