COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3606-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM MEDINA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. William Medina appeals a judgment which convicted him of second-degree recklessly endangering safety, and an order denying postconviction relief. He claims: (1) that his criminal prosecution, which followed prison discipline related to the same incident, violated double jeopardy principles; (2) that the court erred by entering judgment without first resolving his

plea of not guilty by reason of mental disease or defect; and (3) that he was deprived of effective assistance of counsel with regard to a jury instruction on a lesser-included offense. We conclude that the prison discipline which Medina received served a primary purpose other than punishment; that Medina abandoned his special plea; and that counsel's performance fell within the range of acceptable professional conduct. We therefore affirm.

After an incident in which Medina attacked the warden of the Columbia County Correctional Institution at a Labor Day picnic with a metal rod extracted from a mop wringer, the Department of Corrections charged Medina with battery and a weapons violations. On September 21, 1993, a prison disciplinary committee found Medina guilty of violating WIS. ADM. CODE §§ DOC 303.34 and 303.12. The committee gave Medina eight days of adjustment segregation and 360 days of program segregation. After Medina completed the segregation time, he was placed in administrative confinement pursuant to WIS. ADM. CODE § DOC 308.04, partly in order to make "clear to any inmate that participating in any dangerous assaultive activity, whether it's against staff or inmate, will inevitably result in long periods of Administrative Confinement." Thus, Medina eventually spent the better part of two and a half years in solitary confinement in various locations, including the Jefferson and Green Lake County jails and the Waupun Correctional Institution Lower Adjustment Center.

Meanwhile, on October 6, 1993, Medina was charged criminally with attempted first-degree intentional homicide based on the same incident. He initially entered a plea of not guilty, but added a special plea of not guilty by reason of mental disease or defect on August 20, 1994. The case proceeded to trial. The defense rested without offering any evidence on Medina's mental

condition at the time of the crime, and without raising the possibility of a second phase of trial to deal with that issue. At the instruction conference, the State requested an instruction on the lesser-included offense of first-degree recklessly endangering safety. The defense opposed the State's request, but indicated that if first-degree recklessly endangering safety was submitted to the jury, then it would like to have second-degree recklessly endangering safety submitted as well. The trial court gave both instructions, and the jury found Medina guilty of second-degree recklessly endangering safety.

Medina was sentenced to eleven years imprisonment, and he was subsequently transferred to a super-maximum security prison in Colorado. He filed a timely motion for postconviction relief, raising the double jeopardy, special plea, and assistance of counsel issues which he now argues on appeal. Medina claimed that his attorney had informed him that if he were acquitted on all charges, the State intended to recharge him with aggravated battery. He also said that his counsel had failed to explain to him that aggravated battery requires a showing of great bodily harm. Medina further claimed that, had he been better able to assess the unlikelihood of a conviction on an aggravated battery charge, he would not have requested an instruction on the second lesser-included offense. Due to expense and security concerns, the State conceded Medina's factual allegations in order to avoid having to bring him back from Colorado for a hearing under ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

We review constitutional questions de novo. ***State v. Keith***, 216 Wis.2d 61, 69, 573 N.W.2d 888, 893 (Ct. App. 1997). The double jeopardy clause protects defendants against 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). Governmental action constitutes punishment, however, only when "'its

principal purpose is punishment, retribution or deterrence.'" ***State v. McMaster***, 206 Wis.2d 30, 42, 556 N.W.2d 673, 678 (1996) (quoted source omitted). The principal purposes of a prison disciplinary proceeding are to maintain institutional order and assist individual rehabilitation. ***State v. Fonder***, 162 Wis.2d 591, 594, 469 N.W.2d 922, 924 (Ct. App. 1991). Therefore the Fifth Amendment does not bar criminal prosecution of a prison inmate following disciplinary action for the same conduct. ***Id***. at 598-99, 469 N.W.2d at 926.

Medina asserts that the severity of his discipline distinguishes his case from other double jeopardy claims which this court has addressed in the prison discipline context. It is also true, however, that the severity of the security risk posed by Medina exceeds that of the average case. In addition to attacking the warden of the prison, he had previously participated in a prison riot where staff had been taken hostage, and he had been issued several major conduct reports for battery and fighting with other inmates. The committee relied upon this pattern of assaultive behavior, in addition to the violent nature of the homicide for which Medina was serving a life sentence, in making its determination that Medina constituted a threat to staff and inmates at the institution. The fact that Medina's confinement might also deter other inmates from assaulting staff does not change the primary nature of the confinement, which was to address the security risk Medina posed. ***State v. Killebrew***, 115 Wis.2d 243, 251, 340 N.W.2d 470, 475 (1983). We therefore agree with the circuit court that housing Medina apart from the general prison population served the primary purpose of maintaining institutional order, notwithstanding the length or nature of his segregation.

When a defendant joins a plea of not guilty with a plea of not guilty by reason of mental disease or defect, the issues are to be tried separately in a continuous trial. Section 971.165(1)(a), STATS. The jury is to be informed that

the determination of the not guilty plea will precede the introduction of evidence on the mental responsibility of the defendant. Section 971.165(1)(b). The defendant bears the burden of establishing his or her lack of mental responsibility by the greater weight of the credible evidence. Section 971.15(3), STATS. If the jury finds the defendant guilty on the criminal charge, the court shall withhold judgment until a verdict is reached on the not guilty by reason of mental disease or defect plea. Section 971.165(1)(d), STATS.

Medina assigns error to the circuit court's failure to submit the issue of his mental responsibility to the jury, and to its entry of judgment prior to a determination of his not guilty by reason of mental defect plea. A trial court may properly withhold the mental responsibility issue from the jury, however, when the defendant has failed to offer sufficient evidence to establish the affirmative defense. ***State v. Leach***, 124 Wis.2d 648, 663, 370 N.W.2d 240, 248-49 (1985). Moreover, a defendant who selects a certain course of action "will not be heard later to allege error or defects precipitated by such action." ***State v. Robles***, 157 Wis.2d 55, 60, 458 N.W.2d 818, 820 (Ct. App. 1990). Here, Medina said nothing when the trial court advised the jury that the defendant had pleaded not guilty without mentioning the lack of responsibility plea, and when the court later informed the jurors that their service had been completed. He never asked to present evidence on the issue of mental responsibility. His actions clearly show that he had abandoned his special plea, regardless of whether he had formally withdrawn it. *See* § 971.15(3), STATS., (special plea of not guilty by reason of mental disease or defect is an affirmative defense); ***State v. Skamfer***, 176 Wis.2d 304, 311, 500 N.W.2d 369, 372 (Ct. App. 1993) (affirmative defenses may be waived).

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether counsel's actions were deficient or prejudicial is a mixed question of fact and law. ***Id***. at 698. The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. Section 805.17(2), STATS; ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id***. at 634, 369 N.W.2d at 715. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Strickland***, 466 U.S. at 687-88. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id***. at 687. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990).

Medina relies upon ***State v. Ambuehl***, 145 Wis.2d 343, 355-56, 425 N.W.2d 649, 654 (Ct. App. 1988) and its discussion of the ABA STANDARDS FOR CRIMINAL JUSTICE § 4-5.2(a)(i), for the proposition that the decision whether to request an instruction on a less-included offense belongs exclusively to the defendant. Based upon that proposition, he argues that counsel's performance fell below the professional norm when counsel failed to give Medina information which he needed to make an informed choice on that issue. However, in ***State v. Eckert***, 203 Wis.2d 497, 509, 553 N.W.2d 539, 544 (Ct. App. 1996), this court rejected the notion that trial counsel has an obligation to specifically discuss

lesser-included offenses with the defendant. Rather, we held that "a defendant does not receive ineffective assistance where defense counsel has discussed with the client the general theory of defense, and when based on that general theory, trial counsel makes a strategic decision" regarding whether to request an instruction on a lesser-included offense. ***Id.*** at 510, 553 N.W.2d at 544.

Here, defense counsel and Medina had discussed pursuing a go-for-broke strategy. However, that strategy was significantly undermined when the State asked for an instruction on the lesser-included offense of first-degree recklessly endangering safety. We agree with the circuit court that the decision to request an instruction on second-degree recklessly endangering safety at that point was strategic and called for legal expertise. The decision to request the second-degree instruction was counsel's to make, and well within professional norms. Therefore, counsel's performance was not deficient, regardless of whether Medina himself might have chosen not to request the instruction had he been better informed as to the likelihood of the State successfully pressing other charges against him at a later date.

By the Court.—Judgment and order affirmed.

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