COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP366-CR **Cir. Ct. No. 2003CF7037**

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

STATE OF WISCONSIN,

PLAINTIFF–RESPONDENT,

V.

JAMES DARNELL TILLMAN,

DEFENDANT–APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA LAMELAS, Judge. *Affirmed*.

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

¶1 PER CURIAM. James Darnell Tillman pled guilty to one count of first-degree intentional homicide. *See* WIS. STAT. § 940.01(1)(a) (2003-04). He was sentenced to life in prison with eligibility to petition for supervised release on June 3, 2040, thirty-five years from the date of sentencing. He appeals from a

corrected judgment of conviction[1] and an order denying his postconviction motion to accelerate the date on which he may petition for supervised release. He contends that his trial attorney was ineffective by repeatedly adjourning the case, delaying the start of his sentence and thereby delaying his eligibility for release. Because Tillman failed to allege facts sufficient to show that his attorney's performance was prejudicially deficient, the circuit court properly exercised discretion in denying his motion without a hearing. We affirm.

Background

¶2 On December 8, 2003, Tillman was taken into custody as a suspect in a homicide. He remained incarcerated throughout the pendency of the proceedings.

¶3 Tillman's first scheduled trial date of April 12, 2004 was adjourned until May 3 on the circuit court's own motion. On April 5, the circuit court granted the defense request to adjourn the trial until July 6 because Tillman's lawyer, a staff attorney in the state public defender's office, was on medical leave. On June 4, with his attorney back from leave, Tillman appeared and entered a provisional plea of not guilty by reason of mental disease or defect pending receipt of a report from his psychiatric expert. Defense counsel explained that during his medical leave another member of the staff had retained the expert but had not provided that expert with necessary materials for preparation of a report. At the

[1] The original judgment of conviction erroneously recited June 30, 2040 as the date on which Tillman may petition for supervised release. The circuit court issued an amended judgment of conviction to correctly reflect that Tillman's petition eligibility date is June 3, 2040.

State's request, the court appointed a psychiatrist to examine Tillman and set June 30, 2004 for return of the report.

¶4 Tillman's special plea was not supported by the psychiatric examination. On June 30, 2004, counsel requested the opportunity to explore an alternative theory to support the plea, namely "red rage," described as a dissociative psychosis in which a patient's rage leads to a fugue state and loss of awareness of subsequent actions. To pursue this defense, Tillman required the services of Dr. Don Dutton, a Canadian professor of sociopsychology. As the circuit court noted in its postconviction order, the need for Dr. Dutton's involvement presented practical difficulties because Dr. Dutton is virtually unique in his expertise on this issue, he is based outside of the country, and his availability is limited due to his teaching and lecturing. Between June 30, 2004 and February 7, 2005, the defense appeared at a series of court hearings to describe its progress and its difficulties in contacting, retaining, and involving Dr. Dutton.[2]

¶5 "Red rage" did not prove a viable defense. On February 7, 2005, Tillman withdrew his special plea. The case remained set for trial.

¶6 On the trial date of April 4, 2005, Tillman appeared and told the circuit court that he wanted to fire his lawyer. Following a colloquy, the court

[2] At one such hearing, Tillman's attorney responded to demands from the court by stating that he believed he was providing ineffective assistance of counsel. We do not take lightly a statement of this nature, but neither do we blindly accept concessions on matters of law. *See* ***State v. Lord***, 2006 WI 122, ¶6, 297 Wis. 2d 592, 723 N.W.2d 425. Even a neutral witness may not testify as an expert that an attorney rendered ineffective assistance of counsel. ***State v. McDowell***, 2003 WI App 168 ¶62 n.20, 266 Wis. 2d 599, 669 N.W.2d 204, *aff'd*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500.

found that Tillman was trying to delay the start of the trial. The court denied Tillman's request, found him not competent to represent himself, and ordered him to proceed with his current attorney. Later that day, Tillman entered a guilty plea to first-degree intentional homicide.

¶7 The State requested a presentence report that did not include a sentencing recommendation, a request joined by the defense. The court scheduled sentencing for May 23, 2005 and ordered that the presentence report be submitted on May 13, 2005.

¶8 On May 23, 2005, defense counsel requested a week's adjournment of the sentencing because the presentence report had not been submitted until May 19,[3] leaving inadequate time to review the report and prepare a response. The court rescheduled the sentencing for June 3.

¶9 On June 3, 2005, Tillman was sentenced to life in prison. The only issue in contention was when, if at all, he would be eligible to petition for supervised release. The court granted eligibility, setting the petition date at "thirty-five years from today's date … roughly at the age of 75 that's how I calculated this…."

¶10 Tillman moved for postconviction relief. He asserted that his trial attorney was ineffective by delaying resolution of the case, which in turn delayed the start of his sentence. He claimed that but for these delays, he would likely have been eligible to petition for release at an earlier date. He asked the circuit

[3] Tillman's counsel stated that he received the presentence report on "Thursday." We take judicial notice that the Thursday preceding May 23, 2005 was May 19.

court to change the date on which he could petition for release from June 3, 2040 to a date at least 543 days earlier in order to give him credit for presentence detention.

¶11 The circuit court denied the motion without a hearing. It characterized the progress of the case as including "a determined effort by trial counsel to explore, and the State Public Defender's Office to fund, 'red rage' as the avenue of defense that held hope as the basis for a special plea." The court found that any attempt to determine with precision how the sentence would have been structured had it been imposed on another date would be "simply to speculate." This appeal followed.

Discussion

¶12 Preliminarily, the State contends that Tillman may contest his sentence only by showing a new factor or by asserting that the sentence was unduly harsh or unconscionable. We reject this contention. A defendant may seek resentencing grounded on the ineffectiveness of trial counsel. *See* ***State v. Pote***, 2003 WI App 31, ¶2, 260 Wis. 2d 426, 659 N.W.2d 82; *see also* ***State v. Scott***, 230 Wis. 2d 643, 647-48, 602 N.W.2d 296 (Ct. App. 1999).

