COURT OF APPEALS
DECISION
DATED AND RELEASED

August 30, 1995

No. 94-3086-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES J. KEMPINSKI,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. James J. Kempinski appeals from a judgment which convicted him of two counts of burglary, party to the crime, in violation of §§ 943.10(1)(a) and 939.05, STATS., and sentenced him to concurrent sixteen-year prison terms, consecutive to another prison term he was then serving. He also appeals from an order denying his motion for postconviction relief.

All of the issues raised by Kempinski on appeal relate to sentencing. He contends that he was deprived of effective assistance of counsel

at sentencing and was denied due process based on defects in the presentence report. He also contends that the trial court erroneously exercised its discretion in denying his motion for an adjournment of the sentencing hearing. We reject Kempinski's arguments and affirm the judgment and the order.

Kempinski contends that his trial counsel was ineffective because at sentencing he failed to present witnesses who could describe Kempinski's rehabilitative needs and suggest alternatives to the lengthy sentence recommended in the presentence report. He contends that his trial attorney should have presented evidence from Shelly Hoernke, a social worker for the Wisconsin Department of Corrections, who had worked with him in an alcohol and drug treatment program during a previous term of imprisonment. He also argues that his trial counsel could have secured a report from an independent sentencing expert to discuss mitigating factors underlying his criminal record and to provide sentencing alternatives which would have protected the public while rehabilitating him.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** at 127, 449 N.W.2d at 847-48. The appropriate measure of attorney performance is reasonableness, considering all the circumstances. ***State v. Brooks***, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985).

Even if deficient performance is found, a judgment will not be reversed unless the defendant proves that the deficiency prejudiced his or her defense. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848. To establish prejudice, a defendant must show that counsel's errors were so serious as to deprive him or her of a fair trial, a trial whose result is reliable. ***Id.*** 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 129, 449 N.W.2d at 848. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.*** at 129-30, 449 N.W.2d at 848-49.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. ***Id.***

Both Hoernke and Julie Paasch-Anderson, a sentencing specialist retained by appellate counsel, testified at Kempinski's postconviction hearing, as did Kempinski and his trial counsel. Hoernke testified concerning improvements made by Kempinski while in a previous treatment program. Both Hoernke and Paasch-Anderson indicated that Kempinski was "treatable" and that a long period of incarceration was unnecessary and, according to Hoernke, undesirable in terms of his rehabilitation.

Trial counsel testified that he discussed with Kempinski the names of several individuals who had worked with Kempinski in treatment programs during his previous imprisonment. However, trial counsel also noted that the defense strategy at sentencing was to argue in mitigation that Kempinski committed the new burglaries because of a relapse in his drug and alcohol problems. Trial counsel explained that he did not aggressively pursue a strategy involving witnesses like Hoernke because he believed the value of their testimony would have been limited and might have been harmful, since Kempinski's commission of new crimes after participating in a treatment program could be viewed as reflecting poorly on him.

A trial attorney may select a particular strategy from the available alternatives and need not undermine the chosen strategy by presenting

inconsistent alternatives. *See* ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992), *cert. denied,* 114 S. Ct. 99 (1993). Based on the testimony in this case, the trial court found that trial counsel made a strategic decision not to present evidence from treatment professionals who worked with Kempinski during his previous imprisonment. This finding is not clearly erroneous and therefore cannot be disturbed by this court. In addition, we agree with the trial court that the decision was reasonable because presenting such testimony would have highlighted the failure of previous treatment efforts. It thus would have undermined the defense strategy of claiming that Kempinski was committed to treatment efforts and that lengthy incarceration was unnecessary to rehabilitate him and protect the public.[1]

In addition, it is well established that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. ***Strickland,*** 466 U.S. at 691. In this case, Kempinski's trial counsel stated at sentencing that he had discussed issuing subpoenas for prison social workers but that Kempinski had asked him not to because of the distance they would have to travel. This representation is consistent with Kempinski's statements at the original February 18, 1994, sentencing date indicating that he wanted to proceed immediately with sentencing and did not want to delay the hearing even when told by the trial court that a continuance would provide him with additional time to obtain information and witnesses relevant to sentencing. Kempinski's statements as to his wishes further diminish his claim that his trial counsel acted unreasonably in failing to procure additional witnesses or an independent presentence report.

