**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 19, 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. 02-0694-CR** **Cir. Ct. No. 98-CF-10**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRADLEY S. WHITMAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Bradley S. Whitman was convicted on drug charges after being convicted in a separate trial on a homicide charge stemming from the same incident. Whitman argues that he is entitled to a new trial on the drug charges because: (1) he was compelled to appear in jail clothes at trial; (2) his trial counsel provided ineffective assistance in allowing him to appear in jail clothes;

and (3) the jury was prejudiced by extraneous information. Alternatively, Whitman seeks resentencing, arguing that the judge was improperly influenced by the homicide conviction, resulting in an unduly harsh sentence. We reject these arguments and affirm the judgment of conviction and order denying postconviction relief.

## BACKGROUND

¶2 This appeal stems from events at Whitman's residence on the night of February 27, 1998. Whitman was alleged to have stabbed and killed one woman and to have struck another several times in the face. Law enforcement officers found drugs and drug paraphernalia inside the residence. Whitman was subsequently charged with first-degree intentional homicide, misdemeanor battery, possession of tetrahydrocannabinol (THC) in the form of marijuana and possession of drug paraphernalia. Repeater allegations were later added to each charge. On July 15, 1999, the criminal complaint was amended, adding a count of possession of cocaine. Upon Whitman's motion, the court severed the homicide and battery charges from the drug charges.

¶3 At the first trial, the jury verdict was not guilty on the battery charge, and guilty of homicide by the negligent use of a dangerous weapon, a lesser included offense of first-degree intentional homicide. On February 19, 1999, Whitman was sentenced to the maximum seven years in prison.

¶4 At the commencement of the jury trial on the drug charges, Whitman appeared in court in his jail uniform. The court inquired whether Whitman was going to continue to wear his jail uniform. Whitman responded that he had no other clothes. The court then stated:

> All right. And I did – The record should reflect I did speak briefly to defense counsel yesterday afternoon. Defense counsel was here to meet with his client yesterday after Mr. Whitman had been transported from wherever he is incarcerated, and I did inquire whether or not he had street clothes, and counsel said he wasn't sure. I said, well, check on it, if you want him to appear in street clothes make those arrangements; and apparently that decision has been made that he will appear in that uniform.

To this, Whitman's trial counsel, Robert Rusch, responded, "That's correct, your Honor." Neither party requested jury instructions in this regard. On January 19, 2001, Whitman was convicted on all three drug charges. The court then sentenced Whitman to the maximum three years in prison on each count, to be served consecutively to each other and any other sentence.

¶5 On September 26, 2001, Whitman filed postconviction motions asking for a new trial because the jury had been prejudiced by extraneous information relating to the homicide trial, and by seeing Whitman in court in an orange jumpsuit. He also alleged that he received ineffective assistance of counsel from his attorney's failure to ensure that Whitman had street clothes for the second trial. Finally, Whitman argued that the court abused its discretion by imposing the maximum sentence on all three counts, alleging that it was harsh and unreasonable.

¶6 At the motion hearing, one juror testified that he was aware of the homicide case, but it was not until the first day of trial that he became aware that Whitman was the one involved in that case. He said he brought it up during deliberations and four other jurors commented that they knew of Whitman's involvement as well. However, the juror stated that the discussion was brief, and the jurors all decided that it was irrelevant for purposes of the drug case. Another

juror testified that he, too, was aware of the homicide case before trial but had not made the connection to Whitman until it was mentioned during deliberations.[1]

¶7 Attorney Rusch testified that he took no steps to ensure that Whitman had street clothes for the second trial, nor does he recall ever discussing the subject with Whitman. Rusch also testified that he could think of no strategic reason for Whitman appearing in jail clothes, and that he believes he would have tried to talk Whitman out of doing so. The State stipulated that Whitman would testify that he did not freely choose to appear in the jumpsuit.

¶8 The court denied Whitman's motion for a new trial. The court did not accept Whitman's view of events. Instead, it accepted Rusch's testimony that Whitman would have complained "loudly and repeatedly" if he objected to wearing the jumpsuit, and that Rusch would not have ignored Whitman's request for street clothes had he made such a request. The court also determined that there may have been a sympathy factor associated with appearing in jail clothing and that may have been part of the defense strategy. Finally, the court concluded that Whitman's presence in the jail uniform did not imply Whitman's guilt on the drug charge. The court noted that the jurors only discussed the homicide case briefly and decided it was irrelevant. Whitman appeals.

