COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP791-CR **Cir. Ct. No. 2009CF3440**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MILLER X. LARK-HOLLAND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and JEAN A. DiMOTTO, Judges.[1] *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

[1] The Honorable Daniel L. Konkol presided over the trial and sentencing. The Honorable Jean A. DiMotto decided the postconviction motion.

¶1 FINE, J. Miller X. Lark-Holland appeals the order denying his motion for postconviction relief seeking resentencing. He claims that his trial lawyer gave him constitutionally deficient representation because she: (1) did not emphasize that another man threatened Lark-Holland into robbing the pharmacy, and made other statements that he contends undercut his character; (2) lost the letter Lark-Holland prepared for sentencing; and (3) did not file a request for substitution against the assigned sentencing judge, the Honorable Daniel L. Konkol. *See* WIS. STAT. § 971.20 (substitution of judge). We affirm.

I.

¶2 In July of 2009, Lark-Holland, then seventeen years old, walked into a pharmacy with a handgun, showed it to the clerk, and asked the clerk for Oxycotin. The pharmacist put two boxes of Oxycodone, containing 600 pills worth $4000, into Lark-Holland's bag. Lark-Holland immediately left the pharmacy, got on his bicycle, and rode around the corner to an alley where a car was waiting for him. A witness saw Lark-Holland give the bag and gun to a man through the window of the car, which then drove away without Lark-Holland.

¶3 The police arrested Lark-Holland. He told them that "Uncle Tony" and another man said they would pay him to do a job for them.[2] They put Lark-Holland's bicycle in Uncle Tony's car and drove to a pharmacy. During the drive, according to Lark-Holland, Uncle Tony explained that the "job" was getting drugs from the pharmacy. The men gave Lark-Holland a gun and told him to rob the

[2] Although the trial court refers to Lark-Holland's promised payment as $500, Lark-Holland disputed that figure, claiming that he was not told a specific dollar amount for the job. The amount is not relevant on this appeal.

pharmacy, and, according to Lark-Holland, threatened to "blast him" if he refused. Lark-Holland pled guilty to one count of armed robbery, by use or threat of use of a dangerous weapon, as party to a crime, *see* WIS. STAT. §§ 943.32(2) & 939.05, and the trial court sentenced him to six years' initial confinement, followed by four years' extended supervision.

II.

¶4 As we have seen, Lark-Holland claims that his trial lawyer's representation was constitutionally deficient in three respects. He also asserts that the trial court should have held an evidentiary hearing on his claims. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (hearing to determine whether lawyer gave defendant ineffective assistance). We disagree.

¶5 To establish constitutionally ineffective representation, Lark-Holland must show: (1) deficient representation; and (2) resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are "outside the wide range of professionally competent assistance," *see* ***id.***, 466 U.S. at 690, and to prove resulting prejudice, he must, in the context of this case, show that what his lawyer did deprived him of a fair sentencing, *see* ***id.***, 466 U.S. at 687. To establish prejudice, a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See* ***id.***, 466 U.S. at 694. We do not need to address both ***Strickland*** aspects if a defendant does not make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶6 The circuit court must hold an evidentiary hearing on an ineffective assistance claim only if the defendant "'alleges sufficient material facts that, if true, would entitle the defendant to relief.'" ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 123, 700 N.W.2d 62, 68 (quoted source omitted). If the postconviction motion does not set out sufficient facts, or is only conclusory, or if the Record otherwise conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to deny the claim without a hearing. ***Ibid.*** We review *de novo* whether a defendant is entitled to an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996).

A. *The trial lawyer's sentencing argument.*

¶7 Lark-Holland's first complaint is that his trial lawyer did not emphasize the mitigating factor that he said he was forced into committing the robbery, and also made several comments that he says undercut his character. He points to several parts of the sentencing transcript where his trial lawyer: (1) talked about his financial motivation and said "there clearly had to be preparation" by him; (2) faulted him for not withdrawing from the crime, asking why Lark-Holland "didn't just tell [the pharmacy clerks] there are these guys out there, they are trying to force me to rob you. Please call the police immediately."; and (3) said "nothing excuses [the crime]" and armed robbery is "more serious quite honestly than some homicides and some sexual assaults when it comes to punishment." These comments, however, when read in full context, show an effective attempt to argue factors that might mitigate a potentially severe sentence.

¶8 Lark-Holland's trial lawyer addressed the financial motivation to counter the prosecutor's argument that: "When I review the police reports, what contradicts the defendant's statement that he was forced to do this is an indication

in his statement that Uncle Tony stated that he and the white dude would give him $500 for committing the robbery at the pharmacy leading me to think that perhaps this was more pre-meditated than Mr. Lark-Holland wants us to believe." Lark-Holland's trial lawyer thus explained where the $500 figure came from even though Lark-Holland insisted that the men did not offer a specific dollar amount: "Lark-Holland indicated to me that … he was just trying to be cooperative [when police were asking him questions]. He said anything hoping that it would help him sort of get out of trouble." Further, she told the trial court that Lark-Holland was not "motivated either by basic necessity nor [*sic*] pure greed" and that "there was a level of pressure and manipulation" which were all mitigating factors.

