COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2010

David R. Schanker
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. 2009AP315-CR **Cir. Ct. No. 2006CF431**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRAD D. HOLDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Brad D. Holder appeals from a judgment, entered upon his guilty plea, convicting him of two counts of child enticement and two

counts of second-degree sexual assault of a child and an order denying his motion for postconviction relief. We affirm.

¶2 Holder offered teenage boys jobs in his carpentry business. Saying he wanted only healthy individuals because he could not provide health insurance, Holder gave them "physicals" during which he touched their genitals while allegedly checking for hernias. The State charged him with seven counts of child enticement, two counts of fourth-degree sexual assault and five counts of sexual assault of a child under sixteen. According to the detective whose report formed the basis of the complaint, Holder said these were employment physicals but admitted he was "very confused" about his sexual orientation and that his motives included determining if the victims would become sexually involved with him.

¶3 Pursuant to a plea agreement, Holder agreed to plead guilty to two counts each of child enticement and second-degree sexual assault of a child and the State agreed to dismiss and read in the remaining ten counts. Both sides were free to argue sentence. The court ordered a presentence investigation (PSI).

¶4 The PSI process required Holder to complete a twenty-one-page "Sex Offender Disclosure Questionnaire" and to be interviewed by a Department of Corrections probation officer (PO). Holder's retained counsel, Attorney Daniel Mitchell, did not go over the questionnaire with Holder, advise him how to answer the questions, seek to accompany Holder to the interview or stress to Holder the importance of the PO believing that he fully accepted responsibility.

¶5 According to the PSI report, Holder denied that he told police the exams were sexually motivated and said they must have "paraphrased or contorted" his words. He told the PO that during the exams he did not think he was doing anything wrong, realized in retrospect that he was, but denied that his

purpose was sexual gratification. The PO opined that Holder was in "complete and utter denial," was not being honest with her or himself and had no insight about the effect of the assaults on the victims. In lieu of a private PSI report, Mitchell presented the court with numerous letters of support and materials documenting Holder's volunteer and civic activities.

¶6 At sentencing, the State emphasized the PSI writer's impressions and requested twenty years' imprisonment. The defense argued for significantly less: twelve to fifteen months' straight jail time with release only for treatment or work, and an imposed and stayed prison sentence. The court weighed Holder's positive personal attributes, clean record and devotion to civic activities against the severity of the charges, his need for treatment and, specifically citing the PSI report, his failure to fully accept responsibility. The court concluded that Holder used the exams to "troll[]" for young men and required confinement because he had not yet fully come to grips with what was "such serious behavior." The court imposed concurrent sentences of twelve years' imprisonment on each of the two child-enticement charges, bifurcated as eight years' initial confinement and four years' extended supervision. On the two second-degree sexual-assault charges, the court withheld sentence and placed him on fifteen years' probation, consecutive to the child-enticement sentences.

¶7 Holder moved for postconviction relief. He alleged ineffective assistance of counsel on grounds that Mitchell gave only hurried, last-minute explanations, failed to make clear the sexual purpose or intent elements and inadequately prepared him for the PSI process by failing to emphasize the need to clearly convey that he accepted responsibility for his acts. He claimed his pleas

thus were not knowing, voluntary or intelligent, warranting plea withdrawal,[1] and counsel's ineffectiveness was a new factor warranting sentence modification.

¶8 At the ***Machner*** hearing, Mitchell confirmed that he knew the State's sentencing recommendation and ultimately the sentence would be based to some degree on the PSI findings. He also testified that he told Holder that the *judge* "would not look favorably" on it if he maintained that the touching was for physical exams and not for sexual gratification, but that he did not "put it in the context" of the *PSI writer* believing him. Both Mitchell and Holder testified that Mitchell advised Holder to tell the truth and not to "overthink."

¶9 The court found that Mitchell's performance was not deficient. It noted that Holder told the court at the sentencing hearing before being sentenced that he accepted responsibility and that it considered, and accepted some of, the many mitigating factors Mitchell presented in Holder's favor. The court also found that Mitchell's performance was not prejudicial because, regardless of what else Mitchell might have presented at the sentencing hearing it already had ordered "the minimum sentence I could have imposed." The court denied Holder's motion, and he appeals.

¶10 Holder first asserts that Mitchell rendered ineffective assistance by failing to adequately prepare him for the "intensive" sex offender presentence process. He contends Mitchell's performance was deficient because counsel should have had a "come to Jesus" talk with him about the need to acknowledge a

[1] Holder withdrew his request to withdraw his plea at the ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

sexual motivation. Holder argues that the deficient advice was prejudicial because it resulted in an unreliable sentencing process and an overly harsh sentence.

