COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3194

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALFONZO T. YOUNG,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Alfonzo T. Young, *pro se*, appeals from the trial court's denial of his postconviction motions. He claims: (1) he was abandoned by his postconviction counsel; (2) he received ineffective assistance of counsel because his trial lawyer did not challenge the Winnebago Mental Health Institute

physician's conclusion that Young was competent to stand trial; and (3) he received ineffective assistance of counsel because his trial and postconviction lawyers did not challenge the prosecution's charging decision. We affirm.

I.

¶2 Young was charged with first-degree intentional homicide and armed robbery, both as party to a crime, contrary to WIS. STAT. §§ 940.01(1), 943.32(1)(a) and 939.05 (1997-98).[1] According to the criminal complaint, Young and another man lured Johnny Sharp into a basement so they could rob him. During the course of the robbery, Young and his accomplice beat Sharp to death with a stick.

¶3 Young's trial counsel raised the issue of whether Young was competent to stand trial. A court-appointed doctor found Young's competency to be "questionable." The trial court, following the procedures mandated by WIS. STAT. § 971.14, halted the proceedings and ordered an inpatient examination of Young.[2] Dr. James Armentrout performed the examination of Young at the Winnebago Mental Health Institute and concluded that Young "is competent to proceed in court at this time." Neither the State nor the defense challenged Dr. Armentrout's conclusion. The court found Young competent and reinstated the proceedings against him. The case was eventually plea-bargained. In exchange

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] WISCONSIN STAT. § 971.14(1) requires a court to appoint one or more qualified examiners to examine a defendant "whenever there is reason to doubt a defendant's competency to proceed." Section 971.14(2) allows a court to commit a defendant to a mental health facility if it determines that an inpatient examination is necessary. "Inpatient examinations shall be completed and the report of examination filed within 15 days after the examination is ordered." WIS. STAT. § 971.14(2)(c).

for his guilty pleas, the State agreed to move to amend the first-degree intentional homicide charge to first-degree reckless homicide, with the armed robbery charge remaining unchanged. The trial court accepted Young's pleas and sentenced him to thirty-five years in prison for the homicide conviction and to a consecutive twenty-year prison term for the armed robbery conviction.

¶4 Young, represented by new counsel, filed a postconviction motion for resentencing. This motion was denied and was not appealed. Young then filed a *pro se* motion pursuant to WIS. STAT. § 974.06 for postconviction relief, claiming ineffective assistance of trial and postconviction counsel, wrongful prosecution, and improper sentencing. This motion was denied. Young filed a *pro se* motion for reconsideration of his postconviction motion, which was also denied. He now appeals from the denial of his *pro se* postconviction motions.

II.

¶5 A defendant claiming ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient and, as a result, that he or she suffered prejudice. ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216–217, 395 N.W.2d 176, 181 (1986). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. We will "strongly presume" counsel has rendered adequate assistance. ***Id***. To show prejudice, a defendant must show that the result of the proceeding was unreliable. ***Id.***, 466 U.S. at 687. If a defendant fails on either aspect—deficient performance or prejudice—the ineffective-assistance-of-counsel claim fails. ***Id.***, 466 U.S. at 697.

¶6 Whether a lawyer gives a client ineffective assistance of counsel is a mixed question of law and fact. ***Johnson***, 133 Wis. 2d at 216, 395 N.W.2d at 181. The trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985). Whether proof satisfies either the deficiency or the prejudice prong is a question of law that we review de novo. ***Id.***, 124 Wis. 2d at 634, 369 N.W.2d at 715.

A. Alleged abandonment by postconviction counsel.

¶7 Young claims that his postconviction lawyer abandoned him by not performing an adequate examination of his case, by filing an unsuccessful motion for resentencing rather than arguing his "best claims," i.e., the claims he raises in this appeal, and by failing to directly appeal the trial court's denial of the resentencing motion. Young provides no information regarding the circumstances surrounding the alleged abandonment. Indeed, Young offers nothing more than his belief that postconviction counsel "bailed out." While Young believes that his postconviction lawyer should have pursued the issues he raises in this appeal, he is prejudiced only if he could have prevailed on these issues. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69, 76 (1996). As we will discuss, the issues raised by Young are without merit. Therefore, he was not prejudiced by his postconviction attorney's failure to either raise these additional issues in the postconviction motion or pursue an appeal based on these issues.

B. Failure to challenge competency.

¶8 Young claims that he received ineffective assistance because his trial lawyer failed to contest Dr. Armentrout's finding that he was competent and advised Young not to contest the competency issue. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." WIS. STAT. § 971.13(1); ***State v. Garfoot***, 207 Wis. 2d 214, 222, 558 N.W.2d 626, 630 (1997). Not every mentally ill defendant is incompetent, however. ***State ex rel. Haskins v. Dodge County***, 62 Wis. 2d 250, 264–266, 214 N.W.2d 575, 582 (1974). "[I]f a defendant claims to be incompetent, the court shall find him incompetent to proceed unless the state can prove by the greater weight of the credible evidence that the defendant is competent." ***Garfoot***, 207 Wis. 2d at 222, 558 N.W.2d at 630. We will uphold a trial court's competency determination unless it is clearly erroneous. ***State v. Byrge***, 2000 WI 101, ¶4, 237 Wis. 2d 197, 205, 614 N.W.2d 477, 481.

¶9 In support of his motion for reconsideration, Young submitted four medical reports in an attempt to demonstrate his lack of competency. These reports, however, do not establish that Young was incompetent during the trial proceedings. As the postconviction court noted, the reports concern Young's condition *after* sentencing. *See* ***State v. Farrell***, 226 Wis. 2d 447, 454, 595 N.W.2d 64, 67 (Ct. App. 1999) (relevant time period for competency evaluation is at the time of the proceedings, not some time later). Moreover, Young has not demonstrated that Dr. Armentrout's report was erroneous or how the report could have been challenged. Thus, Young has not shown that he was prejudiced by trial counsel's failure to challenge competency.

C. Failure to challenge charges.

¶10 Young next asserts that he cannot be convicted simultaneously of both armed robbery and homicide because the legislature intended for the charge of felony murder to be used in such cases. Consequently, Young argues that he received ineffective assistance from his trial and postconviction lawyers, both of whom failed to challenge the charges. We disagree.

¶11 The Double Jeopardy Clause, embodied in both the Fifth Amendment of the United States Constitution and article I, section 8 of the Wisconsin Constitution, prohibits, among other things, multiple punishments for the same offense. A defendant "may be convicted of either the crime charged or an included crime, but not both." WIS. STAT. § 939.66 (codifying "elements only" test set forth in ***Blockburger v. United States***, 284 U.S. 299 (1932)). To prove a charge of felony murder, the State must prove all of the elements of the predicate felony plus the additional element of causing death. ***State v. Gordon***, 111 Wis. 2d 133, 135–136, 330 N.W.2d 564, 565 (1983). Thus, the predicate felony is a lesser-included offense of felony murder, and double jeopardy principles preclude convictions for both crimes. ***Id.*** The present case, however, is unlike the felony murder situation in ***Gordon***. Homicide and armed robbery are entirely separate crimes and may be charged simultaneously at the discretion of the prosecutor. *See* ***State v. Karpinski***, 92 Wis. 2d 599, 611, 285 N.W.2d 729, 736 (1979); *see also* ***State v. Harris***, 199 Wis. 2d 227, 544 N.W.2d 545 (1996) (defendant charged with

homicide and armed robbery).[3] Accordingly, Young was not prejudiced, and his ineffective-assistance-of-counsel claim fails.

By the Court.—Orders affirmed.

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

[3] In a related argument, Young contends that his sentence should be reduced by fifteen years because the legislature intended for him "to receive 20 years for the homicide resulting from His [*sic*] participation in the armed robbery, and not 35 years." Young incorrectly believes that the maximum sentence for felony murder is twenty years. We need not address this argument because we have already concluded that Young was not entitled to the felony murder charge. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if decision on one point disposes of appeal, appellate court need not decide other issues raised).