COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0480

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MILTON L. REED,

DEFENDANT-APPELLANT,

DONALD PATTERSON,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Milton L. Reed, acting *pro se*, appeals from the order denying his postconviction motion. Reed was convicted of felony-murder,

contrary to WIS. STAT. § 940.03 (1991-92).[1] Reed argues that: (1) his appellate attorney was ineffective;[2] (2) he was improperly subjected to double jeopardy because, when sentenced for felony murder, he was also sentenced for the underlying armed robbery even though he was not charged with this offense; and (3) the trial court erroneously exercised its discretion when sentencing him. We affirm.

I. BACKGROUND.

¶2 On January 22, 1994, Robert Parish was murdered during an armed robbery. Reed was the lookout for his accomplice, who robbed the pizza place and committed the murder. Reed was originally charged with first-degree intentional homicide and armed robbery, both as party to the crime. Pursuant to a negotiated plea, he eventually pled guilty to one count of felony murder, and he was sentenced to forty years' imprisonment.

[1] All references to the Wisconsin Statutes are to the 1991-92 version unless otherwise noted.

[2] Although Reed claims that he received the ineffective assistance of "appellate counsel," we conclude that he is raising a claim of ineffective assistance of "postconviction counsel." Wisconsin law distinguishes between postconviction and appellate counsel when addressing ineffective assistance of counsel claims. Generally, a claim of ineffective assistance of appellate counsel is raised by filing a habeas petition with the appellate court that heard the appeal. *See* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). However, when an ineffective assistance claim is predicated on counsel's failure to pursue a claimed error in a postconviction motion, such claim should be raised in the trial court either by a habeas petition or by WIS. STAT. § 974.06, motion. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996). Because Reed has pursued the latter under § 974.06, we are considering his claim as one for ineffective assistance of postconviction counsel.

¶3 After Reed indicated a desire to pursue an appeal, an attorney was appointed to represent him for the purposes of seeking postconviction relief. His attorney met with him, and, after reviewing the transcripts and other pertinent material, told him that, in his opinion, there were no meritorious issues. Consequently, the attorney related that he was prepared to file a no merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967). Reed contends that he instructed his attorney to file an appeal because he felt certain errors had occurred. He also claims that his attorney failed to advise him that he could file an objection to the no merit report. In any event, nothing was filed on Reed's behalf and Reed's direct appeal rights expired. Reed then sought different counsel, and when this proved to be unsuccessful, he filed a *pro se* "Notice of Appeal/Knight Habeas Corpus Petition" in this court. This petition and other relief sought later by Reed in the Wisconsin Supreme Court and the federal district court were denied.

¶4 Reed, again acting *pro se*, then brought a postconviction proceeding in the trial court pursuant to WIS. STAT. § 974.06, seeking relief on three grounds. First, he argued that he received ineffective assistance of postconviction counsel because his attorney, contrary to his wishes, refused to file an appeal incorporating all the issues which Reed deemed appealable and allegedly failed to advise him that he could file an objection to the no merit report. Second, he contended that his double jeopardy rights were violated because he was sentenced on both the charged crime of felony murder and the uncharged crime of armed robbery. Finally, he claimed that his due process rights were violated at sentencing because the trial court failed to exercise its discretion in fashioning his sentence. His motion was denied by the trial court and Reed commenced this appeal.

II. ANALYSIS.

A. *Reed's postconviction counsel was not ineffective*.

¶5 The familiar two-pronged test for ineffective assistance of counsel claims requires Reed to prove (1) deficient performance and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). To prove deficient performance, Reed must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, Reed must show that counsel's errors were so serious that he was deprived of a fair and reliable outcome. *See* ***id.*** at 687. If this court is satisfied that Reed has not proven one prong, we need not address the other prong. *See* ***id.*** at 697. We are satisfied that Reed is unable to establish either prong.

¶6 Reed contends that his postconviction attorney gave him ineffective assistance for two reasons. First, he asserts that his attorney was ineffective for refusing to file an appeal that contained the issues that Reed felt merited consideration. Next, he argues that his attorney was ineffective because, after determining that a no merit report should be filed, he allegedly failed to advise Reed that he could file an objection to it. We disagree.

¶7 Although Reed devotes several pages of his brief to his contention that an attorney is obligated to follow the wishes of a client, and that disregarding a client's request that certain issues be appealed constitutes ineffectiveness, Reed is wrong. In fact, one of the very cases cited by Reed, ***State v. Redmond***, 203 Wis. 2d 13, 552 N.W.2d 115 (Ct. App. 1996), stands for the opposite proposition. In ***Redmond***, this court noted that the Rules of Professional Conduct obligate an attorney to abide by the client's decisions and consult with the client, but legally

the attorney "is not required to raise every nonfrivolous issue suggested by a client." ***Id.*** at 20 (citation omitted). Here, the attorney consulted with Reed and recommended to him that a no merit report should be filed. Under the law, the attorney was not obliged to file an appeal containing the issues Reed thought appealable when the attorney deemed them frivolous.

¶8 Further, we are satisfied that the attorney advised Reed of his various options concerning the no merit report. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 516 N.W.2d 362 (1994), sets out an appellate attorney's duty to a client when the attorney determines that filing a no merit report is appropriate. The court in ***Flores*** held that an attorney is required to tell his or her client that the client has the right to file a response to the no merit report disagreeing with the attorney's decision. ***Id.*** at 605-06. Ineffective assistance of counsel will only be found when counsel "close[s] a file because of no merit when the criminal defendant does not know of the right to disagree with counsel's assessment." ***Id.*** at 606. Thus, the law requires an attorney who has decided that a no merit report is the proper appellate avenue to advise his client that he or she can object to the no merit report. Although Reed denies that his attorney told him of this option, the record substantiates that he did. A letter from Reed's attorney, which Reed admits having received, is in the record. It reads:

> Finally I informed you of your right to have me file a 'no merit report' with the Court of Appeals.… You would have the right to respond to a no merit report. You informed me that at this time you are inclined not to have me file a no merit report. I told you that I would not file any papers in your case, unless you contacted me and informed me that you would like to have me file a no merit report. If no papers are filed in your case, your right to appeal will simply expire.

This communication refutes Reed's assertion that he was not told his options. The letter he received clearly supports a finding that Reed knew he could respond to the no merit report or he could elect not to have his counsel file it. Reed cannot now complain that his attorney engaged in ineffective assistance of counsel when the record refutes his assertions. Thus, we find that Reed's postconviction counsel's representation was not ineffective. Moreover, we conclude that Reed's ineffective assistance of counsel claim fails because, as explained below, both substantive issues that Reed claims his attorney should have raised are meritless. Reed has, therefore, failed to establish that he was prejudiced by counsel's failure to pursue an appeal.

B. *No double jeopardy violation occurred here.*

¶9 As noted, Reed was originally charged with first-degree intentional homicide and armed robbery. As a result of plea negotiations, he elected to plead guilty to felony murder. Reed now contends that when he was sentenced for felony murder, he was sentenced to multiple punishments because even though he was only convicted of felony murder, he was also sentenced for the armed robbery. He theorizes that because he received a sentence of forty years, the trial court must have unlawfully sentenced him for the armed robbery as well as the felony murder. He submits that before the trial court could sentence him on the armed robbery charge, the State had to prosecute him for this charge. Since Reed pled guilty only to the charge of felony murder, he believes that the trial court violated his constitutional rights against multiple sentences. He cites several federal cases and cases from other state jurisdictions to support his argument. We do not agree with Reed's analysis.

¶10 First, we note that a review of Reed's sentencing transcript reveals that Reed was fully advised of the consequences of pleading to the charge of felony murder. The assistant district attorney stated early in the proceeding that the "[m]aximum penalty is imprisonment for not more than twenty years in excess of the maximum period of imprisonment provided by law for the crime of armed robbery, party to a crime, which is imprisonment for not more than twenty years, for a total maximum penalty of not more than forty years imprisonment." Later, the trial court inquired of Reed, "And you understand what you're now charged with, sir, is that correct?" Reed responded, "Yes, I do." The trial court then asked, "You also understand the penalty the Court can impose?" and Reed stated, "Yes. I do." Thus, the record supports the conclusion that Reed was fully advised of the operation of the felony murder statute and the maximum sentence.

¶11 WISCONSIN STAT. § 940.03, in effect at the time Reed committed the crime, read as follows:

> **Felony murder.** Whoever causes the death of another human being while committing or attempting to commit a crime specified in s. 940.225 (1) or (2) (a), 943.02, 943.10 (2) or 943.32 (2) may be imprisoned for not more than 20 years in excess of the maximum period of imprisonment provided by law for that crime or attempt.

WISCONSIN STAT. § 943.32(2), the armed robbery penalty statute in effect at the time of Reed's offense, stated:

> **(2)** Whoever violates sub. (1) by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon is guilty of a Class B felony.

Read together, the two statutes clarify that Reed faced a maximum sentence under the felony murder statute that was twenty years longer than the maximum sentence

for armed robbery. At the time of Reed's offense,[3] a Class B felony carried a maximum sentence of twenty years' imprisonment. *See* WIS. STAT. § 939.50(3)(b). Thus, Reed's maximum sentencing exposure for the felony murder charge was forty years, which is the sentence Reed received.

¶12 Reed was not sentenced on the armed robbery charge. Rather, Reed was sentenced to a charge which contained a sentencing component which depended on the underlying felony that was committed. Here, the underlying felony was an armed robbery. While not charged with armed robbery, the maximum armed robbery sentence did, however, affect the sentence that he could receive for felony murder. Reed was sentenced on one count of felony murder which incorporated the maximum sentence for armed robbery in computing his maximum sentence. Because Reed was not sentenced for the armed robbery, his double jeopardy argument has no merit.