¶13 Similarly, we reject the State's position that a sentence modification motion may only be brought pursuant to WIS. STAT. § 973.19 (2005-06)[4] or the court's inherent authority. WISCONSIN STAT. RULE 809.30 is a third method for

[4] All further references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

seeking sentence modification. ***State v. Walker***, 2006 WI 82, ¶30, 292 Wis. 2d 326, 716 N.W.2d 498.

¶14 Although Tillman did not invoke with specificity the statutory authority for his postconviction motion, he ordered transcripts and otherwise proceeded in conformity with the requirements of WIS. STAT. RULE 809.30. We conclude that Tillman properly brought his claim before the circuit court. We turn to the merits.

¶15 Tillman claims both that his attorney was ineffective and that the trial court improperly denied this claim without a hearing. We must apply two standards of review to the issues he presents.

¶16 We review a circuit court's decision to deny a postconviction motion without first holding a hearing under the standard set out in ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the motion alleges sufficient material facts to entitle the defendant to relief is a question of law that we review *de novo*. ***Id.***, ¶9. If, however, the "motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.*** We review this determination under the deferential erroneous exercise of discretion standard. ***Id.***

¶17 We review claims of ineffective assistance of counsel under the two-prong standard of ***Strickland v. Washington***, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient and that the deficiency was prejudicial. ***Allen***, 274 Wis. 2d 568, ¶26. "'[B]oth the performance and prejudice components … are mixed questions of law and fact." ***State v. Pitsch***, 124 Wis. 2d 628, 633–34, 369

N.W.2d 711 (1985). (Citation omitted) The circuit court's findings of fact will not be overturned unless clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Whether counsel's performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review *de novo*. ***Id.*** at 128.

¶18 To prove deficiency, Tillman must show that the delays in resolving his case constituted attorney error so serious that his lawyer "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***Allen***, 274 Wis. 2d 568, ¶26. (Citation omitted). To prove prejudice, Tillman must show that his attorney's error had an actual adverse effect. *See* ***Pote***, 260 Wis. 2d 426, ¶16. He must demonstrate that but for his attorney's actions and omissions, he would have been sentenced sooner, and would have been granted a petition eligibility date thirty-five years thereafter. *See* ***id.*** We may begin our review by examining either "deficient performance" or "prejudice" first. *See* ***id.***, ¶14. If Tillman's showing is inadequate on one component, we need not address the other. *See* ***id.*** Tillman must show both deficiency and prejudice to be afforded relief. *See* ***Allen***, 274 Wis. 2d 568, ¶26.

¶19 We look first at Tillman's claim that he was prejudiced by the pre-plea adjournments from April 5, 2004, through February 7, 2005, occasioned by his attorney's medical leave and by pursuit of a "red rage" defense. Tillman posits that defense counsel should have withdrawn rather than returned after taking medical leave; this would have permitted another attorney to take over the case; the new attorney would have hastened the steps necessary to assist Dr. Dutton in conducting his assessment; and the defense of "red rage" would have been expeditiously eliminated. Tillman argues that the "likely" result would have been an earlier sentencing with full credit for all days in custody. Tillman's showing of

prejudice rests only on conclusory allegations and not at all on "facts that can be proven." *See* ***Allen***, 274 Wis. 2d 568, ¶¶20, 24.

¶20 No provable facts show that if Tillman's attorney had withdrawn, a successor attorney would have taken any particular steps or secured a more prompt resolution. No provable facts show that Tillman would have entered a guilty plea if represented by another attorney. No provable facts show that Tillman would have entered a guilty plea more quickly had the "red rage" defense been eliminated earlier. The case was in trial posture for several months after "red rage" proved untenable. On the day of trial, with "red rage" long abandoned, the circuit court made a finding that Tillman's decision to fire his attorney was an attempt to delay resolution of the case.

¶21 No provable facts show that Tillman's sentence would have included an earlier petition eligibility date if the sentence had been imposed earlier. In its postconviction order, the circuit court stressed that many factors were in play at sentencing. The court took particular note of its decision to key Tillman's eligibility for release to his reaching the age of roughly seventy-five. The circuit court ultimately could not find that petition eligibility would have been thirty-five years after sentencing had the sentence been imposed earlier.

¶22 In sum, nothing but speculation supports Tillman's allegation of prejudice from pre-plea adjournments. The circuit court appropriately exercised its discretion in denying him a hearing on these allegations.

¶23 We look separately at Tillman's claim that his trial attorney performed deficiently by requesting a week's adjournment of the sentencing hearing in order to respond adequately to the presentence report. The report was submitted later than ordered and counsel requested a week's continuance to

compensate for the days lost. This course of conduct does not fall '"outside the range of professionally competent assistance."' ***State v. Marshall***, 2002 WI App 73, ¶5, 251 Wis. 2d 408, 642 N.W.2d 571 (citation omitted). Indeed, this court has found trial counsel ineffective for not requesting an adjournment to review a presentence report. ***State v. Anderson***, 222 Wis. 2d 403, 409–12, 588 N.W.2d 75 (Ct. App. 1998). The opportunity to review and refute the report safeguards the defendant's right to be sentenced on the basis of accurate information. ***Id.*** at 408. Although Tillman may now believe that his attorney's decision merely delayed his sentencing date and did not result in a benefit, pursuit of a failed strategy does not render the representation deficient. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979).

¶24 The circuit court did not erroneously exercise its discretion in denying Tillman's ineffective assistance claim without a hearing. Nothing Tillman submitted warranted a hearing in this matter.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).