COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP606-CR **Cir. Ct. No. 2011CF240**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK G. LYNCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Patrick G. Lynch appeals from a judgment of conviction entered upon his guilty plea to one count of armed robbery as a party to the crime and from an order denying his postconviction motion. Lynch argues that he received the ineffective assistance of trial counsel because counsel failed to

(1) request a presentence investigation report (PSI), (2) raise the issue of Lynch's competency, and (3) explore with Lynch the possibility of pleading not guilty by reason of mental disease or defect (NGI). He further contends that the trial court erred in denying his motion for plea withdrawal and by improperly amending the judgment of conviction to shorten the length of his extended supervision. We reject each of Lynch's claims and affirm.

¶2 As part of a negotiated plea agreement, Lynch pled guilty to one count of armed robbery, as a party to the crime. At sentencing, the trial court imposed a bifurcated sentence of thirty years, with twelve years of initial confinement and eighteen years of supervision. A week later, a Department of Corrections (DOC) records supervisor wrote a letter to the court stating that pursuant to WIS. STAT. § 973.01(2)(d)2. (2013-14),[1] the extended supervision ordered in connection with a Class C felony could not exceed fifteen years. The court amended the judgment of conviction to reflect a fifteen-year term of extended supervision, bringing the total length of Lynch's bifurcated sentence down to twenty-seven years.

¶3 Lynch, by counsel, filed a postconviction motion alleging several claims, including the ineffectiveness of trial counsel. After considering the testimony of Lynch and both of his trial attorneys,[2] the court determined that

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Lynch's first appointed trial attorney represented him through the entry of his guilty plea and was then permitted to withdraw. Successor trial counsel represented Lynch at sentencing. All testimony cited in this opinion was given by Lynch's original trial counsel.

counsel's performance was neither deficient nor prejudicial and denied the motion in full.

¶4 On appeal, Lynch maintains that trial counsel provided ineffective assistance by failing to request a PSI, challenge Lynch's competency, and explore with Lynch the possibility of an NGI plea. The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Id***. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight … and to evaluate the conduct from counsel's perspective at the time." ***Id***. at 689. Thus, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id***. at 690. To satisfy the prejudice prong, the defendant must demonstrate 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." ***Id***. at 694.

¶5 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Id***. at 698. The trial court's findings of fact will not be reversed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id***. We need not address both prongs of the test if the

defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶6 We conclude that trial counsel was not ineffective for failing to request a PSI for the court's consideration at sentencing. At the ***Machner***[3] hearing, trial counsel testified that he did not request a PSI for "Two reasons. One is he specifically told me he [didn't] want one. Two is I couldn't see how on earth it could possibly help him." Counsel explained that the defense could present mitigating facts without a PSI and that he wanted to have more control over the information presented to the sentencing court, noting that in his experience, PSI authors tended to include "a lot of incendiary commentary" harmful to the defendant. Acknowledging that PSIs can be "two-sided swords," the trial court accepted counsel's explanation and found that he made a strategic decision not to request a PSI. ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695 (findings of fact for the trial court include trial counsel's conduct and strategy). We accept the trial court's finding and determine that counsel's strategic decision was objectively reasonable.[4]

[3] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel").

[4] We also conclude that Lynch has failed to establish prejudice. We are not persuaded by Lynch's argument that a PSI would have "revealed the seriousness of Lynch's mental health and how his mental health contributed to" his offenses. First, Lynch, himself, knew about his mental condition and how it might have affected his actions. A PSI writer would have only known what Lynch reported. Second, Lynch's claim is merely speculative and, therefore, insufficient to demonstrate prejudice. ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999) (to establish prejudice, it is not enough for a defendant to speculate on what the result of the proceeding might have been if his attorney had not erred).

¶7 We also conclude that trial counsel's failure to raise the issue of Lynch's competency under WIS. STAT. § 971.13[5] did not constitute ineffective assistance of counsel. "Not every mentally disordered defendant is incompetent; the court must consider the degree of impairment in the defendant's capacity to assist counsel and make decisions which counsel cannot make for him or her." *See* ***State v. Byrge***, 2000 WI 101, ¶48 n.21, 237 Wis. 2d 197, 614 N.W.2d 477 (citation omitted). Trial counsel acknowledged that Lynch manifested symptoms of his mental illness but explained:

> Competence is a statutory standard; and if I had suspected [he was incompetent], I'd have to bring it. He was able to communicate a bevy of information about the case; explain why he was guilty, explain why he did what he did, offered a lot of different explanation. Talked about what his understandings were about the case and [was] able to express those. Did I think he was able to represent—or assist in his representation? Yes. And he was able to communicate.

