COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2077-CR **Cir. Ct. No. 01 CF 1185**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAMMEL V. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Trammel V. Johnson appeals from a judgment entered on a jury verdict finding him guilty of: (1) one count of attempted first-degree intentional homicide, with the use of a dangerous weapon, while concealing his identity, as a party to a crime; and (2) attempted armed robbery, with the threat of force, while concealing his identity, as a party to a crime. *See*

WIS. STAT. §§ 940.01(1)(a), 939.32, 939.63, 939.641, 939.05, and 943.32(2) (1999–2000).[1] He also appeals from an order denying his postconviction motion seeking a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and seeking sentence modification. Johnson claims that the trial court: (1) erred when it denied his ineffective-assistance-of-counsel claim without a ***Machner*** hearing; and (2) erroneously exercised its sentencing discretion when it allegedly did not consider "a very harsh sentence" he received in another robbery case. We affirm.

I.

¶2 Trammel V. Johnson was charged with attempting to rob a Burger King restaurant on October 1, 2000. This was not the first robbery that Johnson was charged with. On January 18, 2001, Johnson robbed Lucky's Custard stand.[2] Johnson pled guilty in that case and the trial court sentenced him to forty-five years in prison, to consist of eighteen years of initial confinement and twenty-seven years of extended supervision.

¶3 In this case, Johnson pled not guilty and went to trial. At trial, Thomas Erwine, a Burger King employee, testified that he and a coworker were moving garbage from the back door of the restaurant when a hand came through the door. The door opened and a man, who was later identified as Toni J. Toston, pulled down a ski mask and put a gun in Erwine's face. A man wearing a

[1] All references to the Wisconsin Statutes are to the 1999–2000 version unless otherwise noted.

[2] A complaint charging Johnson with the Lucky's robbery was filed on January 26, 2001. A complaint charging Johnson with the Burger King robbery was filed on March 2, 2001.

Spiderman mask, who was later identified as Johnson, was approximately three feet behind Toston. According to Erwine, both men had guns.

¶4 Erwine testified that Toston told him, "Give me all the fucking money," and put a gun in his face. Erwine began to struggle with Toston. Johnson cocked his gun and Erwine put his hands up. According to Erwine, Toston then said, "You're dead, motherfucker," and shot Erwine in the face. Toston and Johnson ran away and Erwine pushed an alarm button. Erwine testified that Johnson did not indicate in any way that he did not want to participate in the robbery.

¶5 Johnson testified in his defense. He admitted that he participated in the robbery, but claimed that he ran away when Toston threatened to kill Erwine because he "couldn't take part in a homicide." The State elicited testimony from Johnson, however, that he did not tell this to Toston before he (Johnson) ran away.

¶6 During closing arguments, Johnson's attorney argued that Johnson was not legally responsible for the shooting because he withdrew from the plan to commit the crime before Toston shot Erwine. *See* WIS. STAT. § 939.05(2)(c) (defense of withdrawal).[3] A jury found Johnson guilty on both counts.

[3] WISCONSIN STAT. § 939.05(2)(c) provides, as relevant:

> This paragraph [a person concerned with the commission of a crime] does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

¶7 At sentencing, Johnson told the trial court that he did not want a trial:

> THE COURT: Mr. Johnson, I know that you are truly remorseful for what you did to yourself. I don't know how to measure whether you are remorseful to Mr. Erwine, but I give you some credit based on your statement that you have made here today. You made an attempt, although it seems somewhat half-hearted, to apologize to the police at an earlier stage. I would give you even more credit if you would have resolved this before you went to trial. I don't punish you in the least for going to trial.
>
> THE DEFENDANT: I didn't want to go on trial.

The court continued its remarks and sentenced Johnson to twenty years in prison on the attempted-homicide charge, with ten years of confinement and ten years of extended supervision, and twenty years in prison on the attempted-robbery charge, with ten years of confinement and ten years of extended supervision. The sentences were imposed concurrent to each other, but consecutive to any other sentence Johnson was serving.

¶8 Johnson filed a postconviction motion asserting two grounds for relief. First, he requested a ***Machner*** hearing. He alleged that his counsel's performance was deficient because counsel took the case to trial "instead of taking advantage of any plea offers" when "a review of the record show[ed] that there was no way that the defense of withdrawal could have been supported." Johnson also claimed that it was clear that he did not want a trial based on his remark at sentencing. Johnson thus argued that he was prejudiced by the allegedly deficient performance because his "exposure" could have been "limited" by a plea bargain.

¶9 Second, Johnson sought a modification of his sentence. He claimed that the trial court allegedly did not "take into account the reasons for the very harsh sentence" he received in the Lucky's case. Johnson also alleged that the

Lucky's court took the then-pending Burger King charges into account when it sentenced him; thus, he asserted that he was punished twice for the Burger King robbery.

¶10 The trial court denied motion. It concluded that Johnson was not entitled to a ***Machner*** hearing because he did not allege facts sufficient to raise a question of fact as to whether his counsel's performance was deficient:

> Mr. Johnson's ineffective assistance claim rests on a single factual reed: At sentencing, he told me that he did not want his case to be tried.… Since then, Mr. Johnson has had the opportunity … in the present motion to offer further testimony, in an affidavit, in which he could have spelled out any further facts that support his claim … but he does not offer the required factual substantiation…. Without something from the defendant himself stating that his preference not to go to trial was overborne by his attorney and that his attorney did or said or failed to do or say something that would be considered deficient performance by a trial lawyer, I cannot say that Mr. Johnson has raised a genuine question of fact about ineffective assistance of counsel.

The trial court also concluded that Johnson was not entitled to resentencing because it "careful[ly]" considered the sentence in the other case. It commented that when the sentences were "combined and considered in light of two armed, masked robberies where one victim was shot in the face," they were not excessive.

II.

A. Ineffective Assistance of Counsel

¶11 First, Johnson claims that the trial court erred when it denied his ineffective-assistance-of-counsel claim without a ***Machner*** hearing. The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***,

466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶12 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. In order to succeed, "[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.*** at 694.

¶13 Our standard for reviewing this claim involves a mixed question of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶14 A trial court must hold a ***Machner*** hearing if the defendant alleges facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53. If, however, "'the defendant fails to allege sufficient facts in his [or her] motion to raise a question of

fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.'" ***Id.***, 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (quoted source omitted).

¶15 Johnson alleges that his trial counsel was deficient for taking the case to trial because there was "no way" that the third element of the defense of withdrawal—that the person notified others involved of his or her withdrawal far enough before the commission of the crime to allow the other parties to also withdraw—could have been proven. *See* WIS. STAT. § 939.05(2)(c); WIS JI—CRIMINAL 412. He thus claims that he was prejudiced by his trial lawyer's allegedly deficient performance because "if [his] exposure could have been limited more by a plea bargain, then the element of prejudice has been proven." We disagree.

¶16 Johnson's allegations are conclusory and undeveloped. The only allegation that Johnson makes to support his claim is his mere assertion at sentencing that he "didn't want to go on trial." We agree with the trial court that this statement, without more, does not raise an issue of fact as to how or whether his counsel acted improperly. The mere assertion, without any support, that the case could have been plea-bargained to his benefit is not enough. The right to the effective assistance of counsel "applies to advice as to whether a defendant should accept or reject a plea bargain." ***State v. Fritz***, 212 Wis. 2d 284, 293, 569 N.W.2d 48, 52 (Ct. App. 1997). To prove prejudice, however, the defendant must show that "he or she would have in fact accepted the plea bargain but for the lawyer's deficient performance." ***Id.***, 212 Wis. 2d at 297, 569 N.W.2d at 53. Here, Johnson does not allege that the State offered him a plea bargain, let alone that, but for his trial counsel's allegedly deficient performance, he would have accepted

a plea bargain. Thus, he has not shown prejudice under the ***Strickland*** analysis. *See* ***Bentley***, 201 Wis. 2d at 313–314, 548 N.W.2d at 55 (Although the "nature and specificity of the required supporting facts will necessarily differ from case to case … a defendant should provide facts to allow the reviewing court to meaningfully assess his or her claim.").

B. Sentencing

¶17 Second, Johnson alleges that the trial court erroneously exercised its sentencing discretion. We will find an erroneous exercise of discretion, however, "where the sentence is so excessive and 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 v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975), or if the trial court imposes a sentence without considering the appropriate factors, ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512, 520 (1971). A strong public policy exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To obtain relief on appeal, a defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶18 Johnson claims that "the trial court erroneously exercised its discretion by failing to take into account the reasons for the very harsh sentence which he received" in the Lucky's case. Johnson thus alleges that "the sentence which was imposed [in this case] actually acted to punish him twice for the Burger

King robbery, as [the Lucky's sentencing court] already took the Burger King robbery into account." We disagree.

¶19 There is no evidence that the court erroneously exercised its sentencing discretion. Indeed, it specifically considered the Lucky's sentence:

> I look at the [sic] what the State recommends here. I think that is within the realm of reason, but *I take into consideration that with a sentence Judge Crawford has ordered you to serve you will be 40 or at least approaching 40 before you are released from prison, and that is assuming that you are a perfect prisoner and on good behavior the whole time.*
>
> I take into consideration the fact that if I follow the State's recommendation you would be in prison until you approach the age of 55. I don't think that is necessary to punish you. I don't think that is necessary to protect the community. As taxpayers we gain only so much benefit for every day you spend in prison beyond the time you are supposed to be there already.
>
> Now, having said that I don't believe that it would be fair in any stretch of the imagination for this offense to go unpunished. And, therefore, *I cannot in good conscience impose time in this case which would be concurrent with the previous case, or at least that would overlap 100 percent.*

(Emphasis added.) The trial court also considered the gravity of the offense, Johnson's character, and the need to protect the public. The trial court considered the appropriate factors. *See* ***Wickstrom***, 118 Wis. 2d at 355, 348 N.W.2d at 192 (the three primary factors a sentencing court must consider are the gravity of the offense, the defendant's character, and the need to protect the public); ***State v. Harris***, 119 Wis. 2d 612, 624, 350 N.W.2d 633, 639 (1984) ("It is well within the trial court's authority to note the defendant's prior convictions when determining

the appropriate term of incarceration."). Thus, Johnson presents no evidence of an unreasonable or unjustified basis in the record for his sentence.[4]

By the Court.—Judgment and order affirmed.

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

[4] If Johnson wishes to contest the allegedly "harsh sentence" in the Lucky's case, he must appeal that case. Indeed, as this appeal was proceeding, Johnson appealed the sentence in the Lucky's case. We denied his claim in an unpublished opinion. *See* ***State v. Johnson***, No. 02-0277, unpublished slip op. (Wis. Ct. App. March 27, 2003).