COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 2, 1996

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(1), STATS.

NOTICE

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No. 95-2832-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JIMMY LEE HENSLEY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Jimmy Lee Hensley appeals a judgment of conviction and an order denying his motion to withdraw his pleas and obtain a new trial based upon ineffective assistance of trial counsel. A jury found Hensley guilty of nine felony counts: two counts of armed robbery, three counts of false imprisonment, two counts of taking hostages and releasing without bodily harm, and two counts of first-degree recklessly endangering safety. Because we conclude Hensley received effective assistance of counsel, the judgment and order are affirmed.

After learning that his sister had been sexually assaulted, Hensley escaped from a minimum security prison and the nine felony charges resulted from his efforts to reach his sister. These charges consisted of taking various cars and holding the occupants hostage. All the hostages were released unharmed. At the urging of his trial counsel, Hensley pled not guilty by reason of mental disease or defect and did not testify at the jury trial. Because his pleas were not joined with pleas of not guilty, only the matter of his mental capacity was tried to the jury.[1] The jury concluded that Hensley did not have a mental disease at the time he committed the charged crimes and the trial court found him guilty of all nine counts.

Before trial, Hensley became romantically obsessed with his female attorney, Assistant State Public Defender Kelly Holck. Hensley contends that the trial court erred by not allowing him to withdraw his pleas and obtain a new trial due to inadequate assistance of defense counsel after Holck failed to withdraw from further representation of him after learning from the defense psychologist that Hensley's romantic obsession impaired his ability to assist in his defense as long as she remained his attorney. Following an evidentiary hearing, the trial court rejected his motion and this appeal followed. Importantly, we observe that on appeal, Hensley does not pursue the issue whether he was incompetent at the time of his pleas or trial.

On May 5, 1994, Holck received a letter from Hensley along with two drawings that he called "self-portrait" and "father." These drawings had several sexual connotations. In the letter Hensley wrote:

> You should have been an angel not a lawyer. Because just your beauty and presents (sic) is enough to tame a lion. ... You know I look forward to our meeting and I hate them at the same time. Because I look across the table at your beauty. And I think of things that might have been in my life.

[1] Section 971.06(1)(d), STATS., provides that a plea of not guilty by mental disease "may be joined with a plea of not guilty. If it is not so joined, this plea admits that but for lack of mental capacity the defendant committed all the essential elements of the offense charged in the indictment, information or complaint."

Because of Hensley's special pleas, he was examined by two mental health professionals, Drs. John Laney and Gary Cowan. Hensley's argument revolves on two sentences in Laney's report, received in early June 1994:

> With respect to [Hensley's] ability to assist in his own defense, his psychosexual development impairs his ability to do so with the female attorney. He is enamored of her and cannot concentrate, much like an adolescent boy not paying attention in class because of his thoughts about a girl in the room.

Hensley relies on this quoted language and the romantic letter with the drawings he sent Holck as support for his contention that she had reason to doubt Hensley's competency and, therefore, her continued representation of him constituted ineffective assistance of counsel as a matter of law.

The right to effective assistance of trial counsel is guaranteed by the Sixth Amendment to the United States Constitution and art. I, § 7, of the Wisconsin Constitution. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); ***State v. Wirts,*** 176 Wis.2d 174, 180, 500 N.W.2d 317, 318 (Ct. App. 1993). These guarantees are intended to ensure that criminal defendants receive fair trials. *See* ***Lockhart v. Fretwell,*** 506 U.S. 364, 368-69 (1993).

To prevail on appeal, Hensley must prove that his trial counsel's performance was well below the norm of competence in the profession, and that this caused prejudice. ***Strickland,*** 466 U.S. at 687-88. Under our standards of review, the performance and prejudice components of ***Strickland*** are mixed questions of law and fact. ***Id.*** at 698. Findings of historic or evidentiary fact may not be set aside unless they are clearly erroneous. ***State v. Pitsch,*** 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985); § 805.17(2), STATS. The questions whether counsel's behavior was deficient and whether it was prejudicial are questions of law, and we do not give deference to decisions of the trial court. ***Pitsch,*** 124 Wis.2d at 634, 369 N.W.2d at 715.

When reviewing defense counsel's performance, this court must address not what is prudent or appropriate, but only what is constitutionally

compelled. ***United States v. Cronic,*** 466 U.S. 648, 665 n.38 (1984). As stated in ***Strickland***, the appellate court

> must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Id. at 690.

If trial defense counsel had a bona fide reason to doubt Hensley's competency and failed to raise the issue with the trial court, counsel's representation was ineffective under the state and federal constitutions. *See* ***State v. Haskins,*** 139 Wis.2d 257, 262-63, 407 N.W.2d 309, 311 (Ct. App. 1987). The existence of a reason to doubt competency is a constitutional fact, reviewed de novo. ***Id.*** at 265, 407 N.W.2d at 312. If we conclude that Hensley's trial counsel rendered ineffective assistance in this regard, then we must remand the case to the trial court so it can determine whether a meaningful nunc pro tunc inquiry can be made into the question whether Hensley was incompetent to proceed. *See* ***id.*** at 267, 407 N.W.2d at 313. Hensley claims that his lack of competency is so obvious, a retrospective competency determination is

unnecessary. The State disagrees because Hensley's actual competency was not the primary focus at the postconviction ***Machner***[2] hearing.

