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DISTRICT III

April 6, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2019AP824 State of Wisconsin v. Eugene Theodore Gilbert
(L. C. No. 2007CF159)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Eugene Gilbert, pro se, appeals an order denying his WIS. STAT. § 974.06 (2019-20),[1] motion for postconviction relief. Gilbert argues he is entitled to resentencing based on the ineffective assistance of his trial counsel. Gilbert also claims that his postconviction counsel was

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

ineffective when pursuing this underlying § 974.06 motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Gilbert's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21.

In August 2007, the State charged Gilbert with burglary (battery committed within enclosure); robbery with use of force; criminal trespass; and aggravated battery of an elderly person. The charges arose from allegations that Gilbert broke into the home of a then seventy-nine-year-old woman and physically assaulted her before stealing her purse. The victim suffered a broken arm, broken ribs, and bruises as a result of the attack. In exchange for his no-contest pleas to the burglary and robbery charges, the State agreed to recommend the remaining counts be dismissed and read in and to stand silent at sentencing. Gilbert remained free to argue. The presentence investigation report ("PSI") recommended consecutive sentences totaling fourteen years' initial confinement and eight years' extended supervision, and defense counsel recommended concurrent sentences with no more than four years' initial confinement. The circuit court imposed the maximum possible consecutive sentences resulting in an aggregate thirty-year term, consisting of twenty years' initial confinement and ten years' extended supervision. Gilbert did not pursue a direct appeal under WIS. STAT. RULE 809.30.

Ten years after sentencing, Gilbert, by counsel, filed a WIS. STAT. § 974.06 motion for resentencing, alleging that his trial counsel was ineffective at the sentencing hearing. Gilbert recounted that as a result of his trial counsel's professional misconduct, counsel's license was revoked in 2014. Gilbert acknowledged that counsel's disciplinary issues were not tied to Gilbert's case, but he argued that "an examination of [counsel's] sentencing advocacy raises questions about [his] ability to zealously represent Gilbert." Gilbert maintained that his trial counsel "highlighted the severity of the crime and painted Gilbert in an exceptionally negative

light," leaving Gilbert "essentially without counsel." Although trial counsel could not be located for a ***Machner***[2] hearing, the circuit court denied the motion based on the existing record.[3] Gilbert appeals.

This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination as to whether the attorney's performance falls below the constitutional minimum is a question of law this court reviews independently. ***Id.***

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697.

In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. With respect to the prejudice component of the test, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *See* ***id.*** at 693. The defendant cannot meet this burden by merely showing that the error had some conceivable effect on the outcome. ***Id.*** Rather, the defendant must show that there is "a reasonable probability that, but for counsel's unprofessional

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

[3] The Honorable Tim A. Duket presided over Gilbert's sentencing, and the Honorable James A. Morrison presided over Gilbert's postconviction proceeding.

errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. As relevant here, when the counsel in question cannot appear to explain or rebut a defendant's allegations "because of death, insanity, or unavailability for other reasons … [t]he defendant must support his [or her] allegations with corroborating evidence," including "letters from the attorney to the client, transcripts of statements made by the attorney or any other tangible evidence." ***State v. Lukasik***, 115 Wis. 2d 134 140, 340 N.W.2d 62 (Ct. App. 1983).

On appeal, Gilbert argues that his trial counsel performed deficiently at sentencing by repeatedly highlighting the aggravating nature of the crime; by emphasizing the terror, pain and agony experienced by the victim; and by using qualifying language when discussing mitigating factors. Gilbert also faults his counsel for seemingly adopting the recommendation made in the PSI while undermining his own recommendation.