[1] Both parties agree that the jurors' testimony in this instance was admissible under WIS. STAT. § 906.06(2) (1999-2000).

## DISCUSSION

### I. Appearance at Trial in Jail Uniform

¶9 In ***Estelle v. Williams***, 425 U.S. 501, 512 (1976), the United States Supreme Court held that a defendant cannot be compelled to stand trial before a jury while dressed in prison clothing. To do so violates the constitutional right to a fair trial because it may affect a juror's judgment. ***Id.*** at 504-05. However, the fact that a defendant wears prison clothes at trial does not automatically vitiate a conviction. Failure to object to being tried in prison attire "is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." ***Id.*** at 512-13.

¶10 Whitman argues that he was compelled to wear the orange jumpsuit. He has not claimed, however, that any State actor forced him to appear in the jumpsuit. In fact, it is clear from the record that the court would have allowed him to appear in street clothes if he had them. *See* ***United States v. Albritton***, 75 F.3d 709, 711 (D.C. Cir. 1996) (where the record demonstrates that the defendant would have been permitted to wear any clothes supplied, no violation occurs because no State compulsion occurred). Thus, the "compulsion" resulted from Whitman's claim that he had no other clothes, not from the State forcing him to wear prison clothes.

¶11 At the motion hearing, Rusch testified that Whitman had never been afraid to speak up and ask when he wanted something. Rusch said he would not have refused Whitman's request for other clothes had he asked for them. In addition, Rusch testified that he did not remember ever discussing Whitman's clothing with him, but that Rusch would likely have tried to talk him out of wearing jail clothing if Whitman had expressed a desire to wear them. The State

stipulated that if Whitman testified at the motion hearing, he would say that he did not freely choose to wear jail clothes, but that Rusch told him that was the way it had to be.

¶12 Whitman takes issue with the fact that the court assessed greater credibility and weight to Rusch's testimony than to his own. However, that is the essence of the court's role is evaluating the credibility and weight of the evidence. When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony. ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). A trial court's findings of fact shall not be set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶13 The trial court was entitled to accept Rusch's version of facts and reject Whitman's statements that he voiced his desire not to appear in his jail clothes. Appearance in jail clothing is only a violation of a defendant's rights if the defendant wanted to be in street clothes. ***Duarte v. United States***, 81 F.3d 75, 77 (7th Cir. 1996). Under Rusch's version of the facts, Whitman never expressed any desire to appear in street clothes. We cannot say that the court's finding was clearly erroneous.

¶14 Additionally, Whitman's statement that he had nothing else to wear does not rise to the level of an objection. This became especially clear when the court asked if the defense had made a decision that Whitman appear in his jail clothes, and Rusch stated that the court was correct. Whitman did not object at that time or indicate in any way that Rusch or the court was incorrect. Appearance in jail clothing can be a strategic move, ***Estelle***, 425 U.S. at 512, and the court is not required to ask the defendant or the defendant's attorney whether the

defendant's presence in jail attire is a defense tactic or merely indifference. ***Id.*** at 512 n.9. As a result, because Whitman did not timely object, he cannot now claim that his rights were violated.

II. Ineffective Assistance of Counsel

¶15 The Court noted in ***Estelle*** that the defendant and the defendant's attorney are responsible for alerting the court that the defendant wishes to appear in court in street clothes. ***Estelle***, 425 U.S. at 509. Whitman alleges ineffective assistance of counsel because Rusch did nothing to secure street clothes for Whitman.

¶16 The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.*** at 697.

¶17 This analysis requires a mixed standard of review. We review the circuit court's findings of fact regarding counsel's conduct under a clearly erroneous standard. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711

(1985). Whether those facts constitute deficient performance and prejudice are questions of law that we review independently. ***State v. Tulley***, 2001 WI App 236, ¶5, 248 Wis. 2d 505, 635 N.W.2d 807.

¶18 Whitman contends that Rusch's performance was deficient because Rusch did not secure street clothing for Whitman before the second trial. Whitman argues that Rusch told Whitman he had to appear in jail clothing. He then contends that his appearance in jail clothing was prejudicial. The trial court, however, determined that Rusch's assistance was not ineffective.

