COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2585-CR **Cir. Ct. No. 2006CF3747**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE J. KEY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: FREDERICK C. ROSA, Judge. *Affirmed.*

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

¶1 CURLEY, P.J. George J. Key, Jr., appeals the judgment, entered following a jury trial, convicting him of two counts of first-degree recklessly endangering safety while armed, one count of possession of a firearm by a felon, and one count of possession of a short-barreled shotgun, all as a habitual criminal,

contrary to WIS. STAT. §§ 941.30(1), 939.63, 941.29(2), 941.28(2), and 939.62 (2003-04), respectively.[1] Key also appeals from the order denying his postconviction motion. Key argues that his trial counsel was ineffective for failing to object to the trial court's directive prohibiting Key's grandmother from taking notes at the trial. He submits that the trial court's order denied him his constitutional right to a public trial. Because the trial court's prohibition against note-taking by Key's grandmother during the jury trial was not a denial of Key's right to a public trial, Key's attorney was not ineffective for failing to object. Consequently, we affirm.

I. BACKGROUND.

¶2 Witnesses testified that on July 17, 2006, the police responded to an emergency call that Key had shot at his girlfriend and others when the vehicle they were in stopped in front of his mother's house. After a pat-down search, police found a shotgun shell in Key's pocket. The officers then searched the area around the porch on which Key was sitting and found a loaded short-barreled shotgun. The ammunition inside the shotgun matched the shell that was found in Key's pocket.

¶3 Key was charged with two counts of first-degree recklessly endangering safety while armed, one count of possession of a firearm by a felon, and one count of possession of a short-barreled shotgun. The State also charged him in all counts with being a habitual criminal, which is a penalty enhancer.

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

¶4 Key demanded a jury trial. During the trial, a victim recounted how Key, apparently in a jealous rage, shot out the back window of a car that had, up until seconds before the shooting, contained several passengers. Key did not testify at his trial, but his mother testified that he was not the one who fired the gun; rather, she maintained that two or three men who came to the house with Key's girlfriend fired the shots.[2] The pivotal issue at trial was who shot the gun. Because the shotgun that was found on the property met the statutory definition for a "short-barreled shotgun" in that the barrel was less than eighteen inches in length, Key was charged with possessing a short-barreled shotgun. Key stipulated to the fact that he had previously been convicted of a felony, one of the elements of possession of a firearm by a felon.

¶5 During the trial, it came to the court's attention, after an in-chambers meeting with counsel, that a person sitting in the gallery was taking notes. The court asked the gallery if someone had been taking notes, and Key's grandmother responded that she had. The court asked Key's grandmother why she had been taking notes, and she responded: "I just want to know … what was going on, … I'm just hearing all this." The court responded: "Note taking during a trial is done very sparingly. Most times I won't even let the jury do it. I don't have people in the gallery taking notes." The court stated its reason for not allowing note-taking: "The problem is when notes are being taken out in the gallery or elsewhere, then I start having concerns about things being shared with witnesses or that information falling into the hands of witnesses, particularly those who haven't testified." The

[2] Although Key's mother testified that Key's girlfriend was accompanied by two or three males, the victims of the first-degree recklessly endangering safety charges were female, one of whom testified that there was only one man in the car.

court went on to request that Key's grandmother turn over the notes that she had already taken, saying that she would get them back after the trial was over. Key's counsel did not object to either Key's grandmother not being allowed to take notes or Key's grandmother's notes being taken by the court.

¶6 Key was convicted of all counts and was sentenced to a total of ten years of confinement, followed by eight years of extended supervision.[3] Key brought a postconviction motion claiming that his trial counsel was ineffective for failing to object to the trial court's prohibition against note-taking by his grandmother, and the confiscation of her notes. He argued that the trial court's action resulted in his constitutional right to a public trial being violated. The trial court denied the motion in a written order, observing that "[n]ote-taking is not a requirement of a 'public trial,' and the court's prohibition of [Key's] grandmother's note-taking did not violate the defendant's right to a public trial." Further, the trial court, in addressing Key's claim of ineffective assistance of counsel, stated that any objection made by Key's trial counsel would have had no effect on the outcome of the trial because the objection would have been overruled.

II. ANALYSIS.

¶7 Key claims that when the trial court refused to allow Key's grandmother to take notes his right to a public trial was impinged upon, and that

[3] The ten years of confinement consist of two concurrent seven-year sentences on the recklessly endangering safety counts; two years for the felon in possession of a firearm charge; and one year for the possession of a short-barreled shotgun charge. The eight years of extended supervision consist of two concurrent four-year periods on the recklessly endangering safety counts; two years for the felon in possession of a firearm charge; and two years for the possession of a short-barreled shotgun charge.

his trial counsel's failure to object to the trial court's refusal to allow his grandmother to take notes constituted ineffective assistance of counsel.

¶8 The Sixth Amendment to the United States Constitution guarantees "the right to a speedy and public trial," and this right was extended to protect all individuals from state action by the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amends. VI, XIV, § 1; ***Duncan v. Louisiana***, 391 U.S. 145, 148-49 (1968). The Wisconsin Constitution also guarantees a similar right to a public trial. WIS. CONST. art. I, § 7. The concept of a speedy public trial permeates the American justice system and benefits all parties involved in litigation through the accountability, integrity, and public scrutiny that are provided. *See* ***In re Oliver***, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.").

