COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP952-CR **Cir. Ct. No. 2009CF859**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MILTON JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Milton Johnson appeals a judgment, entered upon a jury's verdict, convicting him of two counts of delivering between one and five grams of cocaine, both counts as a second and subsequent offense and as a repeater. Johnson also challenges the order denying his motion for postconviction

relief. Johnson claims he was denied the effective assistance of trial counsel. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Johnson with two counts of delivering between one and five grams of cocaine, both counts as a second and subsequent offense and as a repeater. The Complaint alleged that Johnson delivered cocaine to an undercover police officer on two separate occasions.

¶3 The jury found Johnson guilty of the crimes charged and the court imposed consecutive sentences totaling twelve years, consisting of seven and one-half years of initial confinement and four and one-half years of extended supervision. Johnson filed a postconviction motion to "vacat[e]" the judgment, alleging he was denied the effective assistance of trial counsel. The motion was denied after a ***Machner***[1] hearing and this appeal follows.

DISCUSSION

¶4 A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it is outside the range of professionally competent assistance, in that the attorney's acts or omissions were not the result of reasonable professional judgment. ***Id.*** at 690. 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

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶5 The prejudice prong of the ***Strickland*** test is satisfied when 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. ***Strickland***, 466 U.S. at 694. We may address the tests in the order we choose. If Johnson fails to establish prejudice, we need not address deficient performance. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶6 This court's review of an ineffective assistance of counsel claim presents 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 that this court reviews independently. ***Id.***

¶7 Johnson raises three challenges to his trial counsel's performance. First, he claims counsel was ineffective by failing to "introduce and link up" the numerous telephone calls to him that he asserts would have supported his entrapment defense at trial. At trial, Johnson testified that he felt pressured by his friend, Jayson Campbell, to secure crack-cocaine for a man named "Larry," who was actually Drug Task Force officer Roman Aronstein. During the postconviction hearing, Johnson testified that a total of nineteen incoming calls were made to him around the time of the drug transactions—nine from Campbell and ten from the Drug Task Force. Johnson contends that the "high number of calls" would have "tie[d] in directly to the entrapment defense."

¶8 "'Entrapment' is a defense available to defendants when a law enforcement officer has used improper methods to induce them to commit an offense they were not otherwise disposed to commit." WIS JI—CRIMINAL 780 (2002). However, even assuming without deciding that Campbell could be considered an agent of law enforcement, the existence of a record of phone calls would tell the jury nothing about the substance of those calls or the supposed pressure brought to bear in them. Several calls might have been comprised of nothing more than Johnson telling the caller he could not talk and asking the caller to call back later. Without knowing the content of the calls, mere numbers would not have supported Johnson's entrapment defense. Because the omission of this call log does not undermine our confidence in the trial outcome, Johnson fails to establish how he was prejudiced by counsel's failure to introduce the log at trial.

¶9 Next, Johnson asserts that although the jury was aware he is allegedly disabled and suffers from post-traumatic stress disorder (PTSD), trial counsel was ineffective by failing to stress that his PTSD and status as a Supplemental Security Income (SSI) recipient made him more susceptible to entrapment. Johnson contends "[i]t should be axiomatic to conclude that weak individuals are going to be more susceptible to improper suggestions." We are not persuaded by this conclusory assertion.

¶10 During the postconviction motion hearing, Johnson presented no expert testimony to establish that suffering from PTSD or receiving SSI makes one more susceptible to suggestion or entrapment. And, even assuming the correlation he now asserts, Johnson does not explain what more counsel should have done at trial. Counsel asked Johnson open-ended questions, allowing him to detail for the jury his living situation and personal challenges. Counsel also argued during closing that the jury should consider Johnson's personal background. That the

jury found Johnson guilty despite evidence of his personal struggles does not establish counsel's ineffectiveness.

¶11 Finally, Johnson argues counsel was ineffective by failing to emphasize to the jury that Johnson did not have the "usual characteristics of a drug dealer," including a scale, plastic bags, large amounts of cash, and a cell phone.[2] The underlying factual basis for this claim, however, is based on Johnson's testimony alone, as it is undisputed that Johnson's home was not searched in connection with this case. The evidentiary value of Johnson simply asserting that he had none of the common accoutrements of a drug dealer would have been low. For one thing, these common accoutrements are obviously not necessary to deliver a few grams of cocaine.

¶12 Moreover, as trial counsel reasonably intimated at the ***Machner*** hearing, any claim that Johnson lacked "characteristics of a drug dealer" may have opened the door for the prosecutor to delve into the nature of Johnson's prior convictions, several of which were drug related. Johnson, therefore, fails to establish how he was prejudiced by this claimed deficiency of trial counsel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[2] The telephone calls discussed above were made to the cell phone of Johnson's girlfriend.