

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2003

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. 02-0762-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-326

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK A. H.,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Judgment modified and, as modified, affirmed; judgment and order affirmed; and cause remanded with directions.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Frank H.¹ appeals from judgments of conviction for first-degree and second-degree sexual assault of a child and from an order denying his postconviction motion challenging the effectiveness of trial counsel at sentencing. On appeal, he argues that his trial counsel was ineffective at sentencing. We disagree.

¶2 Frank H. pled guilty to sexually assaulting his daughter. In his sentencing remarks, defense counsel argued that the incestuous nature of Frank H.'s crime and the five years which had elapsed since he last assaulted his daughter made him unlikely to reoffend or to pose a threat to the community. Counsel contended that Frank H. could receive sexual offender and substance abuse treatment in the community without incarceration. Counsel informed the court that Frank H. had used his retirement account to fund a sizable civil settlement with his daughter. Frank H. expressed remorse at sentencing and accepted responsibility for his conduct.

¶3 At sentencing, the court characterized Frank H.'s crimes as morally reprehensible and placed great weight on the gravity of the offense and the impact on the victim. The court did not place great weight on the need to protect the public after finding that it was unlikely Frank H. would reoffend. The court found that a term of probation without imprisonment would unduly depreciate the gravity of the offense. The court sentenced Frank H. to fifteen years in prison for

¹ On our own motion, we have amended the caption of this appeal to shield the victim's identity.

first-degree sexual assault and imposed and stayed a consecutive term of ten years in prison for second-degree sexual assault with ten years of probation.²

¶4 Frank H. filed a postconviction motion alleging that his trial counsel was ineffective at sentencing. Frank H. alleged that counsel should have obtained a psychological and/or sex offender evaluation prior to sentencing, failed to submit a proposed treatment plan, failed to refer Frank H. to counseling prior to sentencing, and failed to timely deliver materials to the defense's presentence memorandum author. In support of the postconviction motion, Frank H. submitted a psychological report detailing his family history and his psychological problems.

¶5 At the postconviction motion hearing, trial counsel testified that his goal at sentencing was to obtain probation or a minimal amount of incarceration with probation and treatment in the community. Counsel hoped to achieve this by showing that Frank H. was unlikely to reoffend and that the victim and her mother supported community-based treatment. Counsel succeeded in part when the court agreed that Frank H. was unlikely to reoffend.

¶6 Counsel admitted offering his amateur psychological diagnosis of pedophilia to the sentencing court even though counsel had decided not to obtain a psychological evaluation to address the problems counsel suspected after

² The judgment of conviction for count five, second-degree sexual assault of a child, is in error. The transcript of the sentencing clearly indicates that the court imposed and stayed a ten-year prison term in favor of ten years of probation. The judgment states that as to count five, the court imposed a fifteen-year prison term. However, because the circuit court clearly and unambiguously imposed a ten-year sentence on count five at the sentencing hearing, its oral pronouncement controls the written judgment. *State v. Perry*, 136 Wis. 2d 92, 114-15, 401 N.W.2d 748 (1987). This matter is remanded with directions to the clerk of the circuit court to amend the written judgment of conviction to reflect that the sentence for count five is ten years in prison, imposed and stayed, not fifteen years.

reviewing Frank H.'s medical records and an investigator's report.³ Counsel did not want to offer the sentencing court a laundry list of Frank H.'s psychological problems because counsel did not think such a report would mitigate Frank H.'s culpability or the seriousness of the offense. Counsel stated that even though the defense's presentence memorandum discussed Frank H.'s difficult family life, the postconviction psychological evaluation offered details and more compelling expert opinions about Frank H.'s psychological condition. Counsel stated that the postconviction psychological report would have undermined his goal of seeking an imposed and stayed prison term with probation because the report revealed numerous, deep-seated problems which supported the need for incarceration. Counsel did not propose a specific treatment plan because Frank H. had treatment needs in many areas which counsel did not want to highlight to the court.

¶7 Counsel put a great deal of effort into the financial settlement with the daughter in the expectation that the daughter would endorse Frank H.'s treatment within the community rather than incarceration. However, neither the daughter nor her mother made the statements trial counsel had hoped for at sentencing.

