COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3318-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG A. SUSSEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

EICH, J. Craig Sussek appeals from a judgment convicting him of attempted first-degree homicide (while armed) and armed burglary, both as a party to the crime, and from an order denying his motion for post-conviction relief. He argues that: (1) his trial counsel was ineffective at sentencing; (2) his sentence on the armed burglary subjected him to double jeopardy and otherwise constituted an

erroneous exercise of discretion; and (3) his psychologist's post-sentencing findings constitute a "new factor" warranting modification of his sentence. We reject his arguments and affirm the judgment and order.

Sussek and another juvenile—who were ages sixteen and fifteen at the time—armed themselves with loaded pistols and went looking for a car to steal. Seeing a car parked in an open garage adjacent to a residence, they rang the doorbell, and, when no one answered, entered the house through the unlocked door. Jacqueline Millar was sleeping in a bedroom. Finding a purse and car keys in the kitchen, they returned to the garage. As they were getting into the car, Millar came out of the house and asked them what they were doing. The young men drew their weapons and ordered Millar back into the house. After forcing her to the floor, they covered her face with a pillow, and shot her in the head at point-blank range.[1] They then left in her car, eventually abandoning it and setting it on fire. They were apprehended within hours of the incident.

Sussek was waived into adult court and entered a plea of no contest to the charges.[2] Following a lengthy hearing, Sussek was sentenced to a total of eighty years in prison—the maximum forty-five years on the attempted homicide and thirty-five years on the armed burglary. He moved for resentencing or, in the alternative, sentence modification and, after an evidentiary hearing, both motions were denied. This appeal followed.

[1] While Sussek initially admitted to police that he was the lone shooter, the transcript of his attorney's remarks at the sentencing hearing indicate that, at some point, he "recanted" his confession.

[2] Sussek was also charged with being a party to the crimes of operating a motor vehicle without the owner's consent and arson. These charges were dismissed pursuant to the plea agreement, but were read-in for sentencing.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution and Article I, § 7 of the Wisconsin Constitution guarantee every criminal defendant the right to effective assistance of counsel. ***State v. Felton***, 110 Wis.2d 485, 499, 329 N.W.2d 161, 167 (1983). We review ineffective assistance of counsel claims under the two-part test set forth in ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). The first element of the ***Strickland*** test requires the defendant to show that counsel's performance was deficient—that counsel made such serious errors he or she "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). In our analysis, we pay great deference to counsel's professional judgment and make every effort to eliminate the distorting effects of hindsight. ***Id.*** Counsel's performance is not deficient unless the defendant shows that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 38 (Ct. App. 1992). If defective representation is found, the defendant must show that counsel's deficient performance prejudiced the defense—that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Johnson***, 153 Wis.2d at 129, 449 N.W.2d at 848.

Whether counsel's actions constituted ineffective assistance presents a mixed question of fact and law. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). The trial court's factual findings, such as what the attorney did, and what happened at trial, will be upheld unless they are clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). However, whether the attorney's performance was deficient and, if so, whether it prejudiced the

defendant, are questions of law which we review without deference to the trial court's decision. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992).

Sussek argues that his trial counsel's performance at sentencing was deficient because he failed to present to the court complete and accurate information about Sussek's character and his remorse over his participation in the offenses. He claims that the pre-sentence report gave the impression that he has "few if any redeeming qualities," and the "abbreviated" amount of testimony offered by his attorney at the sentencing hearing suggested that there was "little positive to say" about him, when, in fact, dozens of people, including family members, former teachers, friends, and Sussek's minister, not only were willing, but were eager, to testify as character witnesses at the sentencing hearing—but never were asked to do so. According to Sussek, his attorney should have put forth additional testimony, or at least solicited letters and written comments from his family and friends—all of whom would have portrayed him as an "honest, trustworthy, responsible, caring and sensitive individual."

