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**DISTRICT IV**

October 10, 2014

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You are hereby notified that the Court has entered the following opinion and order:

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2013AP2308-CR	State of Wisconsin v. Toni L. Van Kirk (L.C. # 2011CF9)
2013AP2309-CR	State of Wisconsin v. Toni L. Van Kirk (L.C. # 2012CF78)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Toni Van Kirk appeals a judgment of conviction, a judgment imposing sentence after revocation, and an order denying postconviction relief. Van Kirk argues that she was denied the effective assistance of counsel at sentencing. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).<sup>1</sup> We summarily affirm.

In 2011, Van Kirk was convicted of delivering methamphetamine. The circuit court withheld sentence and ordered three years of probation. In 2012, Van Kirk was again convicted of delivering methamphetamine. Her probation was revoked, and she returned to court for sentencing as to both cases. The State recommended a global sentence of six years of initial confinement and three years of extended supervision, arguing that the facts of the case and Van Kirk's criminal history and personal characteristics justified that sentence. Van Kirk's counsel's entire argument at sentencing was the following:

Your honor, as with so many people that come into court, I think Ms. Van Kirk is essentially a good person who hasn't been able to address her addiction. I think a three-year prison term would be sufficient to address that.

The court sentenced Van Kirk to a total of five years of initial confinement and five years of extended supervision.

Van Kirk moved for resentencing, claiming that she had been denied the effective assistance of counsel at sentencing because her counsel failed to adequately argue for a lesser sentence. The circuit court held an evidentiary hearing, at which Van Kirk's trial counsel testified that he employed a "soft touch" strategy at sentencing based on his perception that the circuit court was already inclined to impose a lesser sentence and would be more likely to do so with minimal argument from the defense. The circuit court denied postconviction relief.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show 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." *Id.* If a defendant makes an insufficient showing as to either deficiency or prejudice, the ineffectiveness claim fails; accordingly, if an ineffectiveness claim fails on either prong, a court need not address the other. *See id.* at 697. We accept a circuit court's findings as to counsel's actions unless those findings are clearly erroneous, but we review de novo whether those actions constituted deficient performance and whether there was prejudice to the defense. *See State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

Van Kirk argues that her counsel was deficient by failing to develop an argument in support of a lesser sentence than that recommended by the State. Van Kirk argues that her counsel should have argued that mitigating factors supported the lesser sentence. She contends her counsel should have highlighted her role as a middleman rather than a lead in the delivery of methamphetamine. Van Kirk also argues that her counsel should have highlighted the following as evidence of her good character: (1) her fourteen months of sobriety; (2) her cooperation with law enforcement; (3) her prior completion of two terms of probation; and (4) her success on supervision in the community. Van Kirk contends that her counsel should have elaborated on why a three year sentence would have been sufficient to address Van Kirk's treatment needs. She then contends that her counsel's failure to advocate on her behalf was prejudicial because it deprived her of a fair sentencing hearing.

We determine that defense counsel's performance was not deficient at sentencing. We therefore reject Van Kirk's claim of ineffective assistance of counsel without reaching the prejudice prong.

We "will not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" *State v. Elm*, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (quoted source omitted). "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *Id.* at 464-65. Additionally, we consider whether counsel's choice of action "would have been reasonable if defense counsel had made it for strategic reasons." *State v. Kimbrough*, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. "[O]ur function upon appeal is to determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms." *Id.*, ¶31.

Here, at the postconviction motion hearing, Van Kirk's trial counsel testified that, in this case, he decided to use the approach of a "soft touch," which he has found works to obtain positive results. Counsel explained that, when preparing for sentencing, he thinks about how he perceives the circuit court feels about the case. He explained that, in this case, he felt that the circuit court did not view Van Kirk as an evil or violent person, and that the court recognized Van Kirk's problem as an addiction to methamphetamine. Counsel explained he believed that the court would be persuaded that three years would be reasonable to address Van Kirk's addiction in prison, and also that the court would view three years of imprisonment as significant punishment in this case. Finally, counsel explained that he has found that if he believes he can reasonably predict where the court is headed, he achieves a better result by letting the court reach that conclusion on its own.

The circuit court found that Van Kirk's counsel had accurately interpreted the court's view of Van Kirk as being not a bad person, but rather a person struggling with addiction. The circuit court also found that all of the information that Van Kirk believed her counsel should have highlighted was already before the court in some form at the time of sentencing.

Based on counsel's testimony at the postconviction motion hearing and the circuit court's factual findings, we conclude that counsel's performance was not deficient at sentencing. Counsel's sentencing argument was based on a strategic decision to focus on the court's positive view of Van Kirk and gently suggest the result that counsel expected the court to reach. Additionally, it is objectively reasonable for an attorney to rely on the fact that all of the relevant information was already before the court and to highlight the most important points rather than detail all of the information already known to the court.

In reaching our determination that counsel's performance was not deficient, we reject Van Kirk's reliance on *State v. Pote*, 2003 WI App 31, 260 Wis. 2d 426, 659 N.W.2d 82. In *Pote*, we held that defense counsel's performance at sentencing was deficient because counsel simply stated that he was authorized to request a sentence of time served, without offering any argument or explanation. *Id.*, ¶¶2, 6, 33-39. We determined that, despite counsel's explanation that Pote had threatened counsel and instructed counsel to do nothing at the sentencing hearing, "counsel's failure to bring to the court's attention any of several mitigating circumstances relevant to sentencing," or to seek to withdraw as counsel, constituted deficient performance. *Id.*, ¶34. Here, in contrast to *Pote*, counsel made his own reasonable strategic decision to highlight that Van Kirk is essentially a good person with an addiction and that three years of initial confinement would be sufficient to address her addiction.

Finally, we reject Van Kirk's argument that she is entitled to resentencing in the interest of justice. *See* WIS. STAT. § 752.35 (this court has discretion to reverse judgment of conviction if the real controversy has not been fully tried or it is probable that justice has miscarried). Van Kirk argues that the sentencing hearing was not fully "tried" because her counsel did not advocate for her, causing a miscarriage of justice. However, we have already determined that counsel made an objectively reasonable strategic decision at sentencing to limit his argument. Moreover, the circuit court was already aware of all the information that Van Kirk believes her counsel should have highlighted. We therefore decline to order a new sentencing hearing.<sup>2</sup>

IT IS ORDERED that the judgments and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>2</sup> Van Kirk argues in her reply brief that the State concedes that Van Kirk is entitled to a discretionary reversal because the State failed to develop a separate argument on that issue. However, Van Kirk's argument for a discretionary reversal is essentially that her counsel was ineffective at sentencing, which the State has refuted.