COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3125-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FLOYD A. WORTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

EICH, C.J.[1] Floyd Worth was convicted of five counts of practicing law without a license and five counts of bail jumping—all misdemeanors and all carrying repeater enhancements—after trial to the court and a jury. The trial court's cumulative sentence of six years in prison was stayed, and Worth was placed on probation for three years. As conditions of his probation, Worth was

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

forbidden to practice law and was required to undergo psychological evaluation and treatment concerning his belief that he in fact is an attorney.

Worth appeals the conviction and sentence and the trial court's order denying his motion for postconviction relief, arguing that the trial court erred when it: (1) refused to accept his rejection of probation at the sentencing hearing, and (2) denied his request for a ***Machner*** hearing, ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979), with respect to his claim that his trial counsel was ineffective for failing to object to probation and for arguing for a county-jail sentence which would permit the State to pursue involuntary mental commitment proceedings. We reject Worth's arguments and affirm the judgment and order.

I. Sentencing

The State does not question the proposition that a defendant may refuse probation if he or she believes it is more onerous than a possible sentence. ***State v. Migliorino***, 150 Wis.2d 513, 541, 442 N.W.2d 36, 47-48 (1989). Rather, it argues that Worth did not reject the trial court's imposition of probation in this case. Maintaining that he did indeed reject probation, Worth points to two remarks he made during the course of a lengthy statement to the court at the sentencing hearing. While describing the "good" he has done for his "clients," he stated:

> I have clients in Dane County as well as Wood County, and I don't feel—I don't like to say to the Court that I would reject probation, but I don't feel that probation would do me any good because of my belief and my ability that I have that I would continue to practice for the people that I am still supposedly representing ….

Several pages later in the transcript, after Worth had told the court that he had mentioned to his friends and "clients" that he was not a licensed attorney and they continued to seek his representation, the court asked whether he believed that they would continue if they knew he might "go to prison" for practicing law without a license. Worth replied:

> Well, you know, I heard prison was a rehabilitation system. I don't know. Maybe it's not. Maybe I'm wrong. If it is, then if I'm going to be rehabilitated, which in fact I don't feel that I need rehabilitation, you know, but if in fact the prison system is a rehabilitation or if it's a deterrent—I'm not certain. I've never experienced that aspect of it.

Worth argues that these remarks, while not a "straightforward" or an "eloquent" refusal of probation, should have sufficed and, as a result, the trial court erred in placing him on probation. He also asserts that the conditions of probation are "more onerous" than a prison sentence because they forbid him from practicing law without a license. And he claims that he should be able to reject probation because he has a "compulsion" to continue to pose as a lawyer.

In its sentencing remarks, the trial court noted that it could do little to deter Worth's repeated criminal conduct if he persisted in acceding to his friends' requests that he act as their attorney. The court went on to state its belief, however, that these people would not ask for Worth's assistance if they were aware that he would "end up in prison." The court then stated:

> I did not hear any rejection of probation as such. [I am aware of a case giving a defendant a right to reject probation, and] my reading of that case suggests to me that it's under circumstances in which the conditions of probation are so onerous that a defendant rejects it and accepts incarceration or some other penalty. In this case I am going to utilize probation … and not make those conditions of probation onerous at all ….

We agree with the State that the trial court could properly conclude that Worth's remarks were equivocal and could not reasonably be interpreted as a rejection of probation in favor of a prison sentence. As the State points out, during the sentencing hearing Worth made no other statements or remarks on the subject beyond those we discussed.[2]

His argument is no more than a complaint that, in his belief, probation is more onerous than the prison sentence because he does not want—or feels unable—to comply with the condition that he not practice law without a license. But no one in Wisconsin—whether on probation or not—can practice law without a license without facing criminal sanctions, as Worth well knows. Certainly, he is not suggesting that he would be any more likely to be permitted to practice law without a license in prison. We see no error in the sentencing proceedings.