¶9 In order to assert that there has been a violation of the Sixth Amendment public trial right, there must be a timely objection to the action that the objecting party alleges has violated his right to a public trial. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-11, 235 Wis. 2d 486, 611 N.W.2d 727. If there is not a timely objection raised by the party alleging a violation of the public trial right, then the objection to that issue is waived. ***State v. Ndina***, 2007 WI App 268, ¶12, 306 Wis. 2d 706, 743 N.W.2d 722, *review granted* (May 13, 2008) (No. 2007AP5). There is no issue in this case as to whether Key objected in a timely manner; he did not. Thus, his claim comes to us in the form of an ineffective assistance of counsel argument. *See* ***id.***

¶10 Key argues that his trial counsel's failure to object to the trial court's insistence that Key's grandmother not be allowed to take notes constitutes

ineffective assistance of counsel. When reviewing an ineffective assistance of counsel claim raised by a defendant, there are two things that must be proven by the defendant for the claim to succeed: "(1) that his or her lawyer's performance was deficient; and (2) that 'the deficient performance prejudiced the defense.'" ***Id.***, ¶13 (quoting ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). If both of these prongs are not proven, then the claim of ineffective assistance of counsel will fail. ***Strickland***, 466 U.S. at 687. "Deficient," as it relates to counsel, will apply when counsel has "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** Deficient performance is prejudicial if a "defendant … show[s] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. For Key's claim of ineffective assistance of counsel to succeed, he must prove that, but for his trial counsel's failure to object, there was a "reasonable probability" that his claim of deprivation of his Sixth Amendment right to a public trial would have led to a reversal of his conviction. *See* ***id.***

¶11 Key first cites ***Goldschmidt v. Coco***, 413 F. Supp. 2d 949 (N.D. Ill. 2006), for support. In ***Goldschmidt***, the plaintiff brought suit alleging a violation of his First Amendment rights by an Illinois municipal court judge after the judge refused to allow him to take notes while he was a spectator in the court. ***Id.*** at 951. The trial court had several signs posted regarding various court policies against note-taking or other potentially disruptive behavior. ***Id.*** The plaintiff, a college professor with a law degree whose students had also been denied the opportunity to take notes, brought suit after the bailiffs removed him from two separate courtrooms after he had attempted to take notes. ***Id.*** at 950-51. The

federal district court, in which the plaintiff brought suit, held that a blanket policy prohibiting the taking of notes by any outside party was supportive of a claim for which relief could be given. ***Id.*** at 953-54. The court did not, however, specifically rule on the merits of the plaintiff's claim. The court merely dismissed the defendant's motion to dismiss for failure to state a claim. ***Id.*** The situation presented by ***Goldschmidt*** was a civil case where the court was addressing a motion to dismiss brought under FED. R. CIV. P. 12(b)(6), not a criminal defendant's claim that his Sixth Amendment rights to a public trial have been abridged, as Key is claiming. We therefore hold that the facts and causes of action in ***Goldschmidt*** are distinguishable from those here.

¶12 Key next cites ***Waller v. Georgia***, 467 U.S. 39 (1984). In ***Waller***, the Supreme Court was confronted with the question of whether the closing of a suppression hearing was a violation of the public trial right. ***Id.*** at 43. The Georgia trial court excluded the public from a suppression hearing that lasted seven days, due to fears that sensitive wiretap information would become public. ***Id.*** at 42. The Supreme Court held that the public trial right, guaranteed in the Sixth Amendment, does extend to suppression hearings, and that the defendant's public trial right had been impinged upon by the trial court. ***Id.*** at 43.

¶13 Key extrapolates from the holding in ***Waller*** that the Sixth Amendment public trial right prohibits the trial court from impinging on the public's right to know what occurs in public hearings and that this right includes the right to take notes in the gallery. However, the ***Waller*** opinion does not advance Key's point that his public trial right was violated. ***Waller*** only addresses whether the right to a public trial includes a suppression hearing. Nowhere in the case does it discuss note-taking; it only addresses the benefits of a public trial.

¶14 We are more persuaded by the holding of ***People v. Jones***, 637 N.E.2d 601, 612 (Ill. App. Ct. 1994). There, before Jones's jury trial, the trial court, during a motion hearing, ordered the deputy sheriff to confiscate a notepad of a spectator who was taking notes. ***Id.*** at 604. Like the facts here, no objection was made to the trial court's order. ***Id.*** In finding no constitutional violation, the court explained:

> The right to a public trial guaranteed by the sixth amendment is satisfied by the opportunity of members of the public to attend the trial and to report what they have observed. (***United States v. Hastings***, 695 F.2d 1278, 1284 (11th Cir. 1983).) This right of access does not include the right to record the trial, and reasonable limitations upon the unrestricted occupation of a courtroom by members of the public are permissible. *See* ***Hastings***, 695 F.2d at 1280-81.

Jones, 637 N.E.2d at 611 (parenthetical in ***Jones***).

¶15 Key claims that the denial of a public trial right is a "structural error," and that when such an error has occurred, prejudice is presumed, and the remedy for this violation is an automatic reversal. We hold that there has been no violation of the Sixth Amendment public trial right, and therefore, we need not address Key's claim regarding "structural error" or his request for automatic reversal.

¶16 For the reasons stated above, we affirm Key's conviction and we deny Key's motion on ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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