COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2020-CR **Cir. Ct. No. 2009CF1807**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MACEO DOWNER,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Maceo Downer appeals from a judgment of conviction, entered upon his guilty plea, and an order denying his postconviction

motion for a new sentencing hearing. Downer contends that trial counsel was ineffective when she failed to advise him that sentencing would immediately follow the plea hearing, depriving him of the opportunity to prepare for allocution. The circuit court concluded that there was no prejudice and denied the motion. We agree and affirm.

¶2 Downer, then seventeen years old, and a co-actor ordered food for delivery, then robbed the delivery person at gunpoint when he arrived. When the delivery person hesitated, Downer fired his gun into the air as a warning.[1] Downer and the co-actor were each charged with one count of armed robbery as party to a crime, possession of a firearm by a felon, and possession of a short-barreled shotgun or rifle.

¶3 The felon-in-possession charge was dismissed in exchange for Downer's guilty pleas to the other two counts. Additionally, the State would recommend prison, but not any particular length, and would leave the question of concurrent or consecutive sentences to the circuit court. Following the plea, the parties proceeded immediately to sentencing. The court imposed six years' initial confinement and three years' extended supervision on the armed robbery conviction, with a concurrent sentence of three years' initial confinement and two years' extended supervision on the possession charge.

¶4 Downer subsequently moved for postconviction relief. He alleged that trial counsel was ineffective for not advising him that sentencing would

[1] Downer told police he merely pointed the gun in the air, and it accidentally discharged.

immediately follow his plea and for not preparing him for allocution.[2] He further claimed that the lack of preparation led him "to make a poor impression on the court" because he was "nervous, tongue-tied, and unable to express" his feelings to the court. Downer also complained that he did not have an opportunity to tell the circuit court about various facts of his life, particularly his upbringing.

¶5 The circuit court denied the motion without a hearing, noting that its sentence had been based largely on the aggravated nature of the crime and Downer's risk of reoffense, and nothing that Downer wanted to present informed on those factors. The circuit court thus concluded that the additional information would not have altered its sentence, so Downer had suffered no prejudice, and it denied the motion. Downer appeals.

¶6 A defendant alleging ineffective assistance of counsel must show that the attorney was deficient and that this deficiency caused prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We will assume without deciding that trial counsel's failure to advise Downer that sentencing would be immediate was deficient performance.[3] However, the defendant must fulfill both prongs to be afforded relief. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. Showing prejudice requires the defendant to show that there is

[2] Downer also alleged that counsel was ineffective because she did not have other individuals in court to testify on his behalf; that aspect of the postconviction motion has been expressly abandoned on appeal. We therefore do not address it.

[3] We note that we actually do not consider counsel's performance to be deficient. Downer's co-actor had been sentenced earlier in the day by the same judge to a total of five years' imprisonment out of a maximum possible forty-six years. When Downer expressed concern to counsel about proceeding to sentencing, counsel explained to him that, in essence, she was hoping Downer would be able to "ride the coattails" of the co-actor's light sentence. Downer has not attempted to show that this strategy was in any way unreasonable. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶31, 246 Wis. 2d 648, 630 N.W.2d 752.

"a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." ***State v. Guerard***, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12. Downer does not prevail because he cannot show prejudice.

¶7 Downer's main argument appears to be that his right to allocution, as set forth in WIS. STAT. § 972.14(2) (2009-10),[4] was adversely impacted by his lack of preparation. Section 972.14(2) states, in relevant part: "Before pronouncing sentence, the court shall ask the defendant why sentence should not be pronounced upon him or her and allow the district attorney, defense counsel and defendant an opportunity to make a statement with respect to any matter relevant to the sentence."

¶8 Downer expressly concedes that he is not "claim[ing] that he was deprived of his right to allocution by any failure of the court to ask him if he had anything to say."[5] Instead, he contends that because he was unprepared, "his opportunity was wasted and ill-used and was patently unfair." Downer explains that he would have liked to provide more information about his background to the

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

[5] This concession is at odds with Downer's assertion that he was given "no opportunity to provide to the judge … information which he had a right to have considered at sentencing[.]" Downer was, in fact, given that opportunity. His complaint is that he was not able to utilize that chance well.

circuit court.[6] The omitted details Downer thinks are relevant include the lack of a father figure, a "chaotic home," multiple school changes, "things that happened in my life which were bad but which I overcame," and programming he completed while at the Ethan Allen school.

¶9 However, the circuit court explained that the "essential assessments" that drove its sentencing decision were "that his offense was aggravated, that his risk of re-offense was higher than average [given his record], how Mr. Downer's case compared to other cases like this and how the risk to the community might diminish as Mr. Downer approached the age of 25." The circuit court also observed that Downer's upbringing "might explain his poor judgment and debased values, but it does not suggest a lower risk of reoffense; if anything, this information reinforces my assessment of his character and the risk he will commit more crimes." The court additionally noted that completed programming is "marginally reassuring," but the fact that Downer committed a new offense after that programming meant that the earlier rehabilitation attempts were ineffective.

[6] In his postconviction motion, Downer asserted that he wanted sentencing delayed because he wanted to stay in Milwaukee at the House of Corrections so his infant son could be brought for visitation during Christmas; that he thought a new sentencing law was about to be passed that might benefit him; and that he wanted family members in court to speak on his behalf. In his brief, Downer explains that, on appeal, these reasons "are discussed only to shed light on what was in Downer's mind."

These concerns are ultimately irrelevant to the ineffective-assistance question. A delay through Christmas would have required at least a ninety-day adjournment, and Downer cannot show that he would have been granted such a consideration. Downer never identifies what law he thought was going to be passed. While certain changes to sentencing, like the risk reduction sentence option, went into effect less than two weeks after Downer was sentenced, it appears unlikely that Downer would have been deemed eligible for a risk reduction sentence, and armed robbery was expressly excluded from certain new good-time credit options. Finally, the mother of Downer's child was present at the plea and sentencing, and Downer does not explain why she could not have been called as a character witness.

¶10 In other words, Downer's additional information might have gone to factors a sentencing court is *allowed* to consider, but it either did not inform on the factors the circuit court *actually* considered, like the aggravated nature of the offense, or it simply reinforced the court's original determination on those factors, like Downer's risk of reoffense.

¶11 Ultimately, the weight to be given to each factor is left to the circuit court's discretion, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and we discern no error in the circuit court's allocation of weight in the original sentencing determination. In rejecting the postconviction motion, the circuit court noted that it had even "considered [Downer's] new information" but it was "not persuaded that it changes my assessment of Mr. Downer's need for punishment and the community's need for protection from him." Therefore, Downer has not shown a reasonable probability that, but for counsel's failure to prepare him for allocution, the sentencing would have been different.

By the Court.—Judgment and order affirmed.

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