COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP183-CR **Cir. Ct. No. 2005CF2175**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON EDWARD BYRNES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS and DENNIS P. MORONEY, Judges.[1]

[1] The Honorable Elsa C. Lamelas presided over the guilty plea and sentencing. The Honorable Dennis P. Moroney presided over the postconviction motion.

In his notice of appeal, Byrnes states that he appeals from an order denying his motion to suppress, a judgment of conviction, and an order denying his postconviction motions. No arguments were raised in Byrnes's postconviction motions or his appellate briefing with respect to the denial of his motion to suppress. Therefore, we consider the issue abandoned and will not address it here. *See* ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) (noting that issues not briefed or argued are deemed abandoned).

Judgment affirmed; order affirmed in part and reversed in part; and cause remanded.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. Brandon Edward Byrnes appeals from the judgment convicting him of one count of arson, and three counts of second-degree recklessly endangering safety, contrary to WIS. STAT. §§ 943.02(1)(a) and 941.30(2) (2003-04).[2] On appeal, Byrnes argues that: (1) the trial court erroneously exercised its discretion when it determined that he was not eligible for the Challenge Incarceration Program (CIP) until he served five years of his terms of confinement; (2) the trial court erroneously exercised its discretion when it set the restitution order at fifty percent of the requested amount of $422,700 without expressly finding what his ability to pay was, now and in the future; and (3) his trial counsel was ineffective when counsel stipulated that the restitution order be set at fifty percent of the amount sought.

¶2 Because the trial court properly exercised its discretion, both when it required Byrnes to serve five years of his confinement before he would be eligible for the CIP, and when it set the restitution amount because his attorney stipulated to the trial court's suggested amount of $211,350, we affirm the judgment. However, we agree, and the State concedes, that Byrnes is entitled to a ***Machner***[3] hearing to determine if trial counsel was ineffective for stipulating to the $211,350

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

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

restitution order and for failing to establish Byrnes's ability to pay restitution. Consequently, this matter is remanded for a ***Machner*** hearing.

I. BACKGROUND.

¶3 Early in 2004, Byrnes was fired from his job. As a result of his termination, Byrnes was unable to pay rent and was subsequently evicted from his apartment. After Byrnes's eviction, he developed a plan to enter his former apartment in order to set it on fire. On July 12, 2004, Byrnes entered his former apartment, found a few piles of clothing, and set the clothes on fire. Before leaving, Byrnes turned on the stove's burners to make sure the fire would keep burning after he left the property. Byrnes wiped off the areas he had touched to remove any fingerprints, and then he left through an alley to avoid being seen near the building.

¶4 The fire consumed the building, and the property was found to be a total loss, with a damage estimate of $340,000. Additionally, four tenants and one insurance company claimed losses, bringing the cumulative property damages to $422,700. Five adults and three children were in the building when Byrnes committed the arson. All of the people in the building were able to escape without suffering personal injuries.

¶5 After Byrnes's sister alerted authorities that her brother admitted starting the fires, on April 20, 2005, Byrnes was charged with one count of arson of a building without the owner's consent and three counts of second-degree recklessly endangering safety. Byrnes entered guilty pleas to all four charges, and the trial court ordered a presentence investigation report. The presentence investigation report recommended a sentence of ten to eleven years of incarceration and five to six years of extended supervision on the arson charge,

and one to two years of incarceration and two to three years of extended supervision on the remaining counts, to be served concurrently to one another. On the arson count, Byrnes was sentenced to a sixteen-year bifurcated sentence, with ten years of initial confinement and six years of extended supervision. On each of the three, second-degree recklessly endangering safety counts, Byrnes was sentenced to a ten-year bifurcated sentence, with five years of initial confinement and five years of extended supervision. All sentences were to be served concurrently.

¶6 The court found Byrnes to be eligible for the CIP and for the Earned Release Program, but not until he completed five years of confinement.[4] Additionally, Byrnes received 342 days of sentence credit for time already served. Finally, the court ordered Byrnes to submit a DNA sample and pay the surcharge.

¶7 As required, the court discussed the claims for restitution. The victims had submitted claims totaling $422,700. The court ordered restitution amounting to one-half of what was requested by the tenants, the building owner, and the involved insurance companies, and reduced the restitution to $211,350.[5] Counsel for Byrnes stipulated to the trial court's setting restitution at fifty percent of the requested amount. As a consequence, no evidence of Byrnes's ability to pay restitution was presented.

