COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1778-CR **Cir. Ct. No. 2009CF1786**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY D. JEFFERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON and REBECCA F. DALLET, Judges.[1] *Reversed and cause remanded with directions.*

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

[1] The Honorable Patricia D. McMahon presided over Jefferson's jury trial and sentencing. The Honorable Rebecca F. Dallet presided over Jefferson's postconviction motion.

¶1 CURLEY, P.J. Troy D. Jefferson appeals the judgment of conviction sentencing him to twelve years' imprisonment for first-degree recklessly endangering safety with the use of a dangerous weapon, contrary to WIS. STAT. §§ 941.30(1) & 939.63(1)(b) (2009-10).[2] Jefferson also appeals the order denying his postconviction motion, in which he argued that trial counsel was ineffective at sentencing. We agree with Jefferson that counsel's failure to inform the trial court about Jefferson's good character and positive social history in any meaningful way at sentencing constituted ineffective assistance of counsel. We therefore reverse the postconviction order and that part of the judgment sentencing Jefferson, and remand the case to the trial court for resentencing.

BACKGROUND

¶2 Following a jury trial, Jefferson was convicted of first-degree recklessly endangering safety with the use of a dangerous weapon. According to the criminal complaint, Jefferson, while standing at the bottom of a stairwell, shot at a man standing at the top of the stairwell.

¶3 At Jefferson's sentencing hearing, trial counsel focused heavily on why he believed Jefferson was not guilty. Of the five pages of trial counsel's argument in the sentencing hearing transcript, nearly four pages focused solely on Jefferson's innocence. For example, counsel argued:

[2] Jefferson does not challenge his conviction on appeal; he merely challenges his sentence.

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

> [W]hile we accept without qualification the procedure, we vehemently disagree with the verdict of the jury…. Your Honor, I think the evidence shows there's no physical evidence whatsoever that links my client to the crime of reckless endangerment. The gun was found, no fingerprints [were] on the gun, no DNA on the gun notwithstanding the fact that my client was beaten severely, bleeding profusely….
>
> We think the evidence is insufficient, and I think the recommendation by the State—with all due respect, the assistant district attorney here is completely out of line…. The only thing we have here is the testimony of the people who beat my client saying he shot at them….
>
> So our position, Your Honor, is that my client's been in custody 443 days. We think he should be given credit for time served and released. That's what we think.

¶4 Trial counsel also briefly discussed additional factors for the trial court to consider, including the fact that Jefferson's prior record consisted chiefly of misdemeanors and that Jefferson had a "support system" that included several family members and other individuals who had come to the sentencing hearing:

> [B]efore I conclude I just want to point out for the Court's interest, this whole front row of people here is my client's family and other members who know him, who kn[e]w him for a long time and support him. So we have a person here with a support system[,] not someone who comes before this Court, like so often is the case, [where] there's no one here…. So we have a whole row of people here to support my client. Thank you, Your Honor.

¶5 Jefferson then gave the following statement, which trial counsel had prepared for him:

> I would just like to thank the Court for the opportunity to speak and I regret the hardship that I caused on my family and I never fired a firearm at anyone at anytime.[3]

[3] According to trial counsel, this statement was merely on outline for Jefferson to follow.

¶6 The trial court was not persuaded by trial counsel's arguments regarding the evidence; rather, the court explained that "in deciding what the appropriate sentence is," it "looks at the nature and seriousness of the offense, [the defendant's] character, and the needs of the community." The court also noted that while Jefferson had "excellent family support" as his family had been there "through these proceedings," it had not heard "much about anything positive" that Jefferson had done, and that that was a concern.

¶7 The trial court then explained that it would sentence Jefferson in accordance with the State's recommendation:

> [W]e can go back and argue about this case, but the jury has spoken, and I think there's—the evidence is strong in this case, and the Court looks at that evidence and that's the basis, and I think the State's recommendation is not out of line and so the Court will impose 12 years in the Wisconsin State Prison.

¶8 Jefferson was consequently sentenced to twelve years' imprisonment, consisting of nine years of initial confinement and three years of extended supervision.

¶9 After he was sentenced, Jefferson sent a letter to the trial court addressing various positive things he had done. Specifically, the letter indicated that: Jefferson had worked since he was fifteen years old; he had two children—one that he paid child support for and another who he was trying to obtain custody of; he took weekly parenting classes and bi-weekly AODA classes; and his boss of five years and his pastor were in the audience at sentencing and he did not know why they did not get time to speak on his behalf.

¶10 Jefferson also, assisted by new counsel, filed a postconviction motion, and the trial court consequently held a ***Machner*** hearing.[4] At the hearing, counsel made an offer of proof that two of Jefferson's former employers were willing to inform the trial court of Jefferson's good work ethic. Additionally, Jefferson testified that numerous individuals were prepared to testify regarding his good character, including a former employer, his pastor, and his mother, sister, and brother.

