COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1529 **Cir. Ct. No. 02CF000007**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARL E. CUNNINGHAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Carl Cunningham appeals an order denying his postconviction motion for sentence modification. We affirm for the reasons discussed below.

BACKGROUND

¶2 Cunningham entered no contest pleas to a sixth offense of operating a motor vehicle while intoxicated, one count of hit and run, and a second offense of operating a motor vehicle after revocation, in exchange for the dismissal of three other charges and a penalty enhancer. At the sentencing phase of the hearing, the State informed the court about eighteen prior convictions Cunningham had accumulated between 1961 and 2000. It then argued without objection from defense counsel that Cunningham's record was "horrible" and that he deserved "the maximum penalty that can be set by law." Defense counsel argued for probation or a minimal sentence, primarily citing Cunningham's advancing age and health problems. Cunningham also addressed the court personally, admitting to "a very extensive record," but pointing out that he had also had productive periods of sobriety in his life. He claimed that he had relapsed into heavy drinking again following his brother's death. On rebuttal, the prosecutor commented that he didn't think "there's a single kind of crime … that [Cunningham] hasn't committed other than perhaps a white collar crime," including "a sex crime … weapons offenses, law obstruction, property crimes, violence, drugs, alcohol." Cunningham then told the court that the prosecutor had incorrectly stated that he had violated his Huber conditions. The court indicated that it was not going to rely on that disputed information.

¶3 The court considered the offenses serious, because they had resulted in two accidents and injury to another driver, and deemed Cunningham "very dangerous" because he was "an out-of-control alcoholic" whose record demonstrated that he could not be deterred from his conduct. The court concluded that "[t]he need of the public for protection is extraordinarily high." It sentenced Cunningham to three years of initial incarceration and two years of extended

supervision on the OWI-sixth count, a consecutive term of six months on the hit and run, and a concurrent sentence of six months on the OAR.

¶4 Nearly a year after the judgment was entered, Cunningham filed a postconviction motion under WIS. STAT. § 974.06 seeking to modify his sentences. The court denied the motion without a hearing, and Cunningham appeals.

DISCUSSION

¶5 We review the trial court's decision to deny a postconviction motion without an evidentiary hearing under the de novo standard, independently determining whether the facts alleged, if true, would entitle the defendant to the requested relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 308, 548 N.W.2d 50 (1996). Here, we agree with the trial court that none of Cunningham's claims provided any basis for sentence modification.

¶6 Cunningham first claims that the prosecutor's remarks about his prior criminal record were improper because they were unsubstantiated and prejudicial. Cunningham has not pointed to any mistakes in the prosecutor's initial recitation of his prior convictions and revocations, however, aside from the alleged Huber violation which the trial court explicitly stated it would not consider. We see nothing improper about the prosecutor's subsequent characterizations of Cunningham's record. To the contrary, it was the prosecutor's job to give the court the State's view of Cunningham's record and to argue what effect that record should have on Cunningham's sentences.

¶7 Cunningham next argues that defense counsel was ineffective for failing to adequately investigate his case; to object to the prosecutor's comments at

sentencing; and to argue to the court that Cunningham's alcoholism is a disease requiring treatment, not punishment.

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted). Cunningham fails to establish deficient performance on his first two claims because he has identified no specific facts relevant to sentencing that counsel could or should have discovered by more vigorous investigation and we have already determined that the prosecutor's remarks were not objectionable. Cunningham cannot demonstrate prejudice on the third claim because the record shows that the trial court was already well aware of Cunningham's alcoholism and that it was not punishing Cunningham for his alcoholism, per se, but rather for his undeterred criminal conduct over a period of several decades.

¶8 Cunningham also argues that counsel was ineffective for failing to explain all of his appellate options, including the right to have a no-merit report filed on his behalf if counsel felt there were no meritorious issues for appeal. This contention is flawed in multiple respects. To begin with, the discussion of Cunningham's appellate rights after sentencing would provide no grounds for modification of the sentences. Furthermore, the record conclusively shows that

Cunningham was informed of his right to file a notice of intent to appeal within twenty days after his judgment of conviction was entered. The other appellate rights of which he complains he was not properly informed would not have come into existence unless and until he had filed such a notice of intent.

¶9 Finally, Cunningham argues that the trial court failed to explain why it made two of the three sentences consecutive rather than concurrent. The trial court's obligation, however, was to explain the application of the relevant factors to each of the sentences it imposed. It did so. It did not need to expressly state why the sentences were to be consecutive or concurrent.

By the Court.—Order affirmed.

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