¶8 The court determined that trial counsel's performance was not deficient and did not prejudice Frank H. at sentencing. The court found that counsel employed a strategy which he hoped would keep Frank H. out of prison. The court found that the strategy was well-founded in certain respects because the

³ The court found that the postconviction psychological report supported trial counsel's amateur psychological diagnosis.

circuit court agreed with counsel that because Frank H. was unlikely to reoffend, the public did not need to be protected from Frank H.

¶9 Even though the court accepted part of counsel’s argument, the court premised its sentencing rationale on the severity of the crime. The court found that if it had read the postconviction psychological evaluation which discussed Frank H.’s deep-seated problems, the court would never have considered anything other than incarceration. The court found that counsel’s choice not to procure a psychological evaluation or sexual offender profile was a reasonable strategy given what the postconviction evaluation revealed. The absence of a specific treatment plan played no part in the court’s sentencing decision, and the court did not place any weight on Frank H.’s psychological problems or suicidal tendencies. The court found that the late provision of materials to the defense presentence memorandum author did not affect the author’s ability to prepare the memorandum. The court found no prejudice to Frank H.

¶10 “There are two components to a claim of ineffective trial counsel: a demonstration that counsel’s performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components.” *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). Whether counsel’s actions constitute ineffective assistance is a mixed question of law and fact. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The trial court’s findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *Id.* However, whether counsel’s conduct amounted to ineffective assistance is a question of law which we review de novo. *Id.*

¶11 The circuit court's findings regarding trial counsel's conduct and strategy are not clearly erroneous. As the arbiter of the weight of the evidence and the credibility of the witnesses, *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988), the court was free to accept trial counsel's testimony about his strategy at sentencing. Trial counsel testified that he chose not to procure a psychological evaluation or propose a treatment plan because such would not have served his goal of avoiding incarceration. Postconviction, the circuit court found that Frank H.'s psychological problems would have been an aggravating factor at sentencing. A trial attorney may select a particular strategy from the available alternatives and need not undermine the chosen strategy by presenting inconsistent alternatives or evidence. *State v. Hubanks*, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). Here, trial counsel chose to submit a defense presentence memorandum which reported some of Frank H.'s psychological and behavioral issues, but did not have the imprimatur of a psychologist or provide a laundry list of Frank H.'s psychological problems. In the end, the circuit court did not place great weight on the defense memorandum at sentencing.

¶12 Counsel reasonably believed that the civil settlement, Frank H.'s acceptance of responsibility, and the low likelihood that he would reoffend would yield a minimal prison sentence. Even though counsel emphasized that Frank H. was not a threat to the community, the circuit court had discretion to place weight on other sentencing factors, including the severity of the offense. *See State v. J.E.B.*, 161 Wis. 2d 655, 661-62, 469 N.W.2d 192 (Ct. App. 1991).

¶13 The circuit court found that because none of trial counsel's alleged failings would have made a difference at sentencing, Frank H. was not prejudiced by counsel's performance. We agree. On this record, "our confidence in the outcome of the sentence is not undermined and, therefore, the prejudice prong noted in

Strickland [v. *Washington*, 466 U.S. 668 (1984)] has not been satisfied.” *State v. Voss*, 205 Wis. 2d 586, 598, 556 N.W.2d 433 (Ct. App. 1996).

¶14 We reject Frank H.’s claim that trial counsel performed deficiently when he arranged a civil settlement without securing a favorable sentencing recommendation from the victim and her mother. The sentencing court focused on the severity of the crime, and the victim’s recommendation would not have dissuaded the court from its view of the need for incarceration.

¶15 In sum, we affirm the order denying Frank H.’s postconviction motion and the judgment of conviction for count one, first-degree sexual assault of a child. We modify the judgment for count five, second-degree sexual assault of a child, and, as modified, the judgment is affirmed. We direct the clerk of circuit court to enter an amended judgment for count five.

By the Court.—Judgment modified and, as modified, affirmed; judgment and order affirmed; and cause remanded with directions.

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