¶11 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the trial court's findings about counsel's actions and the reasons for them unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel, however, ultimately is a legal determination which this court decides de novo. ***Id.*** To prevail, the defendant must show both that counsel's performance was deficient and prejudicial to the defense. ***Id.*** at 633. To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. ***Strickland***, 466 U.S. at 687-88. To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶12 Holder argues that by failing to review the questionnaire with him before the interview, advise him how to answer certain potentially incriminating questions and impress on him the negative consequences if he appeared to be in denial, Mitchell deprived him of effective representation during what he intimates is a "critical stage" of the proceedings. A person charged with a crime has a Sixth Amendment right to effective assistance of counsel at every "critical stage" of the proceedings. ***State v. Hornung***, 229 Wis. 2d 469, 476, 600 N.W.2d 264 (Ct. App. 1999); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305.

¶13 The PSI interview clearly is not a critical stage such that a Sixth Amendment right to have counsel present attaches. *See* ***State v. Knapp***, 111 Wis. 2d 380, 382, 330 N.W.2d 242 (Ct. App. 1983).[2] A defense lawyer "may"—and we believe should—counsel his or her client before the interview, however. ***Id.*** at 385. The trial court found that Mitchell's instruction that Holder "be as honest as possible … was good advice" because to arrive at a proper sentence the court needed "accurate … and unfiltered information." We agree.

¶14 The purpose of a presentence report is to assist the judge in appropriately sentencing an individual defendant. ***Id.***, at 384. "The active involvement of an advocate … in the information-gathering process could cause a serious degradation in the reliability and impartiality of the sentencing court's information base." ***State v. Perez***, 170 Wis. 2d 130, 141, 487 N.W.2d 630 (Ct. App. 1992). The court observed that if defense counsel had a duty to guide a defendant toward nonincriminating answers, there would be no point in ordering PSIs because the court would have no confidence that the information provided was objective.

¶15 But even were we to assume that counsel neglected a duty to more carefully prepare Holder, we are at a loss to see prejudice. The court advised Holder to be as honest as possible and, when Holder was asked about his statements to the police, he denied making them. The court also found that letters from Holder's psychologist indicated that, after five sessions, Holder still maintained that his motives were nonsexual. In addition, the court noted the

[2] Holder does not contend that Mitchell had to be present at the interview, but that Mitchell should have at least sought to attend.

materials provided on Holder's behalf and stated that there was "no reasonable prospect" that the sentence would have been shorter had Holder conceded a sexual motivation. None of the trial court's findings are clearly erroneous. Holder has not shown a reasonable probability that, but for counsel's failure to more thoroughly guide him through the PSI process, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694.

¶16 Holder next contends that the trial court erroneously denied his motion for sentence modification or resentencing. He argues that, due to Mitchell's deficient performance, the court relied on inaccurate information at sentencing, *i.e.*, a PSI report depicting him as unrepentant and posing a risk of future dangerousness.

¶17 A defendant has a constitutionally protected due process right to be sentenced upon accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant who requests resentencing on this ground must show both that the information was inaccurate and that the court actually relied on it. ***Id.***, ¶26. We review the issue de novo. ***Id.***, ¶9.

¶18 At sentencing, the court said it based its sentence on Holder's statement to the police detective, the PSI report, letters from Holder's treating psychologist and Holder's own sentencing remarks. The court said it perceived in Holder "an unwillingness or an inability … to accept full responsibility for what he did." In his testimony at the ***Machner*** hearing, Holder did not claim the PSI report contained incorrect information. In fact, he admitted telling the PO that the detective must have "contorted" his words because he did not originally say that the exams had a sexual component related to his confusion about his sexual identity. He also testified that he told the PO he was beginning to gain insight

through his sex offender therapy that the "exams" were sexually motivated. The PO included in her report that although Holder at the time did not think what he did was wrong, he now realizes it was. Holder has not established that the information upon which he was sentenced was inaccurate.

¶19 Holder next contends Mitchell's deficient performance constitutes a new factor. He abandoned this claim at the ***Machner*** hearing when he agreed that resentencing, not sentence modification, was the proper remedy. *See* ***State v. Wood***, 2007 WI App 190, ¶9, 305 Wis. 2d 133, 738 N.W.2d 81 (stating that a new factor analysis implicates sentence modification, not resentencing). Moreover, he does not develop the argument. We therefore need not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶20 As a final matter, we note that Holder's appellate counsel filed a false appendix certification. He certified that the appendix complies with WIS. STAT. RULE 809.19(2)(a) and contains "portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues." The appendix includes the written order denying Holder's postconviction motion stating that the court found that Mitchell's performance was not deficient "[f]or all of the reasons stated by the court on the record." It does not include, however, the portion of the transcript showing the court's reasoning, which is essential to this court's review. *See* ***State v. Bons***, 2007 WI App 124, ¶23, 301 Wis. 2d 227, 731 N.W.2d 367. Counsel therefore is sanctioned $150 for providing a false certification and a deficient appendix. ***See id.***, ¶25. Counsel shall pay $150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Judgment and order affirmed.

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