¶11 At the ***Machner*** hearing, trial counsel testified that he addressed the facts of the case—but not Jefferson's good character or positive social history—for strategic reasons. Trial counsel did not indicate, however, what those strategic reasons were beyond wanting to focus on the sufficiency of the evidence. In fact, trial counsel later testified that he did intend to bring up Jefferson's positive social history at sentencing:

> [Appellate Counsel]: And is it your testimony that you went over with Mr. Jefferson that he should talk about his social history?
>
> [Trial Counsel]: Mr. Jefferson is the kind of person [that] … you hear him talk, he's a soft-spoken man … [and] not as articulate as he'd like to be. So sure we went over it. That's why these talking points are very short and very brief. [Jefferson] tends to stumble a little bit. I wanted to make sure he focused on this and talked about every possible aspect … at sentencing. That's correct.

¶12 When questioned about whose job it is at sentencing to inform the court about a defendant's positive attributes, however, trial counsel testified:

[4] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

> [Appellate Counsel]: Being a soft-spoken guy, it was probably incumbent upon you to tell the Court about his possible (*sic*) social traits; correct?
>
> [Trial Counsel]: I wouldn't go so far to say all that, no.
>
> [Appellate Counsel]: Who[se] job would it be, then?
>
> [Trial Counsel]: I am not sure it's anybody's job. The point is this … Mr. Jefferson and I presented what we thought was the best presentation for sentencing at that time. [Jefferson] and I both were aware of the many attributes of [his] life like him always having worked. That had nothing to do with the price of eggs in Brooklyn. What we were talking about was the sentencing on this matter before [the trial court, who] is not particularly, you know, one to hear things other than what she wants to hear….[5] Sure Mr. Jefferson worked. Sure he had a young child. He had a good family life. His mom loved him; his dad loved him. But the point was the case was about firing this weapon at these people in the building.

¶13 The trial court ultimately determined that trial counsel was not ineffective at sentencing. Jefferson now appeals.

ANALYSIS

¶14 Jefferson's sole argument on appeal is that trial counsel was ineffective for not informing the trial court about Jefferson's good character and positive social history at sentencing. Jefferson argues, first, that trial counsel's failure to inform the trial court about Jefferson's good character and positive social history at sentencing was deficient because sentencing courts are required to consider a defendant's character when passing sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶43 n. 11, 270 Wis. 2d 535, 678 N.W.2d 197. He argues, second, that counsel's performance was prejudicial because the trial court's comments at

[5] Trial counsel later testified that he "misspoke" in making this comment.

sentencing addressed many of the factors that trial counsel failed to mention, including the fact that there was not anything "positive" mentioned about Jefferson.

¶15 To establish a claim for ineffective assistance of counsel, Jefferson must show that trial counsel's performance was deficient and that this deficient performance was prejudicial. ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, Jefferson must show facts from which a court could conclude that trial counsel's representation was below objective standards of reasonableness. *See* ***State v. Wesley***, 2009 WI App 118, ¶23, 321 Wis. 2d 151, 772 N.W.2d 232. To demonstrate prejudice, he "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." *See* ***Strickland***, 466 U.S. at 694 (1984). The issues of performance and prejudice present mixed questions of fact and law. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, but the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, *see* ***id.*** at 236-37.

¶16 We agree with Jefferson that trial counsel's performance at sentencing was deficient. While we generally "disapprove[] of postconviction counsel second-guessing the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives[,]" *see* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983), it is also true that trial counsel must adhere to "objective standards of reasonableness" to defeat an ineffective assistance of counsel claim, *see* ***Wesley***, 321 Wis. 2d 151, ¶23.

Objective standards of reasonableness "impl[y] that there be conduct that is more than just acting upon a whim," *see* ***Felton***, 110 Wis. 2d at 502. "It implies deliberateness, caution, and circumspection." *See* ***id.*** In other words, "[i]t is substantially the equivalent of the exercise of discretion; and, accordingly, it must be based upon a knowledge of all facts and all the law that may be available," and "must evince reasonableness under the circumstances." *See* ***id.***

> Thus, when we look to a lawyer's conduct and measure it against this court's standard to determine effectiveness, we cannot ratify a lawyer's decision merely by labeling it, as did the trial court, "a matter of choice and of trial strategy." We must consider the law and the facts as they existed when trial counsel's conduct occurred. Trial counsel's decisions must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied. We will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than upon judgment.

See ***id.*** at 502-03.