The question before this court is whether Laney's two-sentence observation regarding Hensley's romantic obsession (psychosexual development) and the romantic letter and drawings generated a reason for Holck to doubt his competency as a matter of law and, therefore, her decision not to withdraw her representation constituted ineffective assistance.

Unusual behavior by a defendant does not automatically translate into a reason to doubt a defendant's competency. Defense attorneys must be permitted to exercise their professional judgment, assess the totality of the circumstances and determine for themselves whether there is reason to doubt their client's competency. *See* ***Haskins,*** 139 Wis.2d at 265-66, 407 N.W.2d at 312-13 (question whether there is reason to doubt defendant's competency is resolved by examining all relevant facts of record). Consistent with ***Strickland,*** in any challenge to trial counsel's effectiveness, counsel's decision-making must be directly assessed for professional reasonableness in all the circumstances, applying great deference to counsel's judgments. ***Id.***, 466 U.S. at 691.

Holck testified that she first learned of Hensley's romantic interests when she received his letter on May 5, 1994. After discussing this matter with her supervising attorney and asking for permission to withdraw from the case, she elected to take her supervisor's advice and discuss the matter with Hensley. Accompanied by her investigator, Walter Gayan, Holck talked to Hensley on May 9, 1994, and "laid it on the line for him just what exactly was involved and my position and his position and the duties that I had to perform, and we did tell him that if he, you know, wasn't able to deal with me in the professional manner, that he could have another attorney." She also stated, "we told him I was an attorney, I was a professional, I had certain obligations I had to fulfill in that role ... and that I had to exercise independent judgment; that if he was going to have problems participating in his defense, asking me questions, being objectionable, listening to my opinions as a lawyer and not as somebody he had feelings for ... then I couldn't represent him. We made that very clear. Like I said, we were up there about an hour, and we did tell him that if he wished another attorney, we would certainly ... appoint one for him."

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

Hensley thought about the matter and then declined the offer to appoint new counsel. He told Holck that he understood her role as his advocate and that it was in his best interest to maintain a professional, not personal, relationship with her. After this conversation, Holck made greater use of Gayan when communicating with Hensley "just to make sure that the boundaries were set." Gayan also testified that Hensley told him "he would be able to keep his feelings to the side while we were going through this process, and that it would not interfere with our representation of him."

Gayan testified that he saw nothing to suggest that Hensley's competency to plead or to stand trial was adversely affected by Holck's continued representation. He observed that Hensley acted in an understanding and comprehensible manner at all relevant stages of the criminal proceedings. He stated that Hensley was very bright, understood the nature of the judicial proceedings, read all relevant documents, asked intelligent questions and actively participated in the discussions pertaining to his pleas and his defense. After discussion of the available options, Hensley decided to enter his special pleas and not testify. Additionally, he observed that Hensley was not afraid to contradict Holck on matters pertaining to his defense, citing as an example Hensley's insistence that they exercise a peremptory strike against a particular juror.

At the ***Machner*** hearing, Holck stated:

> The way I interpreted Dr. Laney's short ... statement there in the recommendations is not that Jimmy Lee was incompetent to assist in his defense. He understood my position, the judge's position, prosecution, what he was charged with, the crimes. And Mr. Laney had said his ability was impaired like a school boy. School boys still get their homework done. And I didn't say--It doesn't say in there that it prohibited him from concentrating or anything like that. I believe we addressed the issue, and Mr. Hensley was able to participate in his defense.
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> ....
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> I'm an experienced trial lawyer. I do this all the time every day with a lot of people. I know when people are participating and when people don't care and just

> want me to take the lead. Jimmy Lee cared. He asked a lot of questions, he was actively participating in his defense, more so than almost anyone I've had.

Additionally, Holck had received Cowan's July 11, 1994, psychiatric report pronouncing Hensley competent to stand trial. Cowan performed his psychiatric evaluation of Hensley approximately five weeks after Laney performed his psychological evaluation. Under these circumstances, Holck concluded that she had no reason to doubt Hensley's competency.

At the ***Machner*** hearing, Hensley portrayed himself as romantically obsessed with Holck and, in effect, did whatever she told him to do. However, the trial court rejected his claim when it observed:

> The court further finds that defendant's claim that he was not provided an adequate opportunity to assist in his own defense because of his infatuation with his attorney is not persuasive in light of the attorney's testimony. While it is clear that [Hensley] was by his own admission enamored of his counsel and was to some extent distracted by that factor, the evidence indicates again that it was a situation on which his attorney confronted her client and made clear to him the necessity of maintaining a professional relationship in this case and that the defendant appeared to understand that necessity to the point of resolving this problem. Defense counsel testified that after that session the defendant [began] to become more focused on the case and his defense and certainly became involved in discussing the case and in preparing for trial.

Under our standard of review, we defer to the trial court's assessment of Hensley's credibility. Trial courts, not appellate courts, judge the credibility of witnesses and the weight of their testimony. ***Artis-Wergin v. Artis-Wergin,*** 151 Wis.2d 445, 450, 444 N.W.2d 750, 752 (Ct. App. 1989).

Considering all these factors, we agree with the trial court that it was reasonable for Holck to determine there was no reason to doubt her client's competency to enter his special pleas and to litigate only the matter of his mental capacity at the time of the committed crimes. It was reasonable for her to conclude that Hensley was able to assist in his defense, and it was not necessary to withdraw from representing Hensley. The order denying his postconviction motion and judgment of conviction are affirmed.

By the Court.—Judgment and order affirmed.

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