COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

Nos. 99-0095-CR
99-0096-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VENTAE PARROW,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: DOMINIC S. AMATO and MARY M. KUHNMUENCH, Judges. *Affirmed.*

CURLEY, J.[1] Ventae Parrow appeals from the judgments of conviction entered after he pled guilty to two counts of retail theft, and from an order denying his postconviction motion alleging that his attorney was ineffective.

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

Parrow argues that his motion claiming ineffective assistance of counsel alleged facts that entitled him to relief and that the trial court erred when it refused to hold an evidentiary hearing. The judgments and order are affirmed because the allegations against the trial attorney did not rise to the level of ineffective assistance of counsel and, thus, no ***Machner***[2] hearing was required.

I. BACKGROUND.

Parrow pled guilty to two counts of retail theft, as part of a plea negotiation that dismissed an additional count of retail theft that was read into the record for sentencing purposes. The plea bargain also obligated the State to recommend a sentence of ninety days on each count to be served consecutively.[3] At sentencing, Parrow's attorney argued that the trial court should impose only a sixty-day sentence on each count to run concurrently with each other. Despite the recommendations, the trial court sentenced Parrow to the maximum sentence of nine months on each count to be served consecutively in the House of Correction. Parrow brought a postconviction motion, claiming that his attorney was ineffective for "making a plea and sentencing recommendation that trial counsel knew would be disregarded," and for not advising Parrow that it was unlikely that the trial

[2] ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979).

[3] The record reflects that initially there was some confusion regarding the plea negotiation. Parrow's attorney thought the State was going to make a recommendation of ninety days' imprisonment for each count to run concurrent to each other. The trial court misheard the recommendation and told the defendant that the State was going to recommend sixty days' imprisonment for each count to run consecutive to each other. These misunderstandings were cleared up and Parrow eventually agreed to plead guilty knowing that the State's recommendation was for a ninety-day sentence on each count to be served consecutively.

court would follow the sentencing recommendation.[4] The trial court denied this motion without holding an evidentiary hearing.[5]

II. ANALYSIS.

Standard of Review

A trial court has the discretion to deny a postconviction evidentiary hearing if the motion on its face is deficient because it fails to allege sufficient facts and presents only conclusory allegations, or the record conclusively show that the defendant is not entitled to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 309-11, 548 N.W.2d 50, 53 (1996). Whether the motion sufficiently alleges facts which, if true, would entitle the defendant to relief, is a question of law to be reviewed *de novo* by this court. *See* ***id.***

Discussion

Parrow's two arguments, distilled to their essence, are that his trial attorney was ineffective for not arguing for a longer sentence than that recommended by the State, and that he was ineffective for not advising Parrow that there was a substantial risk that the trial court was not going to follow the sentencing recommendation. He submits that had his attorney argued for a longer

[4] Parrow's postconviction motion contained other arguments which are not being appealed. He raised several other claims of ineffectiveness of counsel which include, *inter alia*, that his trial counsel failed to enter a substitution of judge form against Judge Amato, and his trial attorney failed to advise the trial court during sentencing that, contrary to the trial court's assertion that Parrow was in good health, he was actually handicapped as he is missing an eye. He also argued that the trial court erroneously exercised its discretion because the sentences were harsh and shocked the conscience.

[5] In denying Parrow's postconviction motion, the trial court indicated that it had read and considered all of Parrow's arguments but the trial court did not state on the record its reasons for denying both of the claims raised in this appeal.

sentence, the trial court may have adopted this "realistic" sentence rather than imposing the maximum sentences. He also argues that his attorney should have shared with him his professional opinion that there was a substantial risk that the trial court would not follow the sentencing recommendation of the State.

Parrow also argues that he was prejudiced by his trial attorney's failures because, Parrow states, that had his attorney argued for a longer sentence, the trial court would have adopted this recommendation, rather than giving him the maximum sentences. He also claims he was prejudiced by his attorney's lack of candor because had he been given the attorney's opinion that there was a slim chance that the trial court would accept the plea bargain, he "would have proceeded differently." We are unpersuaded by both of Parrow's arguments.

The test for determining whether an attorney is ineffective is found in ***Strickland v. Washington***, 466 U.S. 668. In order to establish ineffectiveness of counsel, a defendant must prove that his counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Id.*** at 687. In determining whether an attorney has engaged in deficient performance, one must measure the attorney's performance against the prevailing professional norms to see if the conduct was reasonable. *See* ***id.*** at 690. In determining whether the defendant has been prejudiced, the lawyer's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *See* ***id.*** at 687.

Parrow argues that his attorney was ineffective for not arguing for a longer sentence for him as a strategic maneuver because the plea bargain his attorney obtained was more than favorable. He cites no case law to support this novel theory. This court is not convinced that, when comparing his attorney's conduct against what an ordinarily prudent lawyer would have done, that an

ordinarily prudent lawyer would have advocated for a harsher sentence than that recommended by the State.

Further, there is no evidence in the record that the trial court would have accepted a recommendation of the trial attorney that was greater than that proposed by the State but less than the maximum. In fact, the record suggests otherwise. The trial court, in commenting on why Parrow received two maximum consecutive sentences, said "Anything less than that would unduly depreciate the seriousness of the offense." The trial court also remarked that "your lawyer saved you another nine months because I would have given you twenty-seven if you were found guilty of all three [charges]." Contrary to Parrow's theory that, had his attorney recommended a harsher sentence than that recommended by the State he would not have received maximum consecutive sentences, it is apparent that the trial court was convinced Parrow deserved the maximum sentences. The trial court's sentencing remarks indicate that the trial court felt that Parrow's crimes, all committed within one month, coupled with his prior record, required the court to sentence Parrow to maximum consecutive sentences. Thus, we conclude that Parrow's contention that a recommendation from his attorney for a longer sentence would have saved him from maximum sentences is nothing more than conjecture.

In any event, the failure of his trial attorney to recommend a stiffer sentence that that of the State is not deficient conduct. It is axiomatic that a lawyer attempts to obtain the best possible resolution for his or her client. Here, the trial attorney negotiated to have one of the three counts dismissed and read into the record, and obtained the State's agreement to recommend only ninety days' imprisonment to run consecutively on each of the remaining counts. Parrow's attorney skillfully obtained a plea negotiation which was extremely favorable to

the defendant and, after doing so, his attorney then argued for a lesser sentence than that being recommended by the State. This is hardly deficient conduct.

Parrow next argues that his trial attorney was deficient for not advising him that there was a substantial likelihood that the trial court would not follow the State's recommendation on sentence. Parrow argues that this lack of candor violated the ABA Defense Function Standard 5.1 adopted in ***State v. Felton***, 110 Wis.2d 485, 506, 329 N.W.2d 161, 170-71 (1983). Parrow reads the holding in ***Felton*** too broadly.

Parrow argues that the holding in ***Felton*** required his trial attorney to advise him that he felt there was a substantial risk that the trial court would sentence him to maximum sentences. In ***Felton***, the trial attorney was found ineffective because he was unaware of the heat-of-passion manslaughter defense to the charge of first-degree murder, ***id.*** at 504, 329 N.W.2d at 170, and the attorney failed to give due consideration to a defense of not guilty by reason of mental disease or defect. ***Id.*** As a consequence, his client was found guilty by a jury of first-degree murder. In ***Felton***, the supreme court cited the ABA Defense Function Standard 5.1:

> 5.1 **Advising the defendant.**
>
> (a) After informing himself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including his candid estimate of the probable outcome.

Id. at 506, 329 N.W.2d at 171. The supreme court then stated that Felton's attorney violated the standard by failing to inform himself fully on the facts and the law. ***Id.*** at 507, 329 N.W.2d at 171.

The record reflects that Parrow's trial attorney discussed with him the contents of a guilty plea questionnaire, which contained a sentence which read: "I understand that the Judge is not bound to follow any plea agreement or any recommendation made by the District Attorney, my attorney or any presentence report." While an affidavit submitted by appellate counsel claims that he spoke to the trial attorney and that the trial attorney advised him that he did not discuss with Parrow his belief that there was a substantial risk that the trial court would not follow the sentencing recommendations, trial counsel did advise Parrow that the judge was not bound by the recommendations. The record also reflects that the trial court explored with Parrow, more than once, the possibility that he could receive a nine-month sentence: The trial court asked Parrow, "You understand you could get nine months in jail and a ten thousand dollar fine on each of these cases?" Parrow responded, "Yes, sir."

Nowhere in ***Felton*** did the court mandate that defense counsel must evaluate the chances of a plea bargain being successful and apprise the defendant of the chances for the successful adoption of the sentencing recommendation. Parrow's trial attorney was not deficient for failing to tell Parrow there was a substantial risk of his receiving maximum sentences. Parrow was well aware of the fact that by pleading guilty to two counts of retail theft he could be sentenced to two nine-month sentences. Both his trial attorney and the trial court told him so, and the guilty plea questionnaire contained language indicating that the trial court was not bound by any sentencing recommendations. Under these circumstances, the trial attorney was not ineffective for failing to tell Parrow that, in his opinion, he believed there was a substantial risk that he would be sentenced to the maximum sentences. Parrow knew his options. Had Parrow not entered

into a plea negotiation with the State, he would have faced a third count of retail theft and an almost certain twenty-seven-month sentence.

Thus, this court concludes that Parrow did not allege facts which, if true, would constitute attorney ineffectiveness. Consequently, Parrow was not entitled to a ***Machner*** hearing.

By the Court.—Judgments and order affirmed.

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