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DISTRICT IV

June 23, 2022

To:

Hon. Daniel G. Wood
Circuit Court Judge
Electronic Notice

Amanda Lynn Folger
Electronic Notice

Melissa M. Zamzow
Clerk of Circuit Court
Waushara County Courthouse
Electronic Notice

Robert Olmr
Electronic Notice

Christine A. Remington
Electronic Notice

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

2020AP1094-CR State of Wisconsin v. Curtis F. Anderson (L.C. #2017CF190)

Before Kloppenburg, Graham, and Nashold, 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).

Curtis Anderson appeals an order for placement and an order denying his motion for postdisposition relief. He contends that trial counsel was ineffective by failing to advocate for less than the maximum term of commitment. Based on our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).¹ We affirm.

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

The State charged Anderson with eight crimes, including one count of threat to a judge, two counts of threat to a prosecutor, one count of disorderly conduct, and four counts of felony bail jumping, all as a repeater. The parties entered into a plea agreement under which Anderson agreed to plead no contest to one count of disorderly conduct and two counts of felony bail jumping and to be found not guilty by reason of mental disease or defect. The State agreed to dismiss the remaining five counts and the repeater allegations. The parties further agreed that the State would recommend the maximum term of commitment and that Anderson would be free to argue the length of the term. The circuit court accepted the parties' plea agreement.

At Anderson's dispositional hearing, the State sought the maximum term of commitment of six years and two months.² Anderson's counsel informed the circuit court that he had considered recommending five years but had "no real general feeling one way or the other" and that he would leave the length of the term to the court's discretion. Counsel did argue, however, that Anderson should be placed on conditional release rather than in institutional care. The court imposed the maximum term and ordered conditional release.³

Anderson filed a postdisposition motion claiming that trial counsel was ineffective by failing to advocate for less than the maximum term of commitment. The circuit court held a *Machner*⁴ hearing and denied the motion. Based on counsel's testimony at the *Machner*

² On appeal, the State asserts that there is a discrepancy in the record regarding whether the maximum term is six years and two months or six years and three months. The discrepancy is not material to our analysis here.

³ Anderson's conditional release was later revoked.

⁴ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

hearing, the court concluded that counsel was not ineffective and that counsel made a reasonable strategic decision to seek conditional release rather than contest the length of the commitment.

We review claims for ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must establish both (1) that counsel’s performance was deficient and (2) that the defendant was prejudiced by counsel’s deficient performance. *Id.* at 687. Whether counsel was ineffective is a question of law that appellate courts review de novo. *State v. Carter*, 2010 WI 40, ¶19, 324 Wis.2d 640, 782 N.W.2d 695. However, we will uphold the circuit court’s underlying factual findings unless those findings are clearly erroneous. *Id.* Factual findings include “counsel’s conduct and strategy.” *Id.* (internal quotation marks and citation omitted). There is a “strong presumption” that counsel’s conduct “falls within the wide range of reasonable professional assistance.” *Id.*, ¶22 (quoting *Strickland*, 466 U.S. at 689).

Anderson argues that the circuit court erred by imputing a strategic reason to counsel to explain counsel’s failure to advocate for less than the maximum term of commitment when counsel testified at the *Machner* hearing that he had no strategic reason. Anderson further argues that counsel’s failure to advocate for less than the maximum term was per se prejudicial because it was a complete failure to engage in the adversarial process. *See United States v. Cronin*, 466 U.S. 648, 659 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.”).

We reject Anderson’s arguments because we disagree with Anderson that the circuit court erred in determining that counsel had a strategic reason for not advocating for less than the

maximum term of commitment. That determination was a factual finding, *see Carter*, 324 Wis. 2d 640, ¶19, and it was not clearly erroneous. Although counsel initially testified that he had no strategic reason, counsel went on to provide additional testimony supporting the court's finding. Counsel testified that he believed that arguing for a reduced term would have been frivolous under the circumstances of Anderson's case, which included Anderson's violation of bond and court rules and a lack of mitigating factors. Counsel further testified that he did not believe the court would entertain such an argument, but that conditional release was a possibility. Counsel also testified that he was concerned that if he made a frivolous argument and the court rejected it, Anderson would become disruptive and affect his chances for conditional release.

Given the circuit court's factual finding, we conclude that Anderson has failed to show that counsel performed deficiently. Rather, we agree with the circuit court that counsel's strategy at the dispositional hearing fell within the wide range of reasonable professional assistance. Accordingly, Anderson has not shown that counsel was ineffective.

Therefore,

IT IS ORDERED that the circuit court's orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals