OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

December 28, 2022

To:

Hon. Janet C. Protasiewicz
Circuit Court Judge
Electronic Notice

Hon. Carolina Stark
Circuit Court Judge
Electronic Notice

George Christenson
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Lauren Jane Breckenfelder
Assistant State Public Defender
Electronic Notice

John D. Flynn
Electronic Notice

Sara Lynn Shaeffer
Electronic Notice

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

2020AP1273-CR State of Wisconsin v. Frank D. Lay, Jr. (L.C. # 2016CF3251)

Before Brash, C.J., Dugan and White, 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).

Frank D. Lay, Jr., appeals a judgment of conviction and an order denying his postconviction motion.[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1)

[1] The Honorable M. Joseph Donald presided over Lay's plea hearing. The Honorable Carolina Stark presided over the sentencing hearing and entered the judgment of conviction. The Honorable Janet C. Protasiewicz issued the order denying Lay's postconviction motion.

(2019-20).[2] We further conclude that the postconviction court's decision identified and applied the proper legal standards to the relevant facts to reach the correct conclusion. We, therefore, incorporate into this order the postconviction court's decision, which we are attaching, and summarily affirm on that basis. *See* WIS. CT. APP. IOP VI(5)(a) (Nov. 30, 2009) ("When the [circuit] court's decision was based upon a written opinion ... that adequately express[es] the panel's view of the law, the panel may incorporate the [circuit] court's opinion ... or make reference thereto, and affirm on the basis of that opinion.").

Lay was charged with one count of first-degree sexual assault of a child as a party to a crime. Pursuant to plea negotiations, Lay pled guilty to an amended charge of second-degree sexual assault of a child. Trial counsel submitted a plea questionnaire and waiver of rights form that stated the plea offer as follows: "State will rec. prison to the court & defense is free to argue."

At the outset of the plea hearing, the following exchange occurred regarding the State's offer:

> [STATE]: ... At the time of sentencing, the State is not going to make any specific recommendation to the court. State will be free to discuss facts and circumstances but will not make any recommendation. The defense will be free to seek any sentence that it deems proper.
>
> THE COURT: All right, [trial counsel] is that your understanding of the negotiations?
>
> [TRIAL COUNSEL]: It is. I did on the plea form write that the State was recommending prison to the [c]ourt, but if he's not making any recommendation, I would change that.

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

> THE COURT: All right, then Mr. Lay, is that your understanding of the negotiations?
>
> [MR. LAY]: Yes, sir.

No additional action was taken regarding the plea form.

At the sentencing hearing, the following exchange took place:

> THE COURT: Then when Mr. Lay entered his guilty plea to the amended information, the sole count of 2nd degree sexual assault of a child under the age of 16, I believe that the State promised to recommend a sentence of prison but without making any specific recommendation as to amount [sic] of the total length in initial confinement or extended supervision, with defense free to argue; is that correct?
>
> [STATE]: Judge, it was either that or it was that the State would make no recommendation at all; I don't recall which, I have conflicting notes. So either—I can tell you right now that I intent [sic] to make no specific recommendation whatsoever to the [c]ourt, I am going to discuss facts and circumstances and I am going to leave the sentence entirely in your good discretion.
>
> THE COURT: I will note that the plea form indicates that the State will recommend prison to the [c]ourt and defense free to argue.
>
> [Trial Counsel], from the defense position, what was the final negotiation with the State?
>
> [TRIAL COUNSEL]: Well, we went back and forth a couple of times and I can't recall; but now that [the State] said what [it] said, I think that may have been our final agreement was that it wasn't going to be a specific recommendation at all [sic].

The court then had a lengthy discussion about the State's recommendation with Lay:

> THE COURT: ... Mr. Lay, when you entered your guilty plea in July of 2017, what did you think your agreement was with the State about any recommendation the State would make at a sentencing hearing?
>
> [MR. LAY]: Yeah, I agreed to it.
>
> THE COURT: To what?

> [MR. LAY]: With no recommendation.
>
> COURT: [Trial counsel] just had a couple of moments of conversation with Mr. Lay at the defense table. At this time, [the State] is telling me that he wishes to make no specific recommendation, he wishes to present information to the [court] but no recommendation; is that correct…?
>
> [STATE]: That's correct, your Honor.
>
> THE COURT: Does the defense have any objection to that? The plea form says the State will recommend prison to the [c]ourt, the defense free to argue; [the State] is saying at this point he wishes not to make any recommendation, just give information. Does the defense wish [the State] to make a recommendation of prison without any specific numbers or does the defense wish [the State] to make no recommendation at all?
>
> [TRIAL COUNSEL]: We are fine with no recommendation at all.
>
> THE COURT: Mr. Lay, do you agree with that? Is that okay with you if the State doesn't recommend probation, doesn't recommend House of Corrections, doesn't recommend prison, doesn't recommend anything. They can give me information about what happened or prior convictions or things like that, but are you okay with the State not making any recommendation for the sentence?
>
> [MR. LAY]: Yes, ma'am.
>
> THE COURT: Is that what you thought was going to happen today?
>
> [MR. LAY]: No, ma'am.
>
> THE COURT: What did you think was going to happen today for the State's recommendation?
>
> [MR. LAY]: Prison.
>
> THE COURT: Is it okay with you if that changes and they don't recommend anything or do you want them to recommend prison?
>
> [MR. LAY]: I don't want them to recommend prison.

The transcript reflects that Lay later reiterated that it was okay for the State not to make any specific recommendation and that that was what he wanted. After its sentencing remarks,

the State indicated that it would "make no specific recommendation" and asked that the court consider the facts of the case. The defense requested that the circuit court "impose a lengthy sentence of probation[.]" The circuit court rejected the defense's request for probation and sentenced Lay to thirteen years of initial confinement and five years of extended supervision.

Postconviction, Lay sought resentencing or a ***Machner*** hearing on grounds that trial counsel was ineffective at sentencing for failing to take any action regarding "the incorrect prison recommendation on the plea form[.]"[3] Lay argued that "[a]lthough the recommendation was ultimately corrected on the record after a lengthy and drawn-out discussion, the sentencing court still heard that the State wanted prison." The circuit court denied the motion without a hearing.

Lay appeals and renews his argument that he is entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to correct the erroneous and unfavorable plea offer listed on the plea questionnaire form prior to sentencing. However, a postconviction motion alleging ineffective assistance of counsel does not automatically trigger the right to a ***Machner*** hearing. ***State v. Phillips***, 2009 WI App 179, ¶17, 322 Wis. 2d 576, 778 N.W.2d 157. In our review of a postconviction court's denial of a ***Machner*** hearing, we review whether the motion on its face alleges sufficient facts, which would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). "[A]n evidentiary hearing is not mandatory if a defendant's motion presents only conclusory allegations or if the record as a

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

whole conclusively demonstrates that the defendant is not entitled to relief." ***State v. Spencer***, 2022 WI 56, ¶47, 403 Wis. 2d 86, 976 N.W.2d 383 (citation omitted).

To obtain a ***Machner*** hearing, Lay's motion needed to allege facts sufficiently showing both deficiency and prejudice, which if true, would entitle him to relief. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Deficient performance results from specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. Prejudice occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. We need not address both prongs of the ***Strickland*** test if the defendant fails to make a sufficient showing on either one. ***Id.*** at 697.

With regard to prejudice, the postconviction court concluded that because there is no allegation that the State breached the plea agreement, the case law that would afford Lay a presumption of prejudice in that scenario does not apply. The postconviction court additionally concluded that even if trial counsel was deficient under the circumstances, which necessitated the discussion at sentencing to clarify what the agreed upon recommendation was in the case, Lay was not prejudiced. The postconviction court explained:

> The defendant was convicted of a Class C felony, which carried a maximum sentence of up to 40 years of imprisonment. The facts in the complaint indicated that he participated in the gang rape of a 14 year old child. This was not a probation case for the reasons [the circuit court] explained at sentencing…. This case called for incarceration. Given the seriousness of the offense and the strong need for punishment, deterrence and community protection, there is no reasonable probability that [the circuit court] would have imposed anything other than a prison sentence in this case. Under the circumstances, there is no reasonable probability that the plea form or the discussion about it materially impacted [the circuit court]'s decision to impose a prison sentence, and therefore, the defendant was not prejudiced.

We adopt the postconviction court's decision, which offers a complete and thorough analysis of the issue Lay now raises on appeal.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* 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

FILED
07-07-2020
John Barrett
Clerk of Circuit Court
2016CF003251

BY THE COURT:

DATE SIGNED: July 7, 2020

Electronically signed by Judge Janet C. Protasiewicz
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT Branch 24 MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 16CF003251

FRANK D. LAY JR.,

Defendant.

DECISION AND ORDER
DENYING MOTION FOR RESENTENCING

On March 2, 2020, the defendant by his attorney filed a Rule 809.30 postconviction motion for a new sentencing hearing on the grounds that his trial counsel was ineffective for failing to remove the recommendation for prison from the plea questionnaire and waiver of rights form prior to sentencing. On November 10, 2017, Judge Carolina Stark sentenced the defendant to 13 years of initial confinement followed by 5 years of extended supervision for one count of second degree sexual assault of a child.[1] The discussions giving rise to this motion took place on the date of sentencing as follows:

> COURT: Then when Mr. Lay entered his guilty plea to the amended information, the sole count of 2nd degree sexual assault of a child under the age of 16, *I believe that the State promised to recommend a sentence of prison* but without making any specific recommendation as to amount [sic] of the total length in initial confinement or extended supervision, with defense free to argue; is that correct?

[1] This court is the current successor to Judge Stark's former sexual assault calendar.

STATE: *Judge, it was either that or it was that the State would make no recommendation at all; I don't recall which, I have conflicting notes.* So either – I can tell you right now that I intent [sic] to make no specific recommendation whatsoever to the court, I am going to discuss facts and circumstances and I am going to leave the sentence entirely in your good discretion.

COURT: I will note that *the plea form indicates that the State will recommend prison to the court* and defense free to argue. [Trial Counsel], from the defense position, what was the final negotiation with the State?

TRIAL COUNSEL: Well, we went back and forth a couple of times and I can't recall; but now that ADA Anderson said what he said, I think that may have been our final agreement was that it wasn't going to be a specific recommendation at all [sic].

[…]

COURT: Mr. Lay, when you entered your guilty plea back in July of 2017, what did you think was your understanding about if the State would recommend anything at all at the sentencing hearing?

MR. LAY: Yes, I understand.

COURT: I think we need to move the microphone. Mr. Lay, when you entered your guilty plea in July of 2017, what did you think your agreement was with the State about any recommendation the State would make at sentencing hearing?

MR. LAY: Yeah, I agreed to it.

COURT: To what?

MR. LAY: With no recommendation.

COURT: [Trial counsel] just had a couple of moments of conversation with Mr. Lay at the defense table. At this time, [the State] is telling me that he wishes to make no specific recommendation, he wishes to present information to the court but no recommendation; is that correct…?

STATE: That's correct, your Honor.

COURT: Does the defense have any objection to that? The plea form says the State will recommend prison to the court, the defense free to argue; [the State] is saying at this point he wishes not to make any recommendation, just give information. Does the defense wish [the State] to make a recommendation of

prison without any specific numbers or does the defense wish [the State] to make no recommendation at all?

TRIAL COUNSEL: We are fine with no recommendation at all.

COURT: Mr. Lay, do you agree with that? Is that okay with you if the State doesn't recommend probation, doesn't recommend House of Corrections, doesn't recommend prison, doesn't recommend anything. They can give me information about what happened or prior convictions or things like that, but are you okay with the State not making any recommendation for the sentence?

MR. LAY: Yes, ma'am.

COURT: Is that what you thought was going to happen today?

MR. LAY: No, ma'am.

COURT: What did you think was going to happen today for the State's recommendation?

MR. LAY: Prison.

COURT: Is it okay with you if that changes and they don't recommend anything or do you want them to recommend prison?

MR. LAY: I don't want them to recommend prison.

[…]

COURT: The reason I'm asking these questions is because I don't have a transcript of the plea hearing. If the State promised to make a recommendation of prison without a specific total length of initial confinement or extended supervision, if the defense wants them to honor that promise, then the State would have to honor the promise, the State would have to honor the promise. But if the defense prefers that the State not make a recommendation, that is okay. I just need to make sure everyone is agreeing to that, if that is a change from what was presented as the negotiations at the plea hearing. At this time, it sounds like everybody is in agreement with that, are you as well, [State]?

STATE: Judge, I am – my recollection is when we entered the plea, counsel and I were still—right up to the moment or shortly before—were still in various stages of negotiation. I think there was a time when what is written on the form is an accurate statement of where we stood with respect to negotiations. My memory is that it changed directly before the plea was entered, the notes that I put on my file are, offer: Plead 2nd degree SA, State silent on sentence recommendation. That is the note I made contemporaneously with the date the plea was made.

> COURT: While I am not saying that I believe or don't believe someone, that is not—my concern is that what the plea form says is different from what you told me. I don't have the benefit of an official transcript, and when I asked Mr. Lay what he thought the recommendation would be, he thought that the State would recommend prison. So I am not trying to decide--this isn't an inquiry about if somebody is being accurate or not to the court, I just don't have the benefit of a plea transcript; and so if everyone agrees that the State is not going to make a recommendation today, I'm okay with that. I just need to make it clear on the record that everyone is in agreement with that. . .
>
> TRIAL COUNSEL: Yes, just for the record, I have a note dated 7/19/17, amended Information, State says they will not make a specific recommendation to the court. Then in parenthesis I have, I wrote plea form prison to court. So I think that is accurate with Attorney Anderson's and my recollection of that day where I wrote prison on there incorrectly.

(Tr. 11/10/2017, pp. 3-6) (emphasis added in defendant's motion).

The defendant suggests that this interaction with the court was the result of trial counsel's deficient performance in failing to strike the erroneous plea form prior to sentencing. He argues that the court should presume prejudice as it does in a breach of plea scenario and that, in the alternative, he was prejudiced by the lengthy discussion of the State's offer for a prison recommendation.

Strickland v. Washington, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second prong, the defendant is required to show "that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; also *State v. Johnson*, 153 Wis.2d 121, 128 (1990). A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. *State v. Moats*, 156 Wis.2d 74, 101 (1990).

Because there is no allegation that the State breached the plea agreement, the case law which would afford the defendant the presumption of prejudice in that scenario does not apply

here. This case is not about a breach; this case is about the sentencing court's knowledge of a prior plea offer. A sentencing court's knowledge of prior negotiations is extremely common and not presumptively prejudicial. Plea offers are often placed on the record as negotiations proceed. The fact that such negations are placed on the record is not, by itself, deficient or prejudicial. Here, the defendant takes issue with the fact that there was a somewhat lengthy discussion at sentencing to clarify what the agreed upon recommendation was in this case. Even if counsel can be deemed deficient for the circumstances which necessitated this discussion, the defendant was not prejudiced.

The only alternatives for a sentence of incarceration are to the state prisons or to a county jail or House of Correction. A sentence of less than one year is to the county jail; a sentence of more than one year is to the state prisons. Section 973.02, Stats. The defendant was convicted of a Class C felony, which carried a maximum sentence of up to 40 years of imprisonment. The facts in the complaint indicated that he participated in the gang rape of a 14 year old child. This was not a probation case for the reasons Judge Stark explained at sentencing:

> And I'm also going to briefly note that I think probation cannot suffice in this case because of the severity, it would unduly depreciate the severity, it would unduly depreciate the severity, it wouldn't accomplish the other sentencing goals that I am going to list; and while he was on bail, there wasn't excellent performance.
>
> […] these are not the biggest considerations of my sentencing decision but it just shows that at least recently, while this case was pending or while he was on probation, he was not following the rules one hundred percent; and with this type of aggravated offense, not following rules one hundred percent does not allow for probation. The Court would have to have confidence that he could follow the rules one hundred percent and be able to contemplate how to fashion a probationary sentence for this type of aggravated offense. So the need to protect the community from him at this point is quite high.

(Tr. 11/10/2017, pp. 42, 45). This case called for incarceration. Given the seriousness of the offense and the strong need for punishment, deterrence and community protection, there is no

reasonable probability that Judge Stark would have imposed anything other than a prison sentence in this case. Under the circumstances, there is no reasonable probability that the plea form or the discussion about it materially impacted Judge Stark's decision to impose a prison sentence, and therefore, the defendant was not prejudiced. Accordingly, his motion for resentencing on these grounds is denied.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is **DENIED**.