



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

March 18, 2021

To:

Hon. Bennett J. Brantmeier
Circuit Court Judge
Jefferson County, Branch 4
311 S. Center Ave.
Jefferson, WI 53549

Cindy Hamre Incha
Clerk of Circuit Court
Jefferson County Courthouse
311 S. Center Ave., Rm. 115
Jefferson, WI 53549

Anne Christenson Murphy
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Matthew S. Pinix
Pinix & Soukup, LLC
1200 E. Capitol Dr., Ste. 360
Milwaukee, WI 53211

Jeffrey M. Shock
Assistant District Attorney
311 S. Center St., #225
Jefferson, WI 53549

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

2019AP2052

State of Wisconsin v. Cynthia J. Rogalski (L.C. # 2013CF124)

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, 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).

Cynthia Rogalski appeals an order denying her postconviction motion that was filed under WIS. STAT. § 974.06 (2019-20).¹ Based upon our review of the briefs and record, we

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In 2013, the State charged Rogalski with first-degree reckless homicide by delivery of a controlled substance and with intentionally encouraging or contributing to the delinquency of a child resulting in the death of the child, both for the same incident. Pursuant to a plea agreement, the State amended the first count to delivery of heroin, while the second count was dismissed and read in. The court imposed a sentence of ten years of initial confinement and five years of extended supervision.

In 2019, Rogalski filed the current postconviction motion alleging that her trial counsel was ineffective by not providing the sentencing court with additional mitigating information and by, instead, pursuing an unsound argument questioning the extent to which Rogalski's substance delivery caused the death of the child. The circuit court denied the motion after an evidentiary hearing.

On appeal, Rogalski renews the claim of ineffective assistance. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his or her defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We affirm the circuit court's findings of fact unless those are clearly erroneous, but the determinations of deficient performance and prejudice are questions of law that we review without deference to the circuit court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

We need not address both components of the analysis if the defendant makes an inadequate showing on one. *Strickland*, 466 U.S. at 697. Here, we focus on prejudice. To

demonstrate prejudice, the defendant must show that there is a reasonable probability that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

Rogalski argues that a more thorough presentation of her own difficult personal history may have had a mitigating effect at sentencing by helping the sentencing court understand that her criminal behavior was the result of “extensive trauma” in her early years, and it may have led the court to a “balanced sentence equally purposed on rehabilitation and retribution,” rather than the actual sentence that focused more heavily on protection of the public and gravity of the offense.

First, we observe that Rogalski’s attorney at sentencing did not ignore the facts of Rogalski’s background. He told the court that Rogalski experienced “[r]eally ugly” abuse from close family members over a number of years, and that she has not dealt with that. Counsel referred to Rogalski as having had “some rough periods of mental health.” He asserted that, in light of the substance-related nature of Rogalski’s prior criminal behavior, she “needs residential treatment.” Counsel referred to a letter that gave a positive description of her participation in programming at the jail. He stated that if Rogalski can be sober, “that’s going to go a long way toward protecting the public.”

In short, the record shows that the sentencing court was presented with information about Rogalski’s past and how it affected her behavior. And, this was accompanied by an argument that specifically drew a connection between her future rehabilitation and protection of the public. As a result, the question before us now is whether the addition of further information and argument of this type would have created a reasonable probability of a lesser sentence. *See id.*

We conclude that it would not have. The sentencing court acknowledged Rogalski's struggles with addiction and abuse, but stated that "there is no excuse or justification link between a person who is addicted and a person who decides to sell dangerous drugs like heroin to somebody else." The court also acknowledged her efforts in treatment and counseling.

However, even with this information, the sentencing court focused on the "scourge" of heroin in our society, the need to protect the public from sellers of it, and the need to send a message to other potential sellers. The court also noted that Rogalski continued to engage in criminal activity, even after being released on bond. Despite acknowledging the arguably mitigating information we have described, the sentencing court determined that public protection was paramount.

Based on this record, we do not see a basis to conclude that the additional information presented by Rogalski during the postconviction process had a reasonable probability of resulting in a lesser sentence. Our confidence in the outcome is not undermined.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals