COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2008AP1723
2008AP1724
2008AP1725
2008AP1726

Cir. Ct. Nos. 1998CF1083
1998CF1367
1998CF1463
1998CF1573

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN I. GAUSTAD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Nathan Gaustad appeals from an order denying his WIS. STAT. § 974.06 (2007-08)[1] motion for postconviction relief without an evidentiary hearing. Gaustad argues that counsel was ineffective for failing to inform him of his right to substitute the judge at his waiver hearing. Gaustad also claims his respective trial attorneys were ineffective for advising him to waive his preliminary hearings and enter no contest pleas in lieu of pursuing a reverse waiver hearing. Finally, Gaustad contends the trial court erroneously exercised its discretion by denying the request to supplement his § 974.06 motion. We reject these arguments and affirm the order.

BACKGROUND

¶2 On February 13, 1998, the juvenile court held a hearing on a petition for a revision and change of Gaustad's placement. At the hearing, the State recommended that Gaustad, then sixteen years old, be transferred to a correctional placement. A social worker, however, recommended an alternative school program and when asked to justify the recommendation, the social worker replied:

> [I]t's just that we placed him in foster homes, group homes and residentials and there haven't been a lot of successes with [Gaustad]. He just doesn't cooperate when he's in those placements and he seemed to be doing better at home … and I guess we want to give him a try living with his mom and stepdad with services in place.

Gaustad indicated he agreed with the social worker's recommendation. At the court's request, the State recited Gaustad's delinquency record, including "a

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

finding of delinquency for burglary in September of 1995; criminal damage to property in December of 1995; [misdemeanor] theft in May of 1996; [misdemeanor] theft in April of [1997]; [and] disorderly conduct in August of [1997]." The court, noting its belief that it was a "waste of resources" to keep Gaustad in community adolescent programs, asked Gaustad: "[D]o you want to give corrections a crack and see whether maybe they can shape you up or do you want to be looking at adult court if you're wrong, if you can't handle what you're talking about?" Gaustad responded: "I would rather take the chance of looking at adult court."

¶3 The court ultimately terminated juvenile court jurisdiction and supervision, expressing its belief that neither Gaustad nor his mother would cooperate with the efforts of the juvenile court. The court noted:

> [W]e have spent so much time trying just about everything we can think of short of a correctional placement to help both [Gaustad] and his mother see that this is not "punishment," this is instead an opportunity to try to change things around before it's too late and all we've had in response is resistance and deception and I just don't see this as a juvenile court case.
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> ….
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> … You're now on your own. You find your own treatment, you find your own place to spend your day so you're not committing crimes, because if you commit crimes, there will be a juvenile court order, the last juvenile court order saying, as I am now saying, there are no juvenile court resources to meet your needs and that you insist upon being your own decision-maker and in that regard, you are functioning more as an adult than as a juvenile.

¶4 Approximately one week after the court terminated juvenile jurisdiction, the State alleged that Gaustad committed two felonies—burglary and

possession of burglarious tools. The State filed a delinquency petition charging the two offenses and simultaneously petitioning to waive Gaustad into adult court. At a March 9, 1998 waiver hearing, Gaustad's counsel advised the court that her client did not oppose waiver. The State reiterated that at the February 13 hearing, the court found that Gaustad had been functioning more as an adult than a juvenile and that no juvenile resources were available to meet Gaustad's needs. The court then addressed Gaustad, asking: "[D]o you understand what's being explained to me?" Gaustad responded in the affirmative. The court continued: "That you're agreeing that I'll send these charges over to the adult court for a prosecution?" Gaustad responded: "Yes." When asked whether Gaustad had a "full opportunity" to talk to his lawyer about his rights to contest the waiver, Gaustad responded: "Yeah." Finally, the court confirmed that Gaustad did not want to have a contested hearing. The court ultimately concluded:

> [I]n light of the findings that I made just a few days prior to the time that it is alleged that the offenses occurred, after full consideration, plus … all of the facts that are represented in the waiver petition, which I do believe to be true and correct, I do find at this time that it would be contrary to the best interests of the public and to the best interests of [Gaustad], given the fact that we have no resources in which he is interested in and which would meet his needs, I do order that this matter be and is waived from juvenile court to adult court for further proceedings consistent with this determination.

¶5 The State subsequently filed a complaint in what became Dane County Circuit Court Case No. 1998CF811, charging Gaustad with burglary and possession of burglarious tools. On May 5, 1998, Gaustad waived his preliminary hearing. Over the next three months, the State charged Gaustad with an additional thirteen crimes arising from Dane County Circuit Court Case Nos. 1998CF1083,

1998CF1367, 1998CF1463 and 1998CF1573. The charged crimes included five counts of felony bail jumping; entry into a locked vehicle; theft of movable property; attempted escape from criminal arrest; obstructing an officer; and party to the crimes of operating a motor vehicle without the owner's consent, theft of movable property, criminal damage to property and entry into a locked vehicle. Gaustad waived his preliminary hearings in each of the cases and ultimately entered into a global plea agreement. In exchange for his no contest pleas to twelve of the fifteen charged counts arising from all five cases, the State dismissed the charges for possession of burglarious tools, entry into a locked vehicle and one count of felony bail jumping. The court accepted Gaustad's pleas and imposed thirty months of probation. Gaustad did not file a direct appeal from the judgments of conviction.

¶6 In August 2000, Gaustad's probation was revoked, and out of a maximum possible fifty-four-and-one-half-year prison term, the court imposed consecutive sentences totaling twenty-one years in prison, including ten years arising from the four cases underlying this appeal.[2] Appointed counsel filed no-merit appeals from the sentences imposed after revocation and this court summarily affirmed the postrevocation sentences. Gaustad, then pro se, filed a WIS. STAT. § 974.06 motion challenging his convictions in Case Nos. 1998CF1083, 1998CF1367, 1998CF1463 and 1998CF1573. After the State filed its response, Gaustad sought to supplement his motion. The trial court denied that

[2] In an earlier appeal, this court affirmed the denial of Gaustad's WIS. STAT. § 974.06 motion arising from Dane County Circuit Court Case No. 1998CF811. *See* ***State v. Gaustad***, No. 2007AP1429, unpublished slip op. (Wis. Ct. App. Feb. 14, 2008).

request and ultimately denied the § 974.06 motion without a hearing. Gaustad appeals.

DISCUSSION

¶7 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** "However, the ultimate determination of whether the attorney's performance falls below the constitutional minimum is a question of law which this court reviews independently." ***Id.***

¶8 "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 … (1984)." ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Gaustad must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. *See* ***Strickland***, 466 U.S. at 694.

¶9 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight …. and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as

they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential …. the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** at 689 (citation omitted). Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Id.*** at 690.

¶10 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. If Gaustad fails to establish prejudice, we need not address deficient performance. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶11 Here, Gaustad argues that counsel was ineffective for failing to inform him of his right to substitute the judge at his waiver hearing. Even were we to assume that counsel's failure to seek substitution of the judge was deficient, we are satisfied that Gaustad was not prejudiced by this claimed deficiency. *See* ***Strickland***, 466 U.S. at 694. A trial court's decision to waive the jurisdiction of the juvenile court and transfer the case to adult court is a matter vested within the trial court's discretion. ***Curtis W. v. State***, 192 Wis. 2d 719, 726, 531 N.W.2d 633 (Ct. App. 1995). The decision whether to waive juvenile jurisdiction is based on the following criteria:

> (a) The personality and prior record of the juvenile, including whether the juvenile is mentally ill or

> developmentally disabled, whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile has been previously convicted following a waiver of the court's jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the juvenile's motives and attitudes, the juvenile's physical and mental maturity, the juvenile's pattern of living, prior offenses, prior treatment history and apparent potential for responding to future treatment.
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> (b) The type and seriousness of the offense, including whether it was against persons or property, the extent to which it was committed in a violent, aggressive, premeditated or willful manner, and its prosecutive merit.
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> (c) The adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.048.
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> (d) The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in the court of criminal jurisdiction.

WIS. STAT. § 938.18(5) (1997-98).

¶12 Here, the same judge presided over both the petition for a revision and change of Gaustad's placement and the delinquency petition. Based on Gaustad's behavior, record and crimes charged, the court reasonably waived juvenile jurisdiction and there is no reason to believe that a different judge would not have done the same, especially in light of Gaustad's decision not to contest the waiver.

¶13 We are likewise satisfied that Gaustad suffered no prejudice from his attorneys' failure to pursue the reverse waiver. Gaustad claims that had his

respective attorneys pursued a reverse waiver, jurisdiction would have been returned to the juvenile court based on the inadequacy of the waiver colloquy. We are not persuaded. WISCONSIN STAT. § 938.18(4)(c) (1997-98) provides:

> If a petition for waiver of jurisdiction is uncontested, the court shall inquire into the capacity of the juvenile to knowingly, intelligently and voluntarily decide not to contest the waiver of jurisdiction. If the court is satisfied that the decision not to contest the waiver of jurisdiction is knowingly, intelligently and voluntarily made, no testimony need be taken and the court, after considering the petition for waiver of jurisdiction and other relevant evidence in the record before the court, shall base its decision whether to waive jurisdiction on the criteria specified in sub. (5).

¶14 Even assuming the waiver hearing, standing alone, creates an arguable inference that the court's waiver colloquy did not comply with WIS. STAT. § 938.18(4)(c), the circumstances of this case necessitate that we consider the waiver hearing in conjunction with the proceedings that had recently been held on the petition for a revision and change of Gaustad's placement. When read together, the transcripts of the two hearings show that Gaustad's subsequent waiver accorded with the desire he clearly expressed at the earlier proceeding, when he stated: "I would rather take the chance of looking at adult court." Moreover, the transcript of the waiver hearing reveals no facts to support a finding that Gaustad lacked the capacity to understand the proceeding, or that he did not make a knowing and voluntary decision.

¶15 To the extent Gaustad contends the trial court erred by denying his WIS. STAT. § 974.06 motion without a hearing, we are not persuaded. The trial court has the discretion to deny a postconviction motion without an evidentiary hearing if a defendant fails to allege sufficient facts to raise a question of fact,

presents only conclusory allegations or if the record demonstrates that the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Because the record demonstrates Gaustad is not entitled to relief, his motion was properly denied without a hearing.

¶16 Finally, Gaustad contends the trial court erroneously exercised its discretion by denying his request to supplement the WIS. STAT. § 974.06 motion. The court, however, ordered Gaustad to simply address the issues he was concerned about within the context of his reply brief. To the extent Gaustad claims the court prevented him from supplementing the motion with a necessary transcript, that hearing transcript was included as an attachment to his affidavit in support of the postconviction motion. We discern no error.

By the Court.—Order affirmed.

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