[4] Byrnes is not challenging the required five years of confinement before he is eligible for the Earned Release Program. The trial court also required Byrnes to remain compliant under the supervision of the Department of Corrections Mental Health Unit.

[5] The amount of one tenant's claim for restitution is in dispute. It is identified as $1300 by the sentencing transcript, but it is identified as $11,300 by the presentence investigation report. Upon review, the latter seems to be more plausible, because the court's actual award of $5650 is in line with the restitution awards to the other parties.

¶8 Byrnes filed a postconviction motion requesting that: (1) his sentence be modified relating to the CIP eligibility date; (2) his sentence be modified to remove the DNA surcharge; and (3) the restitution order should be amended or the trial court should hold a restitution hearing. With respect to the restitution issue, the motion claimed both that the trial court erroneously exercised its discretion in setting the amount and that his attorney was ineffective for agreeing to the reduced amount and failing to establish Byrnes's ability to pay.

¶9 A hearing was held by a different judge, without Byrnes being present. In a rambling and confused statement, the court initially acknowledged that the hearing was set for a status conference, but then proceeded to rule that it had no subject-matter jurisdiction, apparently believing no restitution order had ever been set. When the trial court learned that restitution had already been set, the court expressed its unhappiness with WIS. STAT. § 973.20(13)(a)'s requirement that it consider Byrnes's ability to pay in the future. The trial court stated that Byrnes would have the ability to pay restitution in the future, but refused to decide how much he would be able to pay. The court said that such a finding should take place when Byrnes is released. The court upheld the garnishment of Byrnes's prison wages at twenty-five percent. The trial court failed to mention the claim that Byrnes's trial counsel was ineffective for agreeing to the reduced restitution or for failing to introduce any evidence as to Byrnes's ability to pay. However, despite the fact that the matter was set as a status conference, the trial court denied the motions.[6]

[6] The trial court denied the motion to remove the DNA surcharge, and that issue is not on appeal.

¶10 The court also heard and denied Byrnes's motion requesting a modification of his CIP eligibility date. Byrnes appeals the denial of his motions requesting that his sentence should be modified concerning the CIP eligibility date; arguing that the trial court erroneously exercised its discretion in setting the restitution order; and contending that his attorney was ineffective for agreeing to the restitution order and introducing no evidence as to his ability to pay.

II. ANALYSIS.

A. The trial court properly exercised its discretion by requiring Byrnes to serve five years of his confinement before being eligible for the CIP.

¶11 Byrnes argues that the trial court erroneously exercised its discretion when it required him to serve five years of his initial confinement before being eligible for the CIP. Byrnes complains that the trial court should have made him eligible for the CIP after he serves three years of confinement because, in all likelihood, this would permit him to serve his sentence in a youthful correctional facility. He submits that the trial court failed to explain why he needed to serve five years of confinement before being eligible. We disagree.

¶12 We review a trial court's sentencing decision for an erroneous exercise of discretion. ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). There is a "strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably." ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

¶13 "The primary factors to be considered in imposing sentence are the gravity of the offense, the character of the offender, and the need for protection of the public." ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The

trial court is to identify the factors of greatest importance, which may differ from one case to another, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197, and may attach varying weight to each factor, ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶14 The CIP, commonly known as "boot camp," *see* ***State v. Steele***, 2001 WI App 160, ¶6, 246 Wis. 2d 744, 632 N.W.2d 112, is a program designed for youthful offenders with substance abuse problems who meet the criteria found in WIS. STAT. § 302.045(2), which states:

> PROGRAM ELIGIBILITY. Except as provided in sub. (4), the department may place any inmate in the challenge incarceration program if the inmate meets all of the following criteria:
>
> (a) The inmate volunteers to participate in the program.
>
> (b) The inmate has not attained the age of 40 as of the date the inmate will begin participating in the program.
>
> (c) The inmate is incarcerated regarding a violation other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.075, 948.08, or 948.095.
>
> (cm) If the inmate is serving a bifurcated sentence imposed under s. 973.01, the sentencing court decided under s. 973.01 (3m) that the inmate is eligible for the challenge incarceration program.
>
> (d) The department determines, during assessment and evaluation, that the inmate has a substance abuse problem.
>
> (e) The department determines that the inmate has no psychological, physical or medical limitations that would preclude participation in the program.

Ultimately, the Department of Corrections determines who is to be placed in the program. *See* ***id.*** However, in order to be eligible for placement, an offender must

receive a recommendation from the sentencing judge. *See* § 302.045(2)(cm); ***Steele***, 246 Wis. 2d 744, ¶8.