¶17 Specifically, trial counsel's failure to inform the trial court about Jefferson's good character and positive social history in any meaningful way was deficient because it was not, contrary to what the State argues, the product of a reasoned strategy founded upon the facts or the law. *See* ***id.*** It is no mystery that the primary factors that determine the length of a sentence are the gravity of the offense, the character of the accused and the need to protect the public. *See* ***State v. Hall***, 2002 WI App 108, ¶7, 255 Wis. 2d 662, 648 N.W.2d 41. Yet in this case, trial counsel argued that it was not "anybody's job" to inform the trial court about Jefferson's good character and positive social history—evidence of which included long-term employment, a genuine shouldering of parental responsibility, and strong ties to the community as shown by his relationship with his pastor. Counsel's argument evinces a fundamental misunderstanding of his role during

sentencing and an unreasonable disregard for factors that the trial court was required to consider. *See* ***id.*** While counsel did mention that Jefferson had a "support system," he did not provide the trial court with any substantive information that would help the court determine whether Jefferson would, upon release, act as an asset to the community rather than a burden. Moreover, even when trial counsel did acknowledge a desire to highlight Jefferson's positive attributes—in this case by preparing a statement for Jefferson to read at sentencing—he essentially put the onus on Jefferson, an admittedly soft-spoken and hesitant public speaker, to explain to the trial court in full detail his positive social history. Furthermore, counsel not only neglected to focus on factors that sentencing courts are required to consider when determining sentencing length, but also chose to focus almost wholly on the already-litigated issue of Jefferson's guilt—a factor which, as the trial court correctly mentioned, had already been determined by the jury and was an established fact for the purpose of sentencing. *See* ***Hall***, 255 Wis. 2d 662, ¶7; *see also* ***Felton***, 110 Wis. 2d at 502-03. We therefore conclude that trial counsel's performance was deficient.

¶18 We also agree with Jefferson that trial counsel's performance was prejudicial. The State urges us to adopt the trial court's conclusions that: (1) because Jefferson was reportedly intoxicated when he committed the crime, the fact that he attended AODA classes was inconsequential; and (2) knowledge of Jefferson's other positive attributes—such as paying child support and holding a steady job—would not have made a difference in his sentence. Under our *de novo* review of the matter, *see* ***Sanchez***, 201 Wis. 2d at 236-37, however, we cannot agree with the State. The trial court was required by law to consider evidence of Jefferson's good character. *See* ***Hall***, 255 Wis. 2d 662, ¶7. The court could not do so in this case because it did not have any substantive information about

Jefferson's social history. While the trial court noted that Jefferson's family had been present for many of the proceedings, it also explained that it had not heard "much about anything positive" that Jefferson himself had actually done, and that that was a concern. In a case where the defendant has provided numerous meaningful examples of his positive actions—including taking parenting classes, paying child support, having a very solid work history, and maintaining ties to the community as evidenced by his relationship with his pastor—we must conclude that these examples are sufficient to undermine our confidence in the sentence. *See* ***Strickland***, 466 U.S. at 694.

¶19 Therefore, because trial counsel's performance at sentencing was both deficient and prejudicial, we conclude it was ineffective. We consequently reverse the postconviction order and the portion of the judgment sentencing Jefferson, and remand the matter to the trial court for resentencing.[6]

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

[6] The second from the last sentence of the dissent reads: "In my view, the trial court properly exercised its discretion." That is the majority's view as well! Our complaint is with *trial counsel*, who failed to provide vital positive information to the court about Jefferson's character, thus depriving the court of all the necessary information.

¶20 FINE, J. (*dissenting*). I respectfully disagree with the Majority that Troy D. Jefferson has established that his trial lawyer was constitutionally deficient at sentencing; indeed, in my view, an evidentiary hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), was not even warranted, because under our standard of review, Jefferson could not, as a matter of law, show prejudice under ***Strickland v. Washington***, 466 U.S. 668 (1984). Accordingly, I respectfully dissent.

¶21 To establish constitutionally ineffective representation, Jefferson had to show: (1) deficient representation; and (2) resulting prejudice. *See* ***id.***, 466 U.S. at 687. To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance[,]" *see* ***id.***, 466 U.S. at 690, and to prove resulting prejudice, he had show that his lawyer's errors were so serious that he was deprived of a reliable outcome, *see* ***id.***, 466 U.S. at 687. Given the trial court's careful analysis of Jefferson's crime and its effects on the victims and the community, the minimal "positive" aspects to which the Majority refers were *de minimis*, and thus the sentencing was wholly reliable. *See* ***id.***, 466 U.S. at 697 (We do not need to address both ***Strickland*** aspects if a defendant does not make a sufficient showing on either one.).

¶22 The nub of the trial court's sentencing rationale is captured in this analysis: "Someone who engages in this conduct and has no appreciation for the impact of it has some serious, serious, serious treatment needs, and I think the evidence here as to the use of alcohol shows also serious needs." It would be hard

to find a more succinct statement as to why Jefferson needed a long stretch in prison so he would no longer endanger others. Further, the trial court appropriately factored-in the need to punish Jefferson: "There needs to be a punishment aspect because of the impact on the community, that the community has a right to say, you know, we're tired of this, we're tired of people using guns to settle -- it doesn't even settle it -- to address disputes."

¶23 In reviewing a trial court's sentencing discretion, we must defer to its better ability to assess the ambience of the courtroom, as opposed to the cold transcript that we get. Thus "[i]t is not only our duty not to interfere with the discretion of the trial judge, but it is, in addition, our duty to affirm the sentence on appeal if from the facts of record it is sustainable as a proper discretionary act." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512, 522 (1971). In my view, the trial court properly exercised its discretion. Accordingly, I would affirm.