¶19 First, the court determined that Rusch's performance was not deficient. The court accepted Rusch's testimony that Whitman never hesitated to ask for things he needed or complain when he thought he was not being treated fairly. Additionally, the court noted that Rusch almost daily received correspondence from Whitman, and never failed to respond to any request Whitman made. As a result of Rusch's testimony and the court's experience with Whitman, the court doubted that Rusch would have ignored Whitman in this one particular instance. The court therefore determined that Whitman's accusation that Rusch ignored his request to wear street clothes was "neither conceivable nor credible." Furthermore, Rusch indicated that he felt a jury would already be aware of the homicide charge. The court determined that it would not have been unreasonable to believe seeing Whitman in the jumpsuit would make the jury more sympathetic.

¶20 Second, the trial court determined that even if Rusch's performance was deficient, there was no prejudice resulting from Whitman's appearance in jail clothing. The court determined that there was general knowledge of the homicide conviction within the community so that his appearance in a jail uniform would

not prejudice a jury. Additionally, the court felt the evidence supported the jury's verdict and therefore there was no prejudice.

¶21 We need not reach the issue whether Rusch's performance was deficient because we determine that there is no reasonable probability that but for Rusch's actions, the trial's outcome would have been different. First, we look at Whitman's appearance in the orange jumpsuit. Whitman testified at trial that he had been convicted of a felony. His presence in court in the jumpsuit then would not have been a surprise to the jury. As the trial court noted, there is no implication of guilt on the drug charges resulting from Whitman's appearance in jail attire.

¶22 Next we look at the evidence presented at trial. Whitman testified that he possessed the marijuana and paraphernalia found in his home on the night of February 27, 1998. Regarding the cocaine charge, cocaine was found in drawers in what the police officer called Whitman's "bedroom/living room." Cocaine was also found in a bag that Whitman acknowledged was his and contained other drug paraphernalia belonging to Whitman. Whitman contended at trial that guests planted the evidence. However, the jury rejected this theory, as it is entitled to do. ***State v. O'Brien***, 223 Wis. 2d 303, 326, 588 N.W.2d 8 (1999) (the credibility of witnesses and the assignment of weight afforded to witness testimony are left to the province of the jury). The abundance of evidence tending to show Whitman's guilt is, therefore, sufficient to eliminate any prejudice from Whitman's presence in jail clothing.

III. Extraneous Information

¶23 Whitman contends that he is entitled to a new trial because the jury received extraneous information. Whitman argues that seeing him in a jail

uniform and knowing about his homicide conviction is extraneous information having a prejudicial effect on the hypothetical juror.

¶24 Extraneous information is information that is neither of record nor within the general knowledge of jurors. ***Castaneda by Correll v. Pederson***, 185 Wis. 2d 199, 209, 518 N.W.2d 246 (1994). As to the impropriety of the information, "[i]nformation not on the record is not properly before the jury." ***Id.*** at 210. Whether information is extraneous is a question of fact which we will not overturn unless it is clearly erroneous. ***State v. Eison***, 194 Wis. 2d 160, 177, 533 N.W.2d 738 (1995). Whether extraneous information is so prejudicial as to require a verdict's reversal is a question of law we decide independently. ***Castaneda***, 185 Wis. 2d at 211-12. When a jury has been improperly exposed to or has considered extraneous information and there is a reasonable probability that the error would have a prejudicial effect on a hypothetical jury, a verdict should generally be set aside. ***Id.*** If the information is not prejudicial, however, the error is harmless, and no new trial is required. ***Eison***, 194 Wis. 2d at 179.

¶25 Contrary to Whitman's contention, the jail uniform was not extraneous information. Both the State and Whitman say he was wearing the jail uniform in full view of the jury. However, the jury becoming aware of the homicide conviction was extraneous information. While the trial court held otherwise, the State concedes the information was extraneous. Nevertheless, we conclude that under the circumstances of this case, the information was not so prejudicial as to warrant a new trial.

¶26 The record demonstrates that although the jury was aware of the homicide charge, it discussed the conviction only generally, and quickly decided that it was irrelevant for purposes of its deliberation on the drug charges.

Additionally, the jurors did learn in court that Whitman had been convicted of a felony, although not that the felony was a homicide. The court instructed the jury that the felony conviction could not be used as proof of guilt in the drug case. Jurors are presumed to follow the court's instructions. ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). As a result, we conclude that an average juror would not be prejudiced by the extraneous information.