¶15 "Even if the offender meets all of the department's eligibility requirements under [WIS. STAT.] § 302.045(2), the trial court has the discretion under [WIS. STAT.] § 973.01(3m) to declare an offender ineligible for boot camp."[7] ***Steele***, 246 Wis. 2d 744, ¶8. In ***State v. Lehman***, 2004 WI App 59, ¶17, 270 Wis. 2d 695, 677 N.W.2d 644, we concluded that sentencing courts have the authority both to determine whether a defendant is eligible for the CIP *and* to determine the defendant's eligibility date within the confinement period.

¶16 During the sentencing proceeding, the trial court reviewed the information surrounding Byrnes's crime. Specifically, the court weighed Byrnes's remorse, his intention to have caused significantly less damage than occurred in the arson, and Byrnes's strong family ties, against the long time lapse between the eviction and Byrnes's retaliatory actions, his documented mental health issues, and the gravity of his crime.

¶17 Byrnes was charged with four serious felonies which resulted in over $400,000 of property damage. Arson of a building without the owner's consent is

[7] WISCONSIN STAT. § 973.01(3m) provides:

> CHALLENGE INCARCERATION PROGRAM ELIGIBILITY. When imposing a bifurcated sentence under this section on a person convicted of a crime other than a crime specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.055, 948.06, 948.07, 948.075, 948.08, or 948.095, the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible for the challenge incarceration program under s. 302.045 during the term of confinement in prison portion of the bifurcated sentence.

a Class C felony. WIS. STAT. § 943.02(1)(a). A Class C felony carries a maximum term of imprisonment of not more than forty years, and a maximum initial confinement term of twenty-five years, or a $100,000 fine, or both. WIS. STAT. §§ 939.50(3)(c), 973.01(2)(b)3. Second-degree recklessly endangering safety charges are Class G felonies, with a maximum penalty of imprisonment for not more than ten years, with a maximum initial confinement term of five years, or a $25,000 fine, or both, for each count. WIS. STAT. §§ 941.30(2), 939.50(3)(g), & 973.01(2)(b)7.

¶18 In reaching its judgment, the court observed that the sentence imposed would address "the need to protect the community from this kind of impulsive behavior." The court also noted the presentence investigation report writer's conclusion "that [Byrnes] has treatment and correctional needs that require a very lengthy period of incarceration." The trial court ultimately decided that the "sentence has to reflect the gravity of that crime [arson]. There is no way around that. This is a crime of very significant dimension." The trial court then remarked:

> I am going to make the defendant eligible for the Challenge Incarceration Program or the Earned Release Program after a period of incarceration which I trust will be significant enough to meet his treatment needs and which will allow a release to the community that will allow for the defendant's reintegration into the community and also for his, for the protection of the community.

¶19 The trial court then ordered that Byrnes serve five years of confinement before he would be eligible for the CIP. The trial court's sentences were explained on the record. The decision as to why Byrnes was required to serve five years of incarceration before being eligible for the CIP was discussed. Inasmuch as a participant in the CIP "may complete the program in not more than

180 days," WIS. STAT. § 302.045(1), and if, as the sentencing court ordered, he enters the CIP after five years and successfully completes the program, he could begin extended supervision after approximately five and one-half years. *See* § 302.045(3m). The trial court explained that Byrnes needed "a period of incarceration … significant enough to meet his treatment needs." The trial court determined that he needed five years of treatment for his problems before he would begin the CIP.

¶20 The court laid the greatest emphasis on the severity of the crime. In the court's view, the arson was extremely grave because of the possibility that lives could have been lost in addition to the property destroyed. The court balanced these concerns with its concern for the defendant and its sympathy for his remorse and mental health issues. The trial court explained its decision, and its reasons were valid. No erroneous exercise of discretion occurred in the setting of Byrnes's eligibility for the CIP.

B. The trial court properly exercised its discretion in setting the restitution order.

¶21 Byrnes next argues that the trial court erroneously exercised its discretion when setting the restitution order at $211,350, because "it failed to consider Byrnes's ability to pay and failed to reach a conclusion that a reasonable judge could reach."

¶22 Byrnes advocates that a reasonable amount of restitution would be $42,700. This calculation appears to be one-half of the amount of money owed to the actual victims of the arson after excluding amounts owed to the insurance

companies.[8] We conclude that the trial court did not erroneously exercise its discretion based upon the information presented.

¶23 The appropriate standard of review of a restitution order is the erroneous exercise of discretion standard. *See* ***State v. Haase***, 2006 WI App 86, ¶5, 293 Wis. 2d 322, 716 N.W.2d 526.

¶24 WISCONSIN STAT. § 973.20(13)(a) provides:

> The court, in determining whether to order restitution and the amount thereof, shall consider all of the following:
>
> 1. The amount of loss suffered by any victim as a result of a crime considered at sentencing.
>
> 2. The financial resources of the defendant.
>
> 3. The present and future earning ability of the defendant.
>
> 4. The needs and earning ability of the defendant's dependents.
>
> 5. Any other factors which the court deems appropriate.

State v. Loutsch, 2003 WI App 16, ¶¶24-25, 259 Wis. 2d 901, 656 N.W.2d 781, directs that:

> When restitution is ordered, it becomes a condition of probation, extended supervision or parole, and, after the termination of those, restitution is enforceable in the same manner as a judgment in a civil action by the victim. Section 973.20(1r). Under § 973.20(10), the court may require that restitution "be paid immediately, within a specified period or in specified installments. If the defendant is placed on probation or sentenced to

[8] Byrnes relies on the disputed restitution amount of $1300, purportedly claimed by one tenant, to arrive at $42,700. As we discuss, *see supra* note 5, the amount claimed by the tenant was actually $11,300.

> imprisonment, the end of a specified period shall not be later than the end of any period of probation, extended supervision or parole."
>
> Read together, these sections plainly contemplate that the court order at sentencing an amount of restitution that it determines the defendant will be able to pay before the completion of the sentence–in this case, during the term of imprisonment and subsequent extended supervision and probation. These sections do not permit a court to defer consideration of the defendant's ability to pay when evidence of the defendant's ability to pay is presented. The reference to "present and future earning ability of the defendant," [] § 973.20(13)(a)3[.], plainly contemplates that the court will be making a prediction of what a defendant will be able to pay in the future.

¶25 The trial court made the following comments concerning restitution:

> THE COURT: The bottom line is that these are phenomenal losses, very extraordinary claims….
>
> However, I am to take the defendant's ability to pay in setting the restitution. I'm also required to order restitution. And so what I have determined to do with the consent of the parties I think here is to order restitution in an amount that is half of what is claimed reflecting on the one hand the difficulty of people who have lost everything, because of the manner in which they had to vacate the premises, lost everything to document the value of their losses, and on the other hand also reflect the defendant's limited ability to pay.
>
> All right. Am I okay so far, Ms. Rothstein?
>
> MS. ROTHSTEIN: Yes, judge.
>
> THE COURT: Mr. Anderson?
>
> MR. ANDERSON: Yes, judge. I had just objected to the insurance company being included in that.
>
> THE COURT: Right. You had objected to the insurance company being included at all, but I said that I would have it, and I think at that point you said that was agreeable to the defense; is that correct?
>
> MR. ANDERSON: Yes.

¶26 It is clear that the trial court did consider Byrnes's ability to pay when it halved the restitution requests. Had the parties refused to stipulate to the suggested amounts, the trial court would have held a hearing. However, Byrnes's trial attorney made a hearing unnecessary when he stipulated to the trial court's determination. Byrnes cannot now claim that the trial court erroneously exercised its discretion when his attorney failed to object to the court's order.[9]

C. The matter should be remanded for a ***Machner*** *hearing.*

¶27 Byrnes argues that his attorney was ineffective. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. We "strongly presume[]" counsel has rendered adequate assistance. ***Id.*** at 690. Byrnes asks us to find that his trial attorney deficiently performed his duties as defense counsel

[9] It is apparent that the postconviction court did not understand what proceedings were before it and did not have an appreciation of the case law governing restitution awards. Despite the postconviction court's mistaken view of the law, the record supports the trial court's initial determination.

and that he was prejudiced by his actions. We decline to do so, as factual findings need to be made.

¶28 When an attorney's conduct is questioned, that attorney's presence is required at a hearing on the conduct at issue. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). "We cannot otherwise determine whether trial counsel's actions were the result of incompetence or deliberate [] strategies. In such situations, then, it is the better rule, and in the client's best interests, to require trial counsel to explain the reasons underlying his handling of a case." ***Id.***

¶29 Because the State concedes that trial counsel may have been ineffective for his failure to litigate Byrnes's ability to pay both at the time of sentencing and in the future, we remand this matter to the trial court to conduct a ***Machner*** hearing. In all other respects, the convictions are affirmed.

By the Court.—Judgment affirmed; order affirmed in part and reversed in part; and cause remanded.

Not recommended for publication in the official reports.