At the post-conviction ***Machner*** hearing, Sussek's trial counsel testified that he made a tactical decision not to put on an array of positive character evidence at sentencing, but instead elected to focus on Sussek's age and his potential for rehabilitation. He did so for several reasons. First, he saw no real dispute over Sussek's background—the absence of any prior criminal activity and his reputation in the community as a likable, respectful, law-abiding teenager. Counsel explained that the court already had ample evidence of Sussek's "good character," including: (1) the waiver hearing transcript, at which various individuals, including Sussek's pastor, testified that he was a respectful young man and very active in church affairs—particularly its youth group; (2) a lengthy

psychological evaluation prepared by Dr. E. Rick Beebe detailing Sussek's background and family history, his reactions to his current situation, and his potential for rehabilitation; (3) testimony from three witnesses who appeared at the sentencing hearing to attest to Sussek's good character; and (4) written statements from three other individuals expressing their disbelief in Sussek's involvement in the shooting and explaining that this act was wholly inconsistent with Sussek's overall good character. Finally, counsel said he believed that this evidence, together with Dr. Beebe's opinion that Sussek was remorseful and Sussek's own emotional statement at the sentencing hearing, were sufficient to convey his remorse.

According to counsel, "what it came down to [was] that this was a very ... heinous crime and that's what the Court was going to look at and ... what the State was going to be arguing," and he did not see how "parad[ing] eight, or ten, or twelve [witnesses], or even the Pope himself up [t]here to say that [Sussek] is a nice guy was going to have a whole lot of effect upon what the Judge did." Counsel anticipated the sentencing hearing would be very emotional, and that "the devastation that this act caused would be the forefront of [the State's] argument." It was clear to him that the State's evidence and argument would center on the seriousness of the offense and its impact on the victim, and not on Sussek's character. Considering this, and realizing that the nature of the offense would "obviously" result in a substantial prison sentence, counsel decided the best strategy at sentencing would be to attempt to minimize the sentence by focusing on Sussek's potential for rehabilitation and the low probability of recidivism. In light of these facts, and based on his eighteen years of experience practicing criminal law, counsel determined that presenting more witnesses or letters "would [not] have [had] any effect whatsoever on the sentencing."

We will not second-guess trial counsel's considered selection of trial tactics or strategies in the face of alternatives which have been weighed. ***State v. Elm***, 201 Wis.2d 452, 464, 549 N.W.2d 471, 476 (Ct. App. 1996) (citation omitted). Rather, we "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." ***State v. Pitch***, 124 Wis.2d 628, 636, 369 N.W.2d 711, 716 (1985), *citing* ***Strickland***, 466 U.S. at 690. It is strongly presumed that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions, and the defendant bears the burden of establishing deficient performance. ***Johnson,*** 153 Wis.2d at 127, 449 N.W.2d at 847-48.

Our independent review of the record satisfies us that counsel's decision to emphasize Sussek's potential for rehabilitation—rather than his character—was not unreasonable under the circumstances, and was within professional norms. His performance was, therefore, not constitutionally deficient.[3]

II. DOUBLE JEOPARDY/SENTENCING DISCRETION

Sussek next argues that his sentence for the armed burglary had the effect of punishing him twice for the same acts, and thus violated the Double Jeopardy Clause of the Fifth Amendment. He also claims the length of the sentence—thirty-five years—constituted an erroneous exercise of the trial court's sentencing discretion.

[3] If a defendant fails to adequately satisfy one element of the ***Strickland*** test, we need not address the other, and may dispose of the entire claim on that basis. ***Johnson***, 153 Wis.2d at 128, 449 N.W.2d at 848; *see also* ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992). Because Sussek has not shown deficient performance, we do not consider his other arguments.

