COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1137-CR **Cir. Ct. No. 01CF000253**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE L. MELOY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed*.

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Terrance Meloy appeals from a judgment of conviction and an order denying his motion for postconviction relief. The issues relate to sentencing and ineffective assistance of counsel. We affirm.

¶2 Meloy pled no contest to one count of operating while intoxicated, fifth offense. The court sentenced him to two years' confinement and two years' extended supervision. Meloy filed a postconviction motion raising several issues, and, after an evidentiary hearing, the court denied the motion.

¶3 Meloy first argues that the circuit judge was biased against him because of the judge's prior experience with Meloy in other cases. We review questions of bias on a subjective and objective basis. *See* ***State v. Santana***, 220 Wis. 2d 674, 684-85, 584 N.W.2d 151 (Ct. App. 1998). Specifically, Meloy argues that the judge's experience in Meloy's divorce case must have left the judge with a bias against Meloy. However, Meloy can point to nothing in the present record that shows the judge recalled Meloy from earlier proceedings or held any bias. In response to the postconviction motion, the judge stated that during sentencing he had not had any recollection of Meloy. Thus, there is no merit to this argument.

¶4 Meloy also argues that the court erroneously exercised its sentencing discretion by excessively emphasizing the severity of the offense, failing to recognize the "minimal nature" of his prior offenses, and not giving more weight to Meloy's six years since the last offense. Standards for sentencing are well established. *See* ***State v. Gallion***, 2004 WI 42, ___ Wis. 2d ___, 678 N.W.2d 197. Under those standards, the court has discretion to determine the weight of various factors. ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992).

¶5 As to the severity of offense, Meloy argues that the court should have spent more time considering the specific facts of his case, rather than the fact that it was a fifth offense. However, he does not identify any specific facts that he

believes are in his favor. The court did note that fifth offense is a felony, "represents a significant societal ill," and is dangerous to the public, but this was not the only factor it considered, and it did not do so excessively. As to the "minimal nature" of his prior offenses, Meloy may be suggesting that his earlier drunk driving offenses were "minimal" because they did not result in injuries, or his blood alcohol content was relatively low. However, he does not explain the argument further, and even if this is what he meant, lack of injury, or an only moderately illegal blood level, does not mean that the seriousness of the offense is "minimal." Finally, Meloy argues that the court did not place sufficient weight on his lack of drunk driving offenses during the preceding six years. However, the court did note this fact, and explained that it did not find it significant because the amount of time that passes between repetitions of the offense is less important than the fact that the offense is being repeated. This is a reasonable conclusion.

¶6 Meloy argues that his sentence was excessive because it exceeded guidelines established in judicial districts around the State. However, the guidelines are discretionary and need not be followed by the sentencing court. ***State v. Jorgensen***, 2003 WI 105, ¶27 n.6, 264 Wis. 2d 157, 667 N.W.2d 318. The supreme court has rejected the idea that defendants convicted of similar crimes must receive equal or similar sentences. *See* ***State v. Lechner***, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998).

¶7 Meloy argues that his trial counsel was ineffective in several ways. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at

694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.*** We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Id.*** at 697. We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶8 Meloy first argues that trial counsel was ineffective because she did not seek judicial substitution at the start of the case. However, counsel testified, and the court found, that she recommended against substitution, and that Meloy was the one who made the final decision. There was nothing about counsel's advice that could be considered deficient performance. Moreover, Meloy fails to show prejudice on this issue because he has presented no evidence that the outcome would have been more favorable to him with a different judge.

¶9 Meloy argues that counsel was ineffective because she failed to provide the court with additional character evidence at sentencing. His argument appears to be that she should have done something more besides advise Meloy himself that he could ask people to submit letters on his behalf, and that counsel should have made some independent effort to obtain that information for his benefit, beyond the three letters that counsel did receive and submit to the court. He offers no legal authority that counsel has an obligation to seek and assemble such information for a defendant who appears to be capable of performing that task himself. We do not regard this as deficient performance.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.