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DISTRICT II

July 17, 2013

To:

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Circuit Court Judge
Manitowoc County Courthouse
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Hon. Fred H. Hazlewood
Reserve Judge

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

2012AP2565-CR State of Wisconsin v. Nickolas S. Blackwelder (L.C. # 2010CF250)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Nickolas S. Blackwelder appeals from a judgment of conviction and an order denying postconviction relief. Blackwelder contends that his trial counsel was ineffective for failing to commission and present a private presentence investigation (PSI) report 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).¹ We affirm the judgment and order of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

Blackwelder was convicted following no contest pleas to mayhem and burglary after arming himself with a dangerous weapon. The charges stemmed from a home invasion and brutal sword attack against a former roommate. The circuit court sentenced Blackwelder to a total of twenty years of initial confinement and five years of extended supervision.

Blackwelder subsequently filed a motion for postconviction relief, alleging ineffective assistance of counsel. Specifically, he complained that his trial counsel was ineffective for failing to commission and present a private PSI report at sentencing. Following a hearing on the matter, the circuit court denied Blackwelder's motion. This appeal follows.

On appeal, Blackwelder renews his claim of ineffective assistance of counsel. To establish such a claim, a defendant must show both that counsel's performance was deficient and that such performance resulted in actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We affirm the circuit court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review de novo. *See State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

At the postconviction motion hearing, trial counsel testified that she had considered commissioning and presenting a private PSI report and discussed that option with Blackwelder. However, after some additional discussions with Blackwelder's mother and her supervisor, counsel concluded that the private PSI report could contain information "that wouldn't be beneficial to Mr. Blackwelder." Consequently, she rejected its possible use and elected instead to argue from the evidence and information of record.

Given trial counsel's explanation for her actions, we cannot say that she performed deficiently in failing to commission and present a private PSI report at sentencing. *See State v.*

Libeck, 2013 WI App 49, ¶25, 347 Wis.2d 511, 830 N.W.2d 271 (a valid strategy is not deficient performance). Even if counsel's performance was deficient, Blackwelder fails to establish prejudice as to what the private PSI report would have shown or how it would have made a difference at his sentencing. For these reasons, we reject his claim of ineffective assistance of counsel.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals