COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3080-CR **Cir. Ct. No. 2008CF1887**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY PATTERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Gregory Patterson appeals from a judgment of conviction for two counts of burglary to a building or dwelling, contrary to WIS.

STAT. § 943.10(1m)(a) (2007-08),[1] and from an order denying his motion for postconviction relief. Patterson seeks resentencing on grounds that his trial counsel provided ineffective assistance when he failed to argue at sentencing that Patterson should be sentenced to three to four years of initial confinement. We reject Patterson's argument and affirm.

BACKGROUND

¶2 Patterson was charged with three counts of burglary. He and the State reached a plea agreement pursuant to which Patterson would plead guilty to two counts and the third count would be dismissed and read in. Three additional uncharged burglaries were also read in for sentencing purposes. The State agreed to recommend concurrent prison time in an amount to be determined by the trial court. The maximum sentence Patterson faced on each of the two burglary counts was seven and one-half years of initial confinement and five years of extended supervision.

¶3 The trial court accepted Patterson's guilty pleas and found him guilty. At sentencing, the State argued that Patterson was "a career burglar" and discussed Patterson's current crimes and his criminal history of thirteen prior convictions, including convictions for burglary. The State recommended that Patterson be sent to prison, but said that the sentences should be imposed concurrent to one another in light of Patterson's admissions of guilt and his cooperation.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Trial counsel's sentencing argument highlighted "positives" in Patterson's case, including the fact that he entered guilty pleas and agreed to pay restitution. Trial counsel also noted that Patterson's crimes involved breaking into unoccupied businesses, as opposed to homes with people in them. Trial counsel said that Patterson is close with his sister, who has provided a home for him and is a positive influence on him. Trial counsel asked the trial court to impose concurrent sentences, and to make both sentences concurrent to his revocation sentence in another case.

¶5 When asked, Patterson chose not to exercise his right of allocution. The trial court then proceeded to sentence Patterson to six years of initial confinement and five years of extended supervision on each count, to be served concurrent to one another but consecutive to any other sentence. The trial court said it would not order that the new sentences be served concurrent with Patterson's revocation sentence because that would "unduly depreciate the serious nature" of the current offenses, which were committed while Patterson was on supervision.

¶6 Patterson was appointed postconviction counsel and filed a motion for postconviction relief. Patterson did not seek to withdraw his guilty pleas, but sought resentencing on several grounds, only one of which has been pursued on appeal. As relevant to this appeal, Patterson asserted that his trial counsel provided ineffective assistance when he failed to make a specific sentencing recommendation at the sentencing hearing. The motion asserted that trial counsel had told Patterson that he and the State would recommend a period of initial confinement of three to four years, and that Patterson was surprised when neither did so.

¶7 The trial court conducted a ***Machner***[2] hearing on Patterson's motion. Trial counsel testified that it was his and Patterson's goal for Patterson to receive a sentence of three to four years, but he denied telling Patterson that he would recommend that amount of time to the trial court.[3] Trial counsel testified, in response to questions from postconviction counsel, about the reasons he chose not to recommend a specific sentence where the State had also not made a recommendation. He explained:

> [I]n my experience … some judges want to hear definitely what number you're asking for, and some judges don't push it. My impression is if you give a number that might be higher than what a judge would be going for, either you can turn off the judge, and [the judge would] say, well, that's ridiculous and ignore your argument. But also in my experience, I've had where I'm asking for a number, and the judge goes below it. And so what I'm getting at is, as a Defense attorney, you shouldn't always try to guess the number that the judge will go at[.]
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> ….
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> My experience is that you can point out to the judge the positives. You can try and work out and really aim for a sentence without giving a hard number the judge has to focus on. You can work the judge towards a fair number, which might be in the range of what you want, but not saying that number, if that makes sense.
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> ….
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> … [Y]ou don't want to say numbers that are ridiculously low in the judge's mind, and you don't want to say numbers that might be higher than what the judge would normally go for.

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[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] Trial counsel's testimony was at times unclear, but when questioned by the trial court toward the end of his testimony, trial counsel indicated that he had not "specifically sa[id] to Mr. Patterson that [trial counsel] would make a recommendation of three to four years."