¶8 Counsel's observations are supported by the record. Lynch requested the appointment of counsel, demanded a speedy trial, evinced his understanding of the purpose of a preliminary hearing, and brought a possible suppression issue to counsel's attention. At the plea hearing, the court engaged in a lengthy colloquy to ascertain Lynch's understanding of the proceedings. Lynch stated that although he was bipolar, he was taking his medication and understood the charges, penalties, and constitutional rights waived by the entry of his guilty plea. He understood that although his attorney made a mistake concerning the terms of the plea agreement, the actual agreement was more favorable than

[5] WISCONSIN STAT. § 971.13(1) provides that "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures."

previously relayed. At the postconviction hearing, the trial court agreed with counsel's assessment that Lynch never manifested signs of incompetence and stated that if he had, the court would have immediately stopped the proceedings and ordered a competency evaluation. Where as here, there is no evidence that Lynch's bipolar disorder deprived him of the ability to understand the proceedings against him and assist in his own defense, Lynch has failed to establish that trial counsel performed deficiently or that he was prejudiced by counsel's failure to challenge competency.

¶9 Similarly, Lynch has not established that trial counsel performed deficiently by failing to explore the possibility of an NGI defense[6] or that Lynch was prejudiced by this failure. Although Lynch suffers from bipolar disorder, the presence of a mental illness does not automatically excuse a defendant from the legal consequences of his or her conduct. ***State v. Duychak***, 133 Wis. 2d 307, 316-17, 395 N.W.2d 795 (Ct. App. 1986). The critical inquiry is "whether, as a result of a certain mental condition, a defendant lacks substantial capacity to either appreciate the wrongfulness of the defendant's conduct or conform the defendant's conduct to the requirements of the law." ***Id.***.

¶10 Trial counsel testified that Lynch never suggested his mental illness was at the root of his criminal behavior, and that:

> With Mr. Lynch, however, although he was never really clear about it, he had a number of drug issues. And he basically wrote off the entire ordeal of all these robberies as a series of drug addled decisions, that he was on drugs the

[6] WISCONSIN STAT. § 971.15(3) provides: "Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence."

> whole time that took place or that he was doing it because he was on drugs.…
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> ….
>
> The other thing is though that I did not believe that he presented me any indication that he was unable to conform his behavior based on the nature of the crime itself, because unlike perhaps a one-time event, this was a series of planned-out robberies. Also, he didn't challenge that in Milwaukee, and I thought that the lack of exercise of his rights in Milwaukee would be relevant to any decision going forth here and could open the door.

On this record, trial counsel's failure to further explore an NGI plea with Lynch does not fall below an objective standard of reasonableness. Further, there is no evidence in the record to suggest that Lynch would have prevailed on this defense. Even if trial counsel somehow performed deficiently, any claims of prejudice are merely speculative. ***State v. Erickson***, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

¶11 In addition to his ineffective assistance of counsel claims, Lynch argues that his guilty plea was unknowingly, involuntarily, and unintelligently entered "as a result of mental defect, Bipolar disorder." In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective and the defendant did not understand information that should have been provided, ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986), or demonstrate that under the analysis of ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), factors extrinsic to the plea colloquy rendered his plea infirm. *See* ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794. Lynch does not allege that the colloquy was defective. He contends that his plea was infirm merely by virtue of his bipolar diagnosis. We disagree. The trial court specifically addressed Lynch's mental illness and ascertained that he understood and wished to continue with the proceedings. The trial court determined that

Lynch's plea was knowing, voluntary, and intelligent, and Lynch is unable to point to anything in the record that contradicts this conclusion.

¶12 Lynch's final complaint is that the trial court erred by amending his judgment of conviction after learning that the amount of extended supervision exceeded the permissible statutory maximum. Here, Lynch argues that the trial court clerk was without authority to modify the judgment and that because his original sentence exceeded the maximum, it was void and he is entitled to "further proceedings so that he may argue that the initial sentence imposed was illegal or void."

¶13 We disagree. Pursuant to WIS. STAT. § 973.13, where a court imposes a sentence exceeding the statutory maximum, "such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings." At the postconviction hearing, the trial court explained that after receiving the DOC letter, it ordered the judgment of conviction amended to reflect the correct, legally permissible period of extended supervision. The trial court clerk did not unilaterally amend the judgment. Rather, the sentence was commuted by operation of law, and the sentence and judgment were amended by order of the court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.