Even if we could assume that trial counsel performed deficiently in representing Gilbert at sentencing, Gilbert fails to establish that this deficiency was prejudicial. In fact, Gilbert concedes "it is difficult to define the harm done in this case." Before imposing a sentence authorized by law, the circuit court considered the seriousness of the offenses; Gilbert's character, including his criminal history; the need to protect the public; and the mitigating factors Gilbert raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court focused on the severity of the crime and Gilbert's character, including his extensive contacts with the criminal justice system, his extensive failures in the system, and his "extensive opportunities to … straighten things around, all for naught." The court considered the mitigating factors raised by Gilbert, but it determined that "growing up in tough circumstances" might explain, but did not excuse, Gilbert's conduct.

Ultimately, the sentence was grounded in punishment, community protection, and deterrence, and it reflected the serious nature of Gilbert's conduct. Gilbert fails to articulate what defense counsel could have done or said differently to persuade the circuit court to impose a lesser sentence. Indeed, Gilbert does not even argue with the sentencing court's reasoning. Gilbert cannot show a reasonable probability of a different sentence had his attorney advocated differently on his behalf.

For the first time on appeal, Gilbert attempts to circumvent the "actual prejudice" bar by asserting that prejudice should be presumed. Gilbert has forfeited that argument by failing to raise it in the circuit court. *See* ***State Farm Mut. Auto Ins. Co. v. Hunt***, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633. We nevertheless reject this argument on its merits.

Our supreme court has identified three "rare" instances in which courts presume prejudice in this context: (1) "when the effective assistance of counsel has been eviscerated by forces unrelated to the actual performance of the defendant's attorney"; (2) "when, although the defendant is actually given counsel, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate"; or (3) when "[i]n other, more limited, circumstances the actual assistance rendered by a particular attorney has been deemed so outside the bounds necessary for effective counsel that a court has presumed prejudice." ***State v. Erickson***, 227 Wis. 2d 758, 770-71, 596 N.W.2d 749 (1999). This case presents none of those scenarios.

Gilbert asserts that his trial counsel's performance was so inadequate at sentencing that it amounted to no representation at all. However, counsel did not "entirely fail[] to subject the prosecution's case to meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648,

659 (1984). Specifically, at the sentencing hearing, counsel made corrections to the PSI; presented statements from Gilbert's supportive sister; noted Gilbert's young age, engagement with counseling, future goals, remorse, and apology to the victim; and he gave the defense's alternative sentence recommendation, which was ten years less initial confinement than the PSI recommended, and which recommendation Gilbert asked him to make. Where, as here, a defendant argues that his lawyer made specific mistakes at sentencing, prejudice is not presumed—rather, the defendant must prove prejudice under the standard rubric used in ineffective assistance of counsel cases. *See* ***Bell v. Cone***, 535 U.S. 685, 696-98 (2002).

Gilbert alternatively contends that his trial counsel breached the plea agreement, giving rise to presumed prejudice. Prejudice is presumed when the State substantially and materially breaches a plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 282, 558 N.W.2d 379 (1997). Here, Gilbert does not allege any breach by the State. Rather, Gilbert states that he understood the language in the plea agreement to mean that his sentencing counsel had a duty to advocate on Gilbert's behalf and make the agreed-upon recommendation to the court. Gilbert thus argues that his counsel's failure to do so constituted a breach of the plea agreement. Counsel's duty to render competent representation, however, does not arise from the plea agreement, but from the federal and state constitutions. *See* U.S. CONST. amend. VI; WIS. CONST. art. 1, § 7. Gilbert's claim that prejudice is presumed on this ground therefore fails.

Finally, Gilbert argues his postconviction counsel was ineffective in pursuing the underlying WIS. STAT. § 974.06 motion for resentencing. Gilbert, however, cannot assert that argument. "Defendants do not have a constitutional right to counsel when mounting collateral attacks upon their convictions." ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 649, 579 N.W.2d 698 (1998). An ineffective assistance of counsel claim is premised upon the right to

counsel. *See* ***Strickland***, 466 U.S. at 686. It follows that there is no right to effective assistance of counsel in a collateral attack context. In other words, Gilbert cannot argue that he was deprived the effective assistance of an attorney he had no constitutional right to in the first place.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals