COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1460-CR **Cir. Ct. No. 2003CF2222**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OMENE J. KNIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: R. ALAN BATES, Judge. *Affirmed*.

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

¶1 PER CURIAM. Omene Knight appeals a judgment convicting him, based upon his guilty plea, of being party to the crime of attempted first-degree intentional homicide by use of a dangerous weapon. He claims the trial court should have granted his motion for postconviction relief on the grounds of

ineffective assistance of trial counsel. For the reasons discussed below, we conclude counsel's performance was constitutionally sufficient and affirm the judgment of conviction and postconviction order.

BACKGROUND

¶2 Knight and a co-defendant were charged with multiple counts arising out of two shooting incidents. Knight was unable to post a cash bond and remained in custody while the case was pending. Another jail inmate, Ronald Woods, contacted the police offering to provide information about Knight's case in exchange for sentencing considerations in his own case.

¶3 Woods provided the police with eleven pages of correspondence containing inculpatory statements that Woods claimed had been written by Knight. Woods suggested that the police could verify that the statements were in Knight's handwriting by comparing the correspondence to other written materials of Knight's that had been taken into custody by the sheriff's office pursuant to a lockdown at the jail. An officer looked at Knight's personal property and observed the similarity in handwriting before obtaining a warrant.

¶4 Trial counsel did not immediately file a suppression motion to challenge the admission of the inculpatory statements or the warrantless search of Knight's papers for handwriting samples because Knight had told counsel that he did not write the correspondence to Woods. Instead, counsel sought to obtain an expert opinion that Knight had not written the inculpatory statements. Counsel testified that she might have considered filing a suppression motion later, but wanted to get the defense expert's opinion first. She noted that, in her experience, Rock County judges are generally lenient in allowing such motions to be filed beyond the statutory deadline, especially when successor counsel has been

appointed. However, Knight decided to enter a plea before his handwriting expert was able to complete her analysis.

¶5 Under the plea agreement, the State dismissed multiple counts in this case and another case that was pending against Knight, and agreed to recommend a sentence of two years of initial confinement and eighteen years of extended supervision on the attempted homicide count. At the sentencing hearing, the prosecutor noted that the victim of one of the shootings had died from unrelated causes, creating an evidentiary problem for the State. In addition, the prosecutor explained that some recent acquittals in Rock County in similar cases led the State to believe it was worth a compromise plea in this case to ensure getting a conviction with at least an extended period of supervision. He went on:

> Admittedly it is light on punishment up front. But to steal a phrase from a television commercial, it's a pay me now or pay me later case.
>
> In this situation, it's a pay me later.
>
> If these two young men can't straighten out their lives, if they can't make it on supervision, we will see them again. And this court will then have the option of giving them the remainder of that 18 years of "yes" in the institution.
>
> The state feels with that … supervision, that this is an appropriate recommendation.
>
> Your honor, I would ask you to follow the recommendation that has been made by the parties as I've outlined it at the beginning of my argument, and we think that it's an appropriate recommendation, as I said, given the facts and circumstances that surrounds these cases.

The court declined to follow the parties' joint recommendation, and instead sentenced Knight to fifteen years of initial incarceration followed by fifteen years of extended supervision. Knight then filed a postconviction motion claiming that

counsel provided ineffective assistance by failing to seek suppression of the inculpatory correspondence to Woods and the other writing samples of Knight that were examined without a warrant; by advising Knight to accept the plea agreement; and by failing to challenge the prosecutor's comments at sentencing. The trial court denied the motion and this appeal followed.

DISCUSSION

¶6 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

> The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them.

State v. Swinson, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted).

¶7 Knight argues that counsel should have moved to suppress the inculpatory statements turned over by the informant on the grounds that the informant was acting as an agent for the State when he obtained them, and to suppress the other writing samples examined without a warrant on the grounds that Knight had a reasonable expectation of privacy in his personal papers while he was in pretrial detention. We need not address these arguments, however, because we are satisfied that counsel's strategy of first attempting to establish that Knight had not written the inculpatory statements fell within reasonable professional norms.

¶8 Knight asserts that trial counsel should have filed a suppression motion notwithstanding his own denial that he had written the inculpatory statements, because the State crime lab had concluded that the handwriting was in fact his. We disagree.

¶9 The defendant was obviously in the best position to know whether he had or had not written the statements. Knight's counsel reasonably relied on his denials that he was the author of the inculpatory statements. Knight does not offer any reason why his counsel should not rely on his assertions of innocence. But counsel did not stop there. She took the reasonable step of having the statements examined by a writing expert before moving to have the statements suppressed. In other words, counsel reasonably chose a strategy of first eliminating the possibility that the exculpatory statements were written by Knight before pursuing the more arduous and less certain task of seeking an order to have the statements suppressed. Had the expert determined that Knight did not write the statements, the need to pursue suppression would have been obviated. Unfortunately for Knight, the expert was delayed in rendering an opinion and Knight entered pleas to the charges before the expert rendered an opinion. We

cannot say that counsel's strategy in seeking an expert opinion first before moving for suppression constitutes deficient performance.

¶10 Knight next argues that counsel provided ineffective assistance by failing to challenge the prosecutor's comments at sentencing as a breach of the plea agreement. We agree with the proposition that the State is not permitted to distance itself from a sentence recommendation it has agreed to make or to cast doubt upon the wisdom of the court following the recommendation. *See* ***State v. Williams***, 2001 WI 1, ¶50, 249 Wis. 2d 492, 637 N.W.2d 733. We disagree, however, that that is what the prosecutor did here.

¶11 The parties jointly recommended only two years of initial incarceration for an incident in which the victim had been shot at close range in the head, arm, and abdomen while begging for his life, and had been left paralyzed on his left side. The prosecutor anticipated that the court would view the sentence recommendation as low for a very serious crime, and therefore undertook to explain to the court why the State was making the recommendation, and why the court should follow it. In this context, we do not view the prosecutor's references to evidentiary problems on a dismissed charge or unsympathetic juries in Rock County leading to a "compromised plea" that was "light on punishment up front" as distancing the State from the recommendation. Rather, we read the prosecutor's comments as serving to inform the court why the State believed the recommendation *was* appropriate. Indeed, defense counsel for Knight's co-defendant made similar remarks to those of the prosecutor, noting that the system would not work if every case went to trial, and that compromise pleas protected the public by ensuring a conviction. Therefore, we cannot conclude it was

deficient performance for trial counsel to refrain from objecting to the prosecutor's comments.[1]

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

[1] Knight argues that counsel also performed ineffectively by advising him to plead guilty without properly informing him about his chances at trial, resulting in an unknowing plea. Knight does not fully develop this argument; we therefore do not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address inadequately briefed issues).