II. Ineffective Assistance of Counsel

As indicated, Worth claims his trial counsel was ineffective because: (1) he suggested that the court give Worth some jail time to permit the county to pursue involuntary commitment proceedings; and (2) he failed to object to probation.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's actions constituted deficient performance

[2] Beyond that, we do not believe that Worth, or anyone else, could reasonably entertain a belief that three years' probation would be more "onerous" than a six-year prison sentence. Indeed, if Worth were to prevail on his argument and rule out probation, the court would retain the discretion to impose a much longer sentence, since he was facing a maximum cumulative sentence of thirty years.

and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Since both elements of the test must be satisfied, ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992), we may dispose of an ineffective assistance of counsel claim if the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

On appeal, the issues involve both fact and law. ***Strickland***, 466 U.S. at 698. The trial court's findings as to what the attorney did, what happened at trial and the basis for the challenged conduct are factual, and we will uphold them unless clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). However, determinations relating to deficient performance and prejudice are questions of law which we review independently. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992).

An attorney's performance is not deficient unless it is shown that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***Guck***, 170 Wis.2d at 669, 490 N.W.2d at 38 (quoted source and internal quotation marks omitted). We thus assess whether such performance was "reasonable under the circumstances of the particular case," ***Hubanks***, 173 Wis.2d at 25, 496 N.W.2d at 105; to prevail in the argument the defendant must show that counsel "made errors so serious that [he or she] was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. In assessing counsel's conduct, we pay great deference to his or her professional judgment and make every effort to avoid basing our determination on hindsight. We consider the claim "from counsel's perspective at the time of trial, and the burden is ... on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847-48.

As we indicated above, even if deficient performance is found, we will not reverse unless the defendant proves that the deficient performance actually prejudiced the defense; counsel's errors must have deprived the defendant of a fair trial—a trial whose result is reliable. ***Id***. at 127, 449 N.W.2d at 848. In other words, errors of counsel must actually adversely affect the defense, because not every error that conceivably could have influenced the outcome undermines the reliability of the result in the proceeding. There must be "'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 129, 449 N.W.2d at 848 (quoting ***Strickland***, 466 U.S. at 694).

Ineffective assistance claims normally involve postconviction hearings at which trial counsel's testimony is taken on the subject. ***State v. Machner***, 92 Wis.2d at 804, 285 N.W.2d at 908. Such a hearing may be dispensed with, however, in the trial court's discretion, "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Washington***, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct. App. 1993) (quoted source omitted).

In this case, the trial court determined that Worth's trial counsel was not deficient in his representation when he requested imposition of a minimal jail sentence to allow the State to seek Worth's commitment for treatment of the mental condition that apparently drives him to pose as an attorney. Although the court had rejected counsel's recommendation, it stated that his request was neither unreasonable nor absurd in light of Worth's record and the potential lengthy prison sentence he was facing. Even if such a request could be considered ineffective

assistance, however, Worth cannot show prejudice because the State flatly rejected counsel's suggestion. We do not see how the outcome of Worth's sentencing would have been different had counsel not made this request.

With respect to Worth's claim that his attorney should have rejected probation, the trial court concluded that no prejudice was shown:

> [H]is claim of prejudice is based solely on his opinion that I would have imposed a different sentence had I not imposed and stayed the sentence and placed [him] on probation. This argument is merely a subjective opinion. Ineffective assistance of counsel cannot be based on information that is "opinion-subjective;" it must be based on information that is "factual-objective." There is nothing in the record to suggest that I would have imposed a different sentence had I not utilized the sentencing option of an imposed and stayed sentence.

(Citation omitted.)

We agree with the trial court. Absent some suggestion of a different result, there can be no prejudice, and, as we stressed above, Worth's claim speaks for itself: he was prejudiced because his attorney did not seek a prison sentence (of at least six years) rather than accept the court's imposition of three years' probation. On this record, the trial court could quite properly determine, without a ***Machner*** hearing, that Worth was not entitled to relief on his claim of ineffective assistance of counsel.

By the Court.–Judgment and order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.