Even assuming arguendo that Kempinski proved deficient performance, he failed to satisfy the prejudice prong of the test for ineffectiveness of counsel. In support of his claim that prejudice occurred,

---

[1] Kempinski argues that trial counsel could not reasonably have determined that Hoernke's testimony would not have been beneficial prior to sentencing because he never even talked to her. We disagree. Trial counsel's investigatory duty was to make a reasonable investigation or to make a reasonable decision that made a particular investigation unnecessary. ***State v. Hubert***, 181 Wis.2d 333, 343-44, 510 N.W.2d 799, 803 (Ct. App. 1993) (citing ***Strickland v. Washington,*** 466 U.S. 668, 691 (1984)). Since any testimony by Hoernke would undoubtedly have revealed that Kempinski reoffended within approximately six months of being released from prison after completion of a treatment program, trial counsel reasonably could conclude without further investigation that presenting testimony from Hoernke would be inadvisable.

Kempinski argues that if the trial court had heard the testimony of Hoernke and Paasch-Anderson at the sentencing hearing, it would have concluded that a sentence of less than sixteen years was appropriate. This argument is not supported by the record, which indicates that after hearing their testimony at the postconviction hearing, the trial court stated that it did "not think it would have made that much of a difference" and that failure to present their testimony at sentencing did not prejudice Kempinski.

The trial court's conclusion is substantiated by the transcript of the sentencing hearing, which reveals that its primary concerns at sentencing were Kempinski's lengthy record and continued involvement in serious criminal activities, despite prior juvenile and adult incarceration. The trial court's sentencing discussion indicates that the sentence imposed was based primarily on the gravity of the offense and the trial court's conclusion that lengthy incarceration was necessary to protect the public and provide close rehabilitative control of Kempinski. Its discussion substantiates its conclusion that it would not have imposed a lesser sentence based on the fact that defense witnesses had formed different conclusions about Kempinski's amenability to rehabilitation. Because no basis therefore exists to conclude that Kempinski's sentence would have been shorter if trial counsel had taken the steps Kempinski now alleges he should have, the prejudice prong of the ineffectiveness test is unsatisfied. *See* ***State v. Littrup***, 164 Wis.2d 120, 136, 473 N.W.2d 164, 170 (Ct. App. 1991).

Kempinski's next argument is that he was deprived of due process because the probation agent who prepared the presentence investigation report did not interview him during the preparation of the report, and because the presentence report did not contain all information required by the Wisconsin Administrative Code and the Wisconsin Department of Corrections' operations manual. During the sentencing proceedings, Kempinski objected to the presentence report based on the probation agent's failure to personally interview him. However, he never claimed that due process was violated because the presentence report omitted information required by the administrative code and the operations manual. By failing to timely raise this issue, he deprived the trial court of the opportunity to cure the alleged defects in the report and waived his right to raise this latter issue on appeal. *See* ***State v. Marshall***, 113 Wis.2d 643, 653, 335 N.W.2d 612, 617 (1983).

Even absent waiver, we discern no due process violation arising from the presentence report. A defendant carries the burden of proving by clear and convincing evidence that there was a due process violation in the sentencing process. ***Littrup***, 164 Wis.2d at 124, 473 N.W.2d at 165. A defendant claiming that a due process violation arose from inaccuracies in a presentence report is required to prove by clear and convincing evidence that information in the report was inaccurate and that prejudice resulted from the misinformation. ***Id.*** at 132, 473 N.W.2d at 168.

Kempinski concedes that the presentence report contained no inaccuracies. However, he contends that the presentence writer's failure to include additional objective information gave rise to a due process violation.

We disagree. While the presentence writer did not interview Kempinski for the specific purpose of preparing the presentence report, he previously had been the probation and parole agent for Kempinski and included statements made to him by Kempinski regarding his version of the current offenses. In addition, at the sentencing hearing the trial court permitted trial counsel to state on the record Kempinski's "version of the story." The trial court expressly accepted this statement as true. Consequently, even if the probation agent should have interviewed Kempinski when preparing the presentence report to obtain his version of the offenses, this defect was cured and gives rise to no prejudice.

The record also fails to provide a basis for concluding that Kempinski was prejudiced by the omission of information from the presentence report. While he complains that the report did not provide him with an opportunity to explain his prior criminal record, he was given this opportunity at the sentencing hearing, explaining the role his upbringing and drug and alcohol use played in the present offenses and his prior criminal activities. In addition, while he argues that the report did not advise the trial court of his learning disability and employment following his release from custody in January 1993, Kempinski personally informed the trial court at sentencing that he worked two jobs after being released from prison.

Kempinski fails to provide any basis for concluding that additional information concerning his employment history or his learning

disability would have constituted significant mitigating factors at sentencing and affected the trial court's conclusion that a sixteen-year sentence was appropriate. Similarly, while Kempinski contends that the presentence report did not adequately describe prior psychological evaluations performed on him, the presentence report did describe a 1991 report by Dr. Robert Gordon, which stated that Kempinski had an antisocial personality disorder and would likely continue to engage in antisocial behavior. The evaluations discussed in the presentence report prepared for postconviction purposes by Paasch-Anderson were consistent with Dr. Gordon's evaluation and, like the postconviction testimony of Hoernke and Paasch-Anderson, fail to provide a basis for concluding that Kempinski was prejudiced by the failure to provide the information at sentencing. Kempinski therefore has failed to meet his burden of demonstrating a due process violation.

Kempinski's final challenge is to the trial court's denial of a continuance of the February 25, 1994, sentencing hearing. The decision to grant or deny a continuance lies within the discretion of the trial court. ***State v. Wollman***, 86 Wis.2d 459, 468, 273 N.W.2d 225, 230 (1979). The inquiry requires the balancing of the defendant's constitutional right to adequate representation by counsel against the public interest in the prompt and efficient administration of justice. ***Id.*** The denial of a motion for a continuance will not be disturbed absent an erroneous exercise of the trial court's discretion. ***State v. Echols***, 175 Wis.2d 653, 680, 499 N.W.2d 631, 640, *cert. denied*, 114 S. Ct. 246 (1993).

Factors a trial court should consider in deciding a motion for a continuance are: (1) the length of the delay requested; (2) whether other counsel are prepared to handle the case in the absence of lead counsel; (3) whether any other continuances have been requested and granted to the defendant; (4) the convenience and inconvenience to the parties, witnesses and court; (5) whether the delay seems to be for legitimate purposes or whether its purpose seems dilatory; and (6) other relevant factors. *See* ***Wollman***, 86 Wis.2d at 470, 273 N.W.2d at 231. The mere denial of a continuance does not in itself constitute a denial of due process or the constitutional right to counsel. ***Id.*** at 469, 273 N.W.2d at 230. However, a defendant may establish a constitutional violation by showing actual prejudice, as when the time permitted counsel for preparation is fundamentally unfair, or by showing specific prejudice resulting in ineffective assistance of counsel or a due process violation. *See* ***id.*** at 469-70, 273 N.W.2d at 230-31.

Based on these standards, we conclude that the trial court properly exercised its discretion in denying Kempinski's motion for a continuance. While Kempinski contended that a continuance was necessary to permit the probation agent to interview him in the context of preparing the presentence report, the trial court cured that problem by permitting Kempinski to provide his version of the offenses at the hearing. Although Kempinski contended that the trial court's remedy was insufficient and claimed that a continuance should be granted so that he could seek an independent presentence investigation, the trial court denied that request on the ground that it was dilatory, noting that the agent who prepared the presentence report had three years of contact with Kempinski and that Kempinski had previously had ample time to conduct an independent investigation.

Because Kempinski was provided with adequate time to prepare for sentencing and because this was the second continuance of sentencing requested by him, the trial court properly deemed the request to be dilatory. In addition, since a delay would have inconvenienced the trial court and the State and since Kempinski failed to show any material and unremedied inaccuracies or defects in the presentence report, the trial court reasonably concluded that no legitimate reason existed for a continuance. Moreover, the time given to the defense to prepare for sentencing was not fundamentally unfair, and, as previously discussed, neither ineffective assistance of counsel nor a due process violation has been shown. No basis therefore exists in the record for finding actual or specific prejudice from the denial of the motion. *See* ***id.*** at 470, 273 N.W.2d at 231.

By the Court.—Judgment and order affirmed.

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