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DISTRICT IV

January 8, 2018

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

2017AP186-CR State of Wisconsin v. Robert L. McKenna (L.C. # 2015CF44)

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Robert McKenna appeals a judgment of conviction and an order denying McKenna's postconviction motion for resentencing. McKenna argues that he was denied the effective assistance of counsel at sentencing when his counsel failed to argue additional mitigating factors to the sentencing court. 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 (2015-16).[1] We summarily affirm.

McKenna was charged with eleven counts of burglary, as a party to a crime, based on a series of burglaries committed in June and July of 2014. Pursuant to a plea agreement, McKenna pled guilty to three counts of burglary, and the remaining counts were dismissed and read-in for sentencing purposes. The State agreed to recommend five years of initial confinement and five years of extended supervision on each count, to be served concurrently to each other and consecutive to McKenna's sentence from a prior case.

At sentencing, the State recommended the sentence it had agreed to recommend under the plea agreement, five years of initial confinement and five years of extended supervision. The defense argued for a total sentence of three years of initial confinement and seven years of extended supervision, with the initial confinement concurrent to the sentence McKenna was currently serving. The court sentenced McKenna to a total of nine years of initial confinement and nine years of extended supervision, consecutive to McKenna's current sentence.

McKenna moved for resentencing. He argued that his counsel was ineffective at sentencing by failing to prepare and failing to argue mitigating factors. The circuit court held a motion hearing, at which McKenna's trial counsel and McKenna testified as to counsel's representation of McKenna. The circuit court denied the motion for resentencing, finding that McKenna's trial counsel did not perform deficiently at sentencing and that there was no

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

reasonable probability that the court would have imposed a different sentence absent the claimed errors.

A claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel's performance is deficient only if "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 687-88. Counsel's performance is prejudicial only if "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." ***Id.*** at 694. If the claim fails as to one prong, we need not address the other. ***Id.*** at 697. We will uphold the circuit court's factual findings unless they are clearly erroneous, but we independently review whether those facts meet the standard for ineffective assistance of counsel. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990).

McKenna contends that his trial counsel was ineffective at sentencing by failing to obtain discovery and to investigate so that counsel could have argued mitigating factors. He cites ***State v. Thiel***, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305, for the proposition that it falls below an objective standard of reasonableness to fail to read discovery that may impact the case. He argues that his counsel should have argued additional mitigating factors to the sentencing court concerning the following: "McKenna's family background including siblings and children, education, skills, employment history, version of the crimes, prior criminal convictions, conduct while incarcerated, mental and physical health, need for counseling or treatment, character, etc." McKenna asserts that he was prejudiced by his counsel's failure to present that information

because, according to McKenna, it would have had an impact on the sentence the circuit court imposed.

We conclude that McKenna has not shown that he was prejudiced by his trial counsel's failure to argue additional mitigating factors at sentencing.[2] The circuit court explained in its order denying resentencing that, had defense counsel made the additional mitigating arguments McKenna identified, the court would not have imposed a lesser sentence. It noted that McKenna's counsel argued the following mitigating factors at sentencing: (1) McKenna's coactor was the moving force behind the burglaries; (2) while the State raised McKenna's prior conviction for homicide by intoxicated use of a motor vehicle, McKenna had already served a lengthy sentence for that conviction, which was a first drunk driving offense that resulted in a tragic accident; and (3) the burglaries in this case were storage sheds far from residences, as opposed to homes or garages. McKenna argued in postconviction proceedings that his trial counsel should have argued the following additional mitigating factors: (1) McKenna's first four convictions were twenty years prior to the present offense, and his operating after revocation convictions were crimes related to the status of his driver's license; (2) McKenna did not remember whether he was the driver or passenger during the accident that resulted in his homicide by intoxicated use of a motor vehicle conviction; (3) McKenna played a secondary role to his co-actor in the burglaries; (4) McKenna's positive adjustment in prison; (5) McKenna's COMPAS risk assessment that categorized McKenna as low risk for violent recidivism; (6) a long term of confinement would impact McKenna's placement in a minimum security prison;

[2] Because we conclude that McKenna has not shown prejudice, we do not reach the deficiency prong. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

and (7) evidence of McKenna's good character. The circuit court explained that the facts identified by McKenna had either been obvious to the court or brought to the court's attention at sentencing, or would have been insignificant to the court's sentencing determination.

McKenna contends that the circuit court has an interest in defending the sentence it imposed, and that therefore this court should not consider the court's assessment that it would have imposed the same sentence. We are not persuaded. We give weight to a circuit court's assessment in postconviction proceedings that it would have imposed the same sentence absent counsel's errors at sentencing. *See* ***State v. Voss***, 205 Wis. 2d 586, 598, 556 N.W.2d 433 (Ct. App. 1996) (noting that, at the postconviction motion hearing, the circuit court indicated "that none of the things Voss complains about would have affected the sentence and, indeed, may have made the sentence more severe," and then concluding that "[f]rom our review of the record, our confidence in the outcome of the sentence is not undermined and, therefore, the prejudice prong noted in ***Strickland*** has not been satisfied by Voss"); ***State v. Giebel***, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995) ("In light of this finding by the [circuit] court [that the sentence would have been the same absent counsel's errors] and our own review of the sentencing transcript, we conclude that Giebel does not satisfy the prejudice prong even if counsel's performance had been deficient."). In light of our practice of giving weight to circuit court findings as to whether new information would have affected the sentence imposed, McKenna has not developed a viable argument. We conclude that McKenna has failed to establish the prejudice prong of his ineffective assistance of counsel claim.

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals