COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP619 **Cir. Ct. No. 2015ME617**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF J.M.

WINNEBAGO COUNTY,

PETITIONER-RESPONDENT,

V.

J.M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

¶1 HAGEDORN, J.[1] J.M. appeals from orders extending his WIS. STAT. ch. 51 commitment and denying postdisposition relief. J.M. argues that he

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

was denied effective assistance of counsel because his attorney did not arrange for him to wear civilian clothes or at a minimum request a curative jury instruction. J.M. additionally contends he is entitled to a new trial in the interests of justice. We disagree and affirm.

Background

¶2 On November 20, 2014, J.M. was involuntarily committed for a period of one year under WIS. STAT. § 51.20. Upon the approaching expiration of his commitment, Winnebago County filed a petition to extend J.M.'s WIS. STAT. ch. 51 commitment. J.M. requested and received a jury trial.

¶3 Prior to trial, J.M.'s attorney, Karen Marone, contacted the Wisconsin Resource Center (WRC)—where J.M. was being held—about supplying J.M. with civilian clothes to wear on the day of the trial. For reasons not revealed in the record, Marone's attempt to procure alternative clothing was unsuccessful, and J.M. appeared at trial in his prison garb. Marone did, however, successfully move to have J.M.'s shackles removed; J.M. wore a stun belt that was not visible to the jury.

¶4 During voir dire, Marone explained to the jury that J.M. was wearing prison garb because he was currently serving a prison sentence for a past crime. She explicitly questioned the jurors about whether J.M.'s status as an inmate would impair their ability to fairly render a verdict. No juror indicated any such prejudgment. Marone again mentioned that J.M. was serving a prison sentence during her opening statement but stated, "that's really not our affair."

¶5 At trial, the County called two expert witnesses to testify, both of whom had met with J.M. and evaluated his mental status: Dr. Marshall Bales and

Dr. Barbara Waedekin. Bales testified that he met with J.M. for roughly thirty-five minutes but ended the interview after J.M. grew increasingly agitated following direct questioning about J.M.'s belief that he was "Lord." The doctor recalled that "[J.M.] was glaring at me with a 1000-yard stare.... I was fearing for my safety at that point." Bales concluded that J.M. had schizophrenia and antisocial personality disorder.

¶6 Waedekin—J.M.'s primary doctor during his prior commitment—explained that she had been treating J.M. since March 2014. She testified to meeting with him roughly twenty times during his commitment. She gave several examples of J.M.'s violent behavior—charging doors, attempting to grab staff through the trap door in his cell door, spitting at staff, and throwing things. She also stated that he responded well to the treatment and that if he were taken off of his medication, he would "become more violent." Waedekin additionally addressed J.M.'s belief that he was "Lord" and explained that "he's asked me to have all of his records at DOC changed to have [Lord God Jesus Christ Omnipotent] as his name." She further testified that she had diagnosed him in the range of schizoaffective disorder.

¶7 J.M. took the stand to testify on his own behalf. He claimed that he had calmed down, and the instances Waedekin described had happened when he was "still very angry." He believed he was not mentally ill or dangerous and that the experts' conclusions were "opinions, not facts." Furthermore, J.M. confirmed that he was "Jesus the Lord" and elaborated on this belief claiming, "I was born from the house of the Lord, it's the house that I came from and that's who I am." He also claimed to have the ability to damn people.

¶8 Pursuant to WIS. STAT. § 51.20, the jury was instructed to determine (1) whether J.M. was mentally ill, (2) whether J.M. was a danger to himself or others, and (3) whether J.M. was a proper subject for treatment. Following deliberation, the jury answered all three questions in the affirmative. Based on these findings, the circuit court ordered that J.M.'s commitment be extended. J.M. then filed a motion for a new trial based on ineffective assistance of counsel or alternatively, in the interests of justice. The circuit court denied the motion without a hearing.[2] J.M. appeals.

Discussion

¶9 J.M. argues that Marone's failure to secure him civilian clothes was deficient performance and prejudiced him. Although Marone made an effort to procure better clothing, J.M. insists that she should have done more. He claims that Marone "could have obtained sufficiently presentable civilian clothes for J.M. at modest cost from Goodwill … or other community resources." Even if Marone was not required to provide civilian clothes, J.M. insists that she should at least have requested a curative jury instruction.

¶10 J.M. had a statutory right to counsel in this proceeding under WIS. STAT. § 51.20(3). He argues that the Wisconsin Supreme Court has implicitly found that this statutory right includes a right to effective assistance of counsel,

[2] J.M. cites the general standard for an evidentiary hearing on a postconviction motion but does not develop a separate argument regarding his entitlement to such a hearing. Under this standard, J.M. is not entitled to an evidentiary hearing because his motion for a new trial does not raise a valid claim that his counsel was constitutionally deficient. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334 (holding that a defendant is not entitled to an evidentiary hearing unless his or her petition "raises sufficient facts that, if true, show that the defendant is entitled to relief").

citing ***Winnebago Cty. v. Christopher S.***, 2016 WI 1, ¶4, 366 Wis. 2d 1, 878 N.W.2d 109. The court did not so hold, however. It described the ineffective assistance of counsel claim raised on appeal and indicated the court did not need to reach the issue in that case. ***Id.*** However, the Supreme Court has held in the context of termination of parental rights proceedings that "where the legislature provides the right to be 'represented by counsel' or represented by 'appointed counsel,' the legislature intended that right to include the *effective* assistance of counsel." ***In Interest of M.D.(S)***, 168 Wis. 2d 995, 1004-05, 485 N.W. 2d 52 (1992). Though J.M. cites no other case law establishing the right to an ineffective assistance of counsel claim, the State does not contest the issue in this case. This court will assume without deciding such a right exists for the purposes of this appeal.

¶11 Whether counsel was ineffective is a mixed question of fact and law: findings of fact will not be disturbed unless clearly erroneous, but the ultimate conclusion as to whether counsel was ineffective is a question of law that we review de novo. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994).

¶12 Ineffective-assistance-of-counsel claims are evaluated under the two-prong ***Strickland*** test. J.M. must show both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, J.M. must point to specific acts or omissions by counsel that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id.*** To prove that Marone's performance prejudiced him, J.M. must demonstrate that her errors were

so serious that, but for the errors, "there is a reasonable probability that ... the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** We conclude that counsel's performance was not deficient, and even if it was, J.M. suffered no prejudice.

¶13 J.M.'s deficient performance argument relies principally on federal case law holding that criminal defendants cannot be compelled to wear prison garb. In ***Hernandez v. Beto***, 443 F.2d 634 (5th Cir. 1971), the Fifth Circuit Court of Appeals granted a writ of habeas corpus and overturned a criminal conviction where a defendant was compelled to wear prison garb. ***Id.*** at 635. The court held that trying the defendant in his prison garb violated his constitutional right to a presumption of innocence. ***Id.*** at 636-37; *see also* ***Estelle v. Williams***, 425 U.S. 501, 506-508 (discussing ***Hernandez*** and other cases explaining that these decisions "recognize[] that the particular evil proscribed is compelling a defendant, against his will, to be tried in jail attire" and the decisions do not "adopt a *per se* rule invalidating all convictions where a defendant had appeared in identifiable prison clothes").

¶14 J.M. cites no cases in Wisconsin or otherwise holding what he argues here—that counsel in a mental health commitment proceeding must provide civilian clothes (including at his or her own expense if necessary), and failure to do so is error. No controlling precedent is called to our attention that creates such an obligation. Construed most charitably towards J.M., the law is unsettled. And "[w]hen the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance." ***State v. Jackson,*** 2011 WI App 63, ¶10, 333 Wis. 2d 665, 799 N.W.2d 461. Accordingly, counsel's

failure to personally provide J.M. with civilian clothes was not "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690.

¶15 If there is no established affirmative duty for counsel to ensure her client is not wearing prison garb in a mental health commitment proceeding, it follows that Marone's failure to pursue a curative limiting instruction was also not constitutionally deficient. J.M. again cites no authority for the constitutionally required duty it purports to impose on Marone. Moreover, Marone did draw attention to the issue during voir dire—obtaining the assurances of jurors that this would not color their judgment—and again in her opening statement.

¶16 Even if Marone's performance was deficient, J.M.'s claim still fails because her actions did not prejudice J.M. In order to extend J.M.'s commitment, the County had to prove that J.M. was mentally ill, a danger to himself or others, and was a proper subject for treatment. *See* WIS. STAT. § 51.20. The evidence the County presented was overwhelming. Bales and Waedekin testified that J.M. suffered from mental illness, responded to treatment, and was a danger to himself and others. Both testified about their observations of J.M.'s erratic and sometimes violent behavior. And J.M.'s own testimony simply reinforced the experts' conclusions. He continued to assert his divinity as "Jesus and the Lord," and claimed to have the ability to damn people for "doing something that was wrong," all the while insisting he did not have any mental illness. His own testimony was far more detrimental to his case than what he was wearing. Furthermore, as already noted, each jury member indicated J.M.'s status as a prisoner would not affect his or her judgment. Accordingly, we are not persuaded that J.M. appearing in civilian clothes would have created a reasonable probability of a different result.

¶17 Finally, J.M. asks for a new trial in the interests of justice. We may reverse the order extending his commitment "if it appears from the record that the real controversy has not been fully tried, or … that justice has for any reason miscarried." WIS. STAT. § 752.35. Such power, however, is reserved for exceptional cases. ***State v. Bannister***, 2007 WI 86, ¶42, 302 Wis. 2d 158, 734 N.W.2d 892. This is not such an exceptional case. The record reveals that the case was fully and fairly tried.

By the Court.—Orders affirmed

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