¶8 Patterson also testified at the ***Machner*** hearing. His testimony was at times contradictory, but at one point he said that he believed his trial counsel was going to recommend three to four years and that the State "[w]as going to go along with it." Patterson referred to this as "the deal," although he acknowledged that a length of three to four years was not noted on the written plea questionnaire or stated by any party at the plea hearing or sentencing hearing.

¶9 The trial court found that Patterson's testimony was "incredible with respect to the allegations of prejudice and deficient performance" and that trial counsel's testimony was "credible with respect to the sentencing approach." The trial court found:

> [Trial counsel] stated that it was a strategic decision not to put a particular year out there given the risk that can be associated with that, and he outlined that risk. Sometimes you may put [out] a number that is higher than what the judge may be thinking or you may put a number out there that is substantially lower than what the judge may feel is reasonable, and therefore, there are sentencing times, based on [trial counsel's] experience, that, as he stated, that there are strategic reasons for not putting a particular number out there. I don't find that that, in fact, is anything that really prejudiced [Patterson]. It is a reasonable approach to sentencing arguments, and it's clear that [trial counsel] made a strategic choice to make the sentencing argument that he did.

The trial court denied Patterson's postconviction motion, concluding that trial counsel had not performed deficiently and that Patterson had not been prejudiced. This appeal follows.

DISCUSSION

¶10 The single issue on appeal is whether trial counsel provided ineffective assistance when he did not recommend a specific sentence of three to

four years of initial confinement at the sentencing hearing. 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). We need not discuss both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697.

¶11 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.*** at 690. The Sixth Amendment to the United States Constitution "guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8 (2003) (per curiam); *see also* ***Strickland***, 466 U.S. at 689 (court must make "every effort … to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"). 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. ***Strickland***, 466 U.S. at 687.

¶12 On appeal, we affirm the trial court's findings of fact unless they are clearly erroneous, but we review the trial court's determination of deficient performance and prejudice—both questions of law—without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶13 With those standards in mind, we consider Patterson's allegation that his trial counsel's performance at sentencing constituted ineffective assistance. At the outset, we note that Patterson does not explicitly challenge the trial court's findings of fact or credibility assessments, and we do not discern any reason to disturb them.

¶14 Patterson argues that trial counsel's performance was deficient because his strategy not to suggest a specific period of imprisonment was unreasonable. Patterson explains:

> Counsel's approach in this case amounted to playing a guessing game about the judge's preconceived opinion of the appropriate sentence rather than engaging in advocacy to inform and persuade the judge. When defense counsel has an opinion as to a proper sentence and reasons to support that sentence, it is unreasonable to keep that professional assessment to himself simply out of fear that it may not match exactly the judge's thoughts. It is unreasonable in such a case for a lawyer to shy away from advocating the sentence he has determined to be appropriate. This is especially true in a case such as Patterson's in which there was no specific recommendation being made by the State with which Patterson's attorney had to "compete." In short, counsel "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. For no reason, counsel abandoned his function to make the adversarial testing process work in this particular proceeding.

¶15 We are not convinced that trial counsel performed deficiently. Trial counsel's testimony, which the trial court accepted, confirms that trial counsel made a strategic decision not to suggest a specific period of incarceration. Trial counsel explained the reason for this strategic decision: to avoid offending the trial court with a suggestion that was too low, or offering a number that was higher than what the trial court was considering. Instead, trial counsel focused on highlighting factors that weighed in Patterson's favor, such as his acceptance of responsibility and the fact that his crimes did not involve direct threats to people. We cannot say that the strategy trial counsel employed in this case was, as a matter of law, irrational. Therefore, we conclude that trial counsel did not perform deficiently. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) ("If tactical or strategic decisions are made on [a rational] basis, [we] will not find that those decisions constitute ineffective assistance of counsel.").

¶16 Because we conclude that trial counsel did not perform deficiently, we need not discuss the postconviction court's conclusion that Patterson also failed to prove prejudice. *See* ***Strickland***, 466 U.S. at 697. We affirm the judgment and the order denying Patterson's postconviction motion seeking resentencing.

By the Court.—Judgment and order affirmed.

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