¶13 Moreover, a federal court has rejected almost the identical argument proposed by Reed. In ***Ostrowski v. Burke***, 402 F.2d 377, 379 (7th Cir. 1968), the court stated:

> As to petitioner's double punishment argument, his guilty plea admitted the unarmed robbery specified in the amended information. It is clear that the third degree murder statute was intended to punish both the felony and the death caused during its commission. State v. Carlson, 5 Wis. 2d 595, 93 N.W.2d 354 (1958).

[3] Reed was subject to the penalties listed in the 1991-92 version of the Wisconsin Statutes. The penalties were amended in 1994.

Like ***Ostrowski***, the felony murder statute with which Reed was charged intended to punish Reed for both the underlying felony of armed robbery and the death that occurred during its commission.[4]

C. *The trial court properly exercised its discretion when sentencing Reed.*

¶14 In the alternative, Reed seeks a resentencing. He argues that the trial court erroneously exercised its discretion when sentencing him. He contends that the trial court exhibited conduct and made statements that suggested that it had determined Reed's sentence before the sentencing proceeding was held. He contends that the trial court exercised no discretion and merely sentenced him according to a rigid preconceived sentencing policy. Reed points to the trial court's comments that Reed "got initially the benefit of whatever bargain there was by the plea," and the trial court's statement that it wanted to send a message "as a general deterrent to others if others play a part [in armed robberies]" as

[4] In reviewing Reed's argument that that trial court improperly sentenced him on the armed robbery when sentencing him for the felony murder, it is readily apparent that Reed fails to grasp the difference between his situation and the facts involved in the cases he cites. Several of the cases Reed claims support his argument either dealt with situations not present here, *see, e.g.,* ***Missouri v. Hunter***, 459 U.S. 359 (1983) ("Where … a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same conduct' … the prosecutor may seek and the trial court may impose cumulative punishment under such statutes in a single trial."), or do not support Reed's position, *see* ***Rhode v. Olk-Long***, 84 F.3rd 284 (8th Cir. 1996) (legislature may authorize cumulative punishment for underlying felony and felony murder without violating double jeopardy). Other cases cited have no relevance whatsoever to the facts. *See, e.g.*, ***O'Brien v. DuBois***, 145 F.3d 16 (1st Cir. 1998) (upholding denial of habeas relief where petitioner sought writ of habeas corpus attacking his conviction for manslaughter in Massachusetts on the ground that the trial court unconstitutionally restricted recross-examination); ***Faull v. State***, 178 Wis. 66, 189 N.W. 274 (1922) (addressing the joinder of two counts in one information where the two misdemeanors grew out of distinct and separate transactions and reversing the trial court's sentence on the second count of the information because the trial court improperly used the conviction on the first count to sentence the defendant as a repeat offender on the second count). Moreover, Reed cites to ***Grady v. Corbin***, 495 U.S. 508 (1990), for support, despite the fact that this case was overturned by the United States Supreme Court. *See* ***United States v. Dixon***, 509 U.S. 688 (1993).

evidence that the trial court had a preconceived rigid sentencing policy and exhibited a closed mind.[5] We disagree.

¶15 The three primary factors the trial court must consider at sentencing are: (1) the gravity of the offense; (2) the character of the defendant; and (3) the need to protect the public. *See* ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). In reviewing a trial court's sentence, we are mindful of the great discretion given to the trial court at sentencing. *See* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 433-34, 351 N.W.2d 758 (Ct. App. 1984) (weight to be given to each of the primary sentencing factors is particularly within the wide discretion of the trial court). Further, besides the primary sentencing factors, the trial court may also consider, in connection with the three primary factors:

> the vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance, and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention.

State v. Echols, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶16 Here, the trial court advised Reed at sentencing that it must consider "the gravity of the offense, the character of yourself and the need to protect the community." The trial court then told Reed that "no two cases present identical factors." In explaining its sentence, the trial court expressed concern over the fact

[5] Reed also claimed the trial court failed to consider the armed robbery sentencing guidelines then in effect but, as noted, Reed was not convicted of or sentenced for armed robbery.

that the victim knew Reed and trusted him and that Reed also robbed the victim of his life. The trial court specifically commented on what the trial court believed were Reed's serious rehabilitative needs. The trial court's remark that Reed received a significant consideration when the State agreed to reduce the charges and, by doing so, reduced Reed's potential exposure to prison, was appropriate and nothing more than an acknowledgement of the case's history. Further, the trial court's statements that the court hoped to send a message to other possible offenders was also proper. *Cf.* ***State v. Spears***, 147 Wis. 2d 429, 446-48, 433 N.W.2d 595 (Ct. App. 1988). Thus, we can find nothing in the trial court's remarks to suggest that the trial court was following a preconceived rigid sentencing policy or that it failed to exercise its discretion. Consequently, we find the trial court's comments proper and we conclude that the trial court properly exercised its discretion in sentencing Reed to the maximum term of imprisonment.

By the Court.—Order affirmed.

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