COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1760-CR **Cir. Ct. No. 00-CF-87**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT G. CULVER,

DEFENDANT-APPELLANT.

APPEAL from an order[1] of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Reversed and cause remanded with directions*.

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 SNYDER, J. Kurt G. Culver appeals from a judgment of conviction for possession with intent to deliver marijuana (500 grams or less), contrary to

[1] Culver appeals both his judgment of conviction and the order denying his motion for postconviction relief. However, because we are reversing the order and remanding to the trial court to make findings of fact, we do not at this stage address the judgment of conviction.

WIS. STAT. §§ 961.14(4)(t) and 961.41(1m)(h)1 and an order denying his motion for postconviction relief. Culver argues that he received ineffective assistance of counsel when his trial attorney failed to request the submission of a lesser-included offense. We conclude that the trial court's findings about trial counsel's and Culver's discussions, or lack thereof, regarding the submission of a lesser-included offense are too speculative and imprecise to resolve this issue. We therefore reverse the order of the trial court and remand this matter to the trial court for proceedings consistent with this opinion.

FACTS

¶2 On February 18, 2000, Culver was charged with possession with intent to deliver marijuana, 500 grams or less, as a drug repeater, contrary to WIS. STAT. §§ 961.14(4)(t), 961.41(1m)(h)1 and 961.48(2). On June 20, 2000, at trial, Culver testified on his own behalf; he admitted that he purchased the marijuana, but denied that he had any intent to sell the drug. He instead claimed that the marijuana was for his own personal use. A jury found Culver guilty of the charge of possession with intent to deliver.

¶3 On September 28, 2000, Culver was sentenced to three years' imprisonment, followed by a three-year term of extended supervision. The judgment of conviction was entered on October 2, 2000.

¶4 On April 16, 2001, Culver filed a postconviction motion seeking a new trial because of ineffective assistance of counsel. On June 14, 2001, the trial court denied this motion. Culver appeals.

DISCUSSION

¶5 Culver has a Sixth Amendment right to the effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984); ***State v. Eckert***, 203 Wis. 2d 497, 506, 553 N.W.2d 539 (Ct. App. 1996). In order to prove he has not received effective assistance of counsel, Culver must show two things: (1) his lawyer's performance was deficient; and (2) this deficient performance prejudiced his defense. ***Eckert***, 203 Wis. 2d at 506. The issues of performance and prejudice present mixed questions of law and fact. ***Id***. at 507. Findings of historical fact by the trial court will not be upset unless they are clearly erroneous. ***Id***.

¶6 On April 16, 2001, Culver filed a postconviction motion asking for a new trial based upon ineffective assistance of counsel. Culver claimed that his counsel rendered deficient performance because (1) counsel failed to consult Culver about the availability of the lesser-included offense of simple possession of marijuana, and (2) counsel failed to ask the court to submit the lesser-included offense of possession of marijuana to the jury. While an all-or-nothing, go-for-broke strategy can be reasonable in rejecting the submission of a lesser-included offense if done in accordance with trial strategy, ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-32, 246 Wis. 2d 648, 630 N.W.2d 752, Culver claims that he was never consulted about this issue and the submission of a lesser-included offense was completely consistent with his trial strategy.

¶7 At the postconviction hearing, Culver's trial counsel, Brian Mares, testified; the following exchange took place between Mares and Culver's postconviction defense counsel:

> Q: Okay. Mr. Mares, as you sit here today, do you have a present recollection whether at any time up to the commencement of the jury trial you had considered

> requesting a lesser included offense as part of your trial strategy?
>
> A: I don't recall specifically discussing with [Culver] requesting a lesser included offense. The discussions up to the date of trial were basically this is an alternative charge that we would work with the DA on. I don't recall saying to him, you know, we can also request it of the jury. I don't -- I simply recall discussing the two options to argue for the jury.
>
> ....
>
> Q: Okay. From the time the trial commenced up until the point that you've just mentioned -- the conclusion of the jury instructions conference with the Judge -- do you have a present recollection whether you consulted with Mr. Culver about a lesser included offense at any time during that interval?
>
> A: I went through my notes and I wracked my brain. I don't recall ever discussing with him once the trial started the jury instructions.
>
> Q: Now, when you say you referred to your notes, are you referring to the notes that you kept in your file as part of the preparation of this case?
>
> A: Yes. I tried to write down any discussions or things that I think are going to come up later that I'm going to be asked, "did you discuss this, did you not discuss that," and in reviewing those notes, I couldn't find any indication that I had discussed that.

Mares was then cross-examined by the prosecutor:

> Q: At some point, did you consciously kind of make a decision to go all or nothing and not --
>
> A: I don't recall ever making that decision consciously, whether I did that day or not. I don't remember doing that and I don't think I would have done that without discussing it with my client and I don't recall doing that. I can't say that I did or didn't. I don't recall as I sit here today doing that.

Both Culver and his father testified that a lesser-included offense option had never been discussed during Culver's conferences with his attorney.

¶8 The trial court then stated:

> The whole issue here was whether or not he possessed it with the intent to deliver. And as Mr. Mares indicated all along, he and [Culver] were willing to plead to a charge of possession if the State would amend this count to simple possession. State apparently refused. Now, Mr. Mares, in questioning, when he was asked do you recall whether this was a specific decision on your part to go for all or nothing, he didn't recall yes or no whether he had thought about that either before the trial commenced or after the trial was completed and before the verdict was received and the instructions put together because the instructions obviously were put together after all the testimony was presented.
>
> But, in light of his client's belief, in light of their efforts to enter a plea just to possession, *it's very conceivable* that a decision was made at some point in time that we will go for all or nothing....
>
> Now, again, Mr. Mares doesn't recall and ... we're almost a year out to the date of trial. He doesn't recall if he discussed with Mr. Culver or not a third option of requesting a lesser included offense of just to simple possession. Mr. Culver seems to recall that that was never discussed, but Mr. Mares does not recall if he discussed it or not.
>
> ....
>
> Based upon all of that and the fact that Mr. Mares can't specifically recall if he did discuss this with Mr. Culver prior to the instructions being given and can't specifically recall whether he made a decision that day that he would not ask for it or not discuss it with his client, *the Court feels that it's just as conceivable* that he did make a specific decision that they were going to go for all or nothing and may even had discussed this with Mr. Culver, although Mr. Culver doesn't recall that. (Emphasis added.)

¶9 The trial court therefore found that it was conceivable that Culver and Mares discussed the lesser-included offense option. Finding that something is conceivable is not finding a fact. A conceivability is merely a possibility or a likelihood that something happened, not a reality. Because this is not a finding of

fact but pure conjecture, we must remand this matter for the trial court to make specific and precise findings of fact on this issue.

CONCLUSION

¶10 We conclude that the trial court's findings about Mares's and Culver's deliberations, or lack thereof, regarding the submission of a lesser-included offense are too speculative and vague to resolve this issue. We therefore reverse the order of the trial court and remand this matter to the trial court for proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.