IV. Sentencing

¶27 The standard of review for a motion for sentence modification is whether the sentencing court erroneously exercised its discretion. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is strong public policy against interfering with the trial court's sentencing discretion, and we must assume the sentencing decision was reasonable. ***State v. Littrup***, 164 Wis. 2d 120, 126, 473 N.W.2d 164 (Ct. App. 1991). The primary factors the court is to consider in sentencing are: (1) the gravity and nature of the offense; (2) the offender's character and rehabilitative needs; and (3) the public's need for protection. ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). An erroneous exercise of discretion will be found only if the sentence is excessive, unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***Ocanas***, 70 Wis. 2d at 185.

¶28 Whitman argues that the trial court erroneously exercised its discretion by acting on improper considerations in sentencing him to the maximum three years in prison on each count. Specifically, he contends that the court utilized information from the first trial in sentencing after the second trial, and that sentencing was based primarily on the basis of the first trial. Whitman

further notes that the court proceeded immediately to sentencing after the verdict in the second trial, arguing that this shows that the court had already made up its mind regarding the sentence it would impose. Finally, Whitman contends that he was punished despite his First Amendment right to advocate drug legalization. He claims that the court wrongly made a connection between his advocacy of marijuana and the charge of THC possession.

¶29 We first note that the trial court discussed the necessary sentencing factors. The court considered the gravity and nature of the offenses, rejecting probation due to the seriousness of the offense. The court also considered Whitman's character and rehabilitative needs, noting that Whitman had not sought rehabilitation because he did not see his actions as serious or dangerous. The court incorporated its statements from the first trial regarding Whitman's character, which Whitman does not identify as inaccurate. Finally, the court noted that there was a need for public protection because Whitman did not see the danger caused by his drug habits. We see no error in this analysis.

¶30 Next, we address Whitman's contention that the court had already made up its mind regarding sentencing. A court may not employ a "preconceived policy of sentencing that is 'closed to individual mitigating factors.'" ***State v. Ogden***, 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996). However, we are satisfied that the trial court clearly articulated its reasoning for sentencing, discussing the appropriate factors. Although the court referenced the first trial, the record fails to demonstrate that the court had already made up its mind as to Whitman's sentence.

¶31 Finally, we look at Whitman's First Amendment argument and determine there was no violation. The court expressly stated that Whitman was entitled to his views, but has to take responsibility for the fact that his drug use

diminished his ability to conform his actions to the law. Nothing about Whitman's sentence violated his First Amendment rights. Consequently, the court did not erroneously exercise its discretion by sentencing Whitman to the maximum penalty for each count, nor does the sentence so shock's public sentiment as to require its reversal.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶32 CANE, C.J. (*dissenting*). I respectfully dissent. Because it is undisputed Whitman's counsel allowed his client to appear in a clearly identifiable orange jail jumpsuit during the entire jury trial, I would reverse the conviction and remand the matter for a new trial on the drug charges.

¶33 This is a defendant who came from prison and whose family lived in Tennessee. He was not in any realistic position to secure street clothes on his own. When the court observed and commented prior to trial that Whitman was in an orange jumpsuit, Whitman blurted, " I have no other clothes, your honor." Not surprisingly, the State has stipulated Whitman would testify that he did not freely choose to appear at trial in the orange jail jumpsuit.

¶34 Finally, the evidence is undisputed Whitman's trial counsel could not conceive of any possible strategic reason for having his client appear before the jury in the orange jumpsuit. Counsel admits that it was to his client's disadvantage to appear at the trial in the orange jumpsuit. Unfortunately, the record is silent as to whether Whitman at some time agreed to continue his appearance before the jury in the jail jumpsuit. We should not be required to speculate for an explanation. We do know from the record, however, that Whitman apparently did not have the option of wearing street clothes.

¶35 On this record, I can come to only one conclusion. Counsel has obviously rendered ineffective assistance of counsel by allowing Whitman to appear in the identifiable orange jail jumpsuit during the jury trial. The prejudicial

impact of this error is so great, especially when Whitman's credibility was an issue in this case, that we should not hesitate to reverse the conviction.

¶36 Because I would reverse and remand the matter for a new trial based on this error, I need not address Whitman's second claim that he should receive a new trial due to the jury receiving the extraneous information.