Sussek's double-jeopardy argument is that his sentence for the armed-burglary was, in his words, no more than a "thinly-veiled attempt to increase the statutory maximum for the attempted murder" and, as such, violated his constitutional right not to be punished twice for the same offense. The Double Jeopardy Clause prohibits multiple punishments for the same offense. U.S. Const. amend. V; ***State v. Kurzawa***, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717 (1994). There is no question, however, that armed burglary and attempted first-degree intentional homicide are separate and distinct offenses, with separate elements and separate punishments; and Sussek's argument doesn't really dispute that fact. In reality, he does not argue double jeopardy at all, but rather that the trial court erroneously exercised its discretion in imposing the burglary sentence by over-emphasizing his participation in the attempted homicide and otherwise failing to adequately explain its reasons for the sentence. Sussek points to the fact that the court's comments referred primarily to the viciousness of the shooting and its impact on the victim, and failed to explain why he was given such a lengthy sentence on the burglary charge. While admittedly a serious offense, he says that the armed burglary "pales in comparison with both the attempted murder and [even with] many other armed burglaries." Stressing his youth and his first-offender status, Sussek maintains that only one conclusion can be drawn from all this: that his burglary sentence is simply "additional punishment" for his part in the shooting.

Sentencing is committed to the sound discretion of the trial court, and our review is limited to determining whether there has been a "clear" misuse of that discretion. ***McCleary v. State***, 49 Wis.2d 263, 278, 182 N.W.2d 512, 520 (1971). Our limited review in this area reflects the strong public policy against interference with sentencing discretion; we presume that the trial court acted reasonably, and we assign to the defendant the burden of "show[ing] some unreasonable or unjustified basis in the record for the sentence complained of."

State v. Harris, 119 Wis.2d 612, 622-623, 350 N.W.2d 633, 638-639 (1984). We do so, at least in part, because the trial court "has a great advantage in considering the relevant factors and the defendant's demeanor." ***State v. Roubik***, 137 Wis.2d 301, 310, 404 N.W.2d 105, 108 (1987).

When imposing a sentence, a trial court may consider—in addition to the gravity of the offense, the offender's character and the public's need for protection—a variety of factors, including: the defendant's prior record of offenses; his or her age, personality, character and social traits; the viciousness or aggravated nature of the crime and the degree of the defendant's culpability; his or her demeanor, including remorse, repentance, or cooperation with authorities; the defendant's—and the victim's—rehabilitative needs; and the needs and rights of the public. ***State v. Thompson***, 172 Wis.2d 257, 264-65, 493 N.W.2d 729, 732-33 (Ct. App. 1992). And whether a particular factor or characteristic will be considered an aggravating or mitigating circumstance will depend upon the particular defendant and the particular case. ***Id***. at 265, 493 N.W.2d at 733. This is a principle inherent in the concept of individualized sentencing. ***Id***.

Finally, we must not substitute our own sentencing preferences for that of the trial court in a particular case. ***McCleary,*** 49 Wis.2d at 281, 182 N.W.2d at 521. Indeed, we have a duty to affirm the sentence if the facts show it is sustainable as a proper discretionary act—even in cases where the court fails to adequately explain its reasons for selecting the sentence it did. ***Id***. at 282, 182 N.W.2d at 522.

We believe there is sufficient evidence in the record to support Sussek's armed burglary sentence. The sentencing transcript indicates that the trial court considered the burglary, not in isolation but in the context of Sussek's entire course of conduct. Sussek intentionally armed himself and illegally entered a residence intending to steal a car. After the shooting, he fled the area, drove

around in the stolen car and then abandoned and burned it. In imposing the armed burglary sentence, the trial court stated:

> Your actions were planned. You had your agenda. You intended to carry it out. You armed yourself with intent to carry it out. You acted in a way that whoever – regardless of who got in your way or what the consequences might be, you were going to move forward.... By arming yourself you were searching for violence. Any intention that you did not intend violence is absurd. If harm wasn't intended, why would you be carrying loaded guns? Why would you enter a home to steal a car? Why would you draw your weapon before entering that home? If you intended robbery, the only inference can be that you intended to use the weapons you had if something went wrong in your intended robbery. It appears that your plans were not spur of the moment. They began to develop days, weeks, perhaps months earlier. Your actions that day were premeditated in all respects. You exhibited no regard for the safety of others or the personal rights or property rights of others.

Sussek's contention that the trial court should have considered the burglary in isolation ignores the fact that the shooting stemmed from the burglary. The two offenses are intertwined and we cannot say it was unreasonable to consider each of them against the backdrop of the other. In addition, the record reveals that the court did not ignore Sussek's personal history and profile, but rather considered his age, educational background, employment record and prior history—as well as his personality, character and social traits. The court considered and weighed relevant legal factors in imposing the sentence and we have consistently held that the weight to be given to any particular factor is left to the court's discretion. *See* ***Thompson***, 172 Wis.2d at 264, 493 N.W.2d at 732. Sussek's armed burglary sentence was a product of that consideration, and he has not persuaded us that the court erroneously exercised its discretion in selecting the sentence it did.

III. "NEW FACTOR"

Sussek also argues that a post-sentence psychological evaluation prepared by Dr. Kenneth H. Waldron constitutes a "new factor" entitling him to modification of his sentences on both charges. Again, we disagree.

A trial court may, in its discretion, modify a defendant's sentence if a "new factor" is found to exist. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). A "new factor" is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial court at the time of the original sentencing, either because it was not then in existence or because, even though it was in existence, it was unknowingly overlooked by all the parties. ***Rosado v. State***, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). To warrant resentencing, the new factor must frustrate the purpose of the original sentence. ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). Whether a new factor exists is a question of law which we review *de novo*. ***Franklin***, 148 Wis.2d at 8, 434 N.W.2d at 611.

Sussek argues that Waldron's evaluation provides new and pivotal information about his potential for rehabilitation and the role "fantasy" played in his commission of the offenses. He claims that this information was not available to the court or the defense at the time of sentencing because Dr. Beebe, who prepared the pre-sentence psychological evaluation, did not have this "overwhelming character evidence" available to him, and, had it been available, it might have prompted Beebe to "refocus" his evaluation in a manner more favorable to Sussek.

Waldron states in his report that, in his opinion, Sussek has a treatable personality disorder and does not exhibit the type of "obsessive purpose," "lack of empathic compassion," or "criminal thinking patterns" typically associated with people who repeatedly harm others. Rather, Waldron concluded

that Sussek possesses the qualities necessary for successful rehabilitation. Waldron also states that Sussek's "fantasies" played a role in the offenses, which suggests to him that they were not premeditated, but more a matter of "getting carried away with something without really seeing where it was going to end up." Sussek argues that Waldron's analysis of the psychological factors that contributed to his involvement in the offenses—which he says were "overlooked by everyone" at sentencing—constitutes a new factor warranting resentencing.

We are not persuaded. The record reveals that, at the time the sentences were imposed, both the trial court and the defense were well aware of most, if not all, of the issues discussed in Waldron's report. Beebe's earlier report detailed Sussek's past history and profiled his character at some length. It specifically addressed issues of rehabilitation, recidivism and premeditation. Moreover, as we have indicated above, Sussek's trial counsel testified that his strategy at sentencing was to focus on Sussek's youth and potential for rehabilitation, which he did primarily through Beebe's report, which, among other things, concluded—much as Waldron's did later—that Sussek's actions were "significantly out of character and most likely more the product of the interaction and decision-making between [Sussek] and his friend than an intentional, individually motivated act of his sole intentions." Beebe described Sussek as a "one-time offender" who did not exhibit the type of "[a]ntisocial characteristics" or "[c]onduct [d]isorder[s]" which would limit or lessen his potential for rehabilitation. He concluded that Sussek had a "good potential" to lead a crime-free life without any probable danger of future dangerousness or recidivism.

We conclude, therefore, that Waldron's post-sentence psychological evaluation is not the type of newly acquired information which was "unknowingly overlooked" at sentencing and frustrates the purpose of the original sentences. The trial court observed that, while Waldron's evaluation addressed issues similar to those discussed in Beebe's report "with perhaps a more in depth approach in

certain ways," it did not constitute a new factor. We agree. The basic information addressed in Waldron's report was available and known to the parties—and considered by the trial court—at the time the sentences were imposed. It follows that Sussek has not demonstrated the existence of a new factor warranting modification of his sentences.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.