COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2031 **Cir. Ct. No. 2000CF5284**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN H. TOWNSEND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. In 2001, John H. Townsend pled no contest to felony murder, with attempted armed robbery as party to a crime as the underlying crime, in connection with the armed robbery of a grocery store. *See* WIS. STAT. §§ 940.03, 939.05 & 939.32 (1999–2000). We summarily affirmed on his direct

appeal. *See* ***State v. Townsend***, No. 2002-0183-CR, unpublished slip op. (WI App Dec. 18, 2002). In June of 2007, Townsend filed a *pro se* WIS. STAT. § 974.06 motion claiming that his trial and postconviction lawyers were ineffective. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (ineffective assistance of postconviction counsel may be a sufficient reason for failing to have previously raised the issues). The circuit court held a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (hearing to determine whether lawyer gave a defendant ineffective assistance), and denied Townsend's motion. Townsend appeals *pro se*. We affirm.

I.

¶2 Townsend argues that his postconviction lawyer was ineffective because the lawyer did not raise the issue of his trial lawyer's ineffectiveness. Townsend contends his trial lawyer gave him ineffective assistance because the lawyer: (1) did not investigate alleged newly discovered evidence (a co-actor's statement to another inmate that Townsend did not know his co-actor intended to rob the store), which Townsend claims would have allowed him to withdraw his plea; (2) should have filed a suppression motion, alleging that his confession was coerced; (3) did not properly explain the elements of the crime, which he alleges led to an involuntary plea; and (4) promised Townsend a specific sentence. We address and reject each argument in turn.

¶3 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range

of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. We need not address both deficient performance and prejudice if the defendant does not make a sufficient showing on either one. ***Id.***, 466 U.S. at 697. Our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Ibid.*** Its legal conclusions—whether the lawyer's performance was deficient and, if so, prejudicial—present questions of law we review *de novo*. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848.

A. Alleged Newly Discovered Evidence.

¶4 Townsend claims his trial lawyer gave him ineffective assistance because he ignored the statement a co-actor made to another inmate that Townsend did not know about the co-actor's intent to rob the store. Townsend says this information was a new factor that would have supported a motion for plea withdrawal, and that his trial lawyer was ineffective for not pursuing it. We reject this claim.

¶5 Whether a new factor exists is a question of law we review *de novo*. ***State v. Slagoski***, 2001 WI App 112, ¶10, 244 Wis. 2d 49, 59, 629 N.W.2d 50, 54.

> A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial court at the time of original sentencing, either because it was not then in existence or because it was unknowingly overlooked by the parties. The new factor not only must be previously unknown, but it must also strike at the very purpose of the original sentence.

Ibid. (citations omitted). The Record demonstrates that the co-actor's statement was not a new factor and thus could not be used as a basis for plea withdrawal.

- Townsend's trial lawyer testified that he got the co-actor's statement after the plea, but before sentencing. He testified at the ***Machner*** hearing that he "thought Mr. Townsend should look at it and see whether this new evidence affected his decision to enter his guilty plea." "I gave him a copy of the … statement and asked him whether he wanted to move to withdraw his pleas on this basis, and he decided that he did not."

- The trial lawyer told Townsend that the "statement didn't significantly change the landscape of the evidence" because the videotape of the robbery clearly shows Townsend to "be involved in this armed robbery." The lawyer further testified that the videotape showed Townsend saying "give me the money. And so it was clear that even if he didn't know what was going on when they walked through the door, at some point he realized what was going on and involved himself and that made him a party to the crime."

¶6 Townsend testified that his trial lawyer never told him about the co-actor's statement and never asked him whether he wanted to withdraw his plea. But the circuit court found the trial lawyer's testimony to be credible and made findings of fact consistent with the trial lawyer's account. These findings are not

clearly erroneous. Based on those findings, the statement *was* known before sentencing, and thus not "new." Further, Townsend's own decision not to pursue plea withdrawal defeats his attempt to blame his trial lawyer. Accordingly, the trial lawyer's conduct with regard to the co-actor's statement was not ineffective.

B. Suppression Motion.

¶7 Townsend also contends that his trial lawyer was ineffective because he did not file a suppression motion claiming that the police coerced Townsend's confession. Based on the circuit court's findings of fact, this claim, too, is without merit.

¶8 At the ***Machner*** hearing, Townsend testified that he was handcuffed during his interview with police and that the police coerced him into confessing by saying that if he did not confess he "was going to prison for the rest of [his] life" and "was going to be somebody's bitch in prison," but if he told them what happened, he wouldn't "go to prison." Townsend said he told his trial lawyer about this. His trial lawyer testified, however, that he reviewed Townsend's statement to determine whether "there may be grounds to suppress" and that Townsend "never told me anything about a problem with the statement" so he did not pursue a suppression motion.[1] The detective who interviewed Townsend also testified. He said that Townsend was not handcuffed, was advised of his rights under ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966) (Before the police may

[1] The Record has a one-page generic suppression motion filed in December of 2000, where Townsend's trial lawyer asked the court to suppress Townsend's statement because it was obtained "illegally" in violation of "Article 1, Sections 1, 7, 8 and 11 of the Wisconsin Constitution and the 4th, 5th, 6th and 14th Amendments to the United States Constitution." There was no further action on the motion.

question a suspect in custody, they must warn that person that he or she does not have to say anything and that the person may have a free lawyer.), understood his rights, agreed to give up those rights and talk, was fully cooperative, knew what was going on, was never threatened, and was given food and drink. When specifically asked whether the police told Townsend "anything to the effect that if he did not give a statement he would go to prison for the rest of his life, that he would either be raped or somebody's 'bitch' in prison. But if he told what happened, he would not go to prison[,]" the detective answered, "No."

¶9 The circuit court found the police and trial lawyer's version of events to be credible and Townsend to be "incredible and not worthy of belief." It further found that Townsend was not coerced by police during the interview:

> At no time during the interview did [the police] or anyone else tell the defendant anything to the effect that if he did not give a statement he would go to prison for the rest of his life, that he would either be raped or somebody's "bitch" in prison, nor was the defendant told that if he told what happened he would not go to prison and may even just go out of the door.

¶10 These findings are not clearly erroneous. Thus, there was no basis to pursue the suppression motion, and, therefore, the trial lawyer was not ineffective for not doing so.

C. Voluntary Plea.

¶11 Townsend also argues his trial lawyer gave him ineffective assistance because he did not explain the elements of the crime to him before he agreed to plead no contest, resulting in an involuntary, unknowing and unintelligent plea. The circuit court found otherwise and the Record supports the circuit court's findings.

¶12 The circuit court found:

- The trial lawyer "went over the guilty plea questionnaire and waiver of rights form … and explained everything on the form to the defendant."

- The trial lawyer "described the elements of felony murder to the defendant and attached jury instructions to the plea questionnaire and believed that is how he went over the elements with the defendant."

- The trial lawyer "underlined the sentence on the guilty plea questionnaire: 'These elements have been explained to me by my attorney.' That is the practice [the trial lawyer] employed when he explained elements orally to a client."

- "The Wisconsin ju[ry] instructions for felony murder … party to a crime … and armed robbery … and attempt … were attached to the guilty plea questionnaire. … [The trial lawyer] had the jury instructions with him when he discussed the elements with the defendant because he drafted them and put them in his file and filed them with the court, [the trial lawyer] did not recall if he stapled them to the plea questionnaire or not but [the trial lawyer] went over the elements in those instructions of that offense with the defendant and explained the relationship of how those elements were proven by the facts in the case."

These findings are not clearly erroneous and support the circuit court's legal conclusion that Townsend's trial lawyer properly advised him of the elements of

the crime. Accordingly, Townsend did not prove that his trial lawyer gave him ineffective assistance.

D. Sentence.

¶13 Townsend next claims that his trial lawyer promised him that if he pled no contest, his sentence would be ten years in prison and fifteen years of extended supervision. Townsend was actually sentenced to eighteen years' initial confinement, followed by seven years' extended supervision. Townsend argues his trial lawyer's promise was ineffective assistance.

¶14 The circuit court found that the trial lawyer "never promised the defendant he would get 10 years of initial confinement and 15 years of extended supervision." This finding is supported by the trial lawyer's testimony at the ***Machner*** hearing:

- "I know for a fact I never made a promise to Mr. Townsend as to what his sentence would be."
- "I would not have said that…. It is possible I discussed where I thought the [sentence] might fall … things of that nature. … But I'm very scrupulous about making it clear that the [court] is free to sentence a person to whatever he wants. I would not have made it a promise."

The circuit court's finding here is further supported by the Record documents including the plea-bargain agreement and the plea-waiver form, which both tell Townsend the maximum potential penalty and that the circuit court was not bound by the plea-bargain. Townsend did not prove ineffective assistance with regard to his sentence-promise claim.

E. Postconviction Lawyer.

¶15 Townsend also argues his postconviction lawyer gave him ineffective assistance. Because his premise for postconviction lawyer ineffectiveness is based on what he contends his trial lawyer should have done, and, as we have seen, none of his allegations of trial lawyer ineffective assistance have any merit, he has no grounds to assert postconviction-lawyer ineffectiveness.[2]

*F. **Machner** Hearing Lawyer.*

¶16 Finally, Townsend asserts that the lawyer who was assigned to represent him at the ***Machner*** hearing gave him ineffective assistance. He claims this lawyer "did nothing but show up to the hearings," "could have presented a better case" and did "[n]o investigation." He claims this prejudiced him because "it swayed the trial court to believe that Townsend was not presenting a genuine postconviction proceeding." Townsend does not, however, beyond these conclusory assertions, show what the lawyer who represented him at the ***Machner*** hearing should have done that he did not do. Accordingly, he has not shown that the lawyer gave him ineffective representation at the hearing. *See* ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388, 397 (Ct. App. 1999).

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

[2] At the end of his brief, Townsend makes a general claim that the circuit court erroneously exercised its discretion when it denied his motion. We have rejected all of his specific contentions. That ends the matter.