¶9 Lark-Holland also suggests that his trial lawyer should not have raised the issue of why he did not "just tell the pharmacy clerks to call the police?" In context, however, the lawyer was clearly attempting to explain, as she told the trial court, that Lark-Holland's "coping skills" were insufficient to recognize that there might have been a "a safe way to address what was occurring [but he] just didn't think it through." Given the facts to which Lark-Holland pled guilty, this was a not an unreasonable tack.

¶10 Finally, Lark-Holland could not just ignore that armed robbery with a gun *was* a very serious crime; she would have undercut her own credibility and, therefore, Lark-Holland's chance of getting a reasonable sentence, had she done so. Further, the lawyer spent a substantial amount of time at sentencing telling the trial court about Lark-Holland's positive qualities, pointing out that he got good grades at school, was on sports teams, was an active member of his church, and did not have a criminal record. She also noted his remorse and that he cooperated when he was arrested. Thus, she told the trial court: "You have more positive qualities to start the fabric of discipline and rehabilitation with Mr. Lark-Holland

than … anybody I worked with this year." She would have undercut all of this had she tried to soft-soap the seriousness of armed robbery. Her sentencing arguments were thus within the "wide range of professionally competent assistance." *See* ***Strickland***, 466 U.S. at 690.

B. *Lost Letter.*

¶11 Lark-Holland claims that his trial lawyer was ineffective because she lost a letter he wrote to be read at sentencing. In his postconviction motion, he argues that "his written statement included discussion of how he was threatened and manipulated into committing the crime by Uncle Tony and another man." Lark-Holland spoke directly to the circuit court because the letter was missing:

> Excuse me, your Honor. In my letter I started off by saying that I am really, I'm very, very remorseful for the situation. I'm very remorseful to the victims, the community, the customers, the owner of the store, of which I committed the crime to. I also wanted to say that this, this just like being in jail wasn't my worse punishment. My worse punishment was looking in the mirror every day to see the person that did what he did.

Lark-Holland does not show how the missing letter prejudiced the outcome of his sentencing; indeed, direct comments are more effective than reading off of a piece of paper. Further, Lark-Holland does not tell us that he forgot to tell the trial court anything of significance that was in the letter. The trial court acknowledged that Lark-Holland felt "manipulated or pressured" and that this "would obviously be a mitigating situation." Thus, Lark-Holland has not shown that the trial lawyer's loss of the letter made the result of the sentencing unreliable. *See* ***Strickland***, 466 U.S. at 694.

C. *Not filing a request for substitution against Judge Konkol*.

¶12 Lark-Holland also claims his lawyer was ineffective because she did not advise him to bump Judge Konkol, who, according to Lark-Holland, is known to impose longer sentences than do some other judges. To establish ineffective assistance on a failure-to-substitute claim, Lark-Holland must show that Judge Konkol's handling of his case was fundamentally unfair or that Judge Konkol was not impartial. *See* ***State v. Damaske***, 212 Wis. 2d 169, 200–201, 567 N.W.2d 905, 919–920 (Ct. App. 1997). To establish ***Strickland*** prejudice, it is not sufficient to show "'the idiosyncracies of the particular decisionmaker, [*sic*] such as unusual propensities toward harshness or leniency.'" ***Damaske***, 212 Wis. 2d at 201, 567 N.W.2d at 919 (quoting ***Strickland***, 466 U.S. at 695) ("'evidence about … a particular judge's sentencing practices, should not be considered in the [ineffective assistance] prejudice determination'").

¶13 Lark-Holland did not show that he was prejudiced by not being advised to substitute against Judge Konkol. Judge Konkol fully explained the sentence in accord with a well-reasoned exercise of discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d 535, 565–566, 678 N.W.2d 197, 211. After noting that the maximum penalty was forty years in prison and a $100,000 fine, Judge Konkol explained:

> I've had an opportunity to listen to the statements of counsel and to the statements of the defendant as well as his mother. I reviewed the pre-sentence investigation report prepared by the Department of Corrections. I have reviewed the sentencing memorandum prepared … on behalf of the defense. I reviewed the crime victim impact statements and restitution worksheet….
>
> ….
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> In determining the appropriate sentence, the Court needs to consider the gravity of the offense, the character

> and rehabilitative needs of the defendant and the need to protect the public. In looking at the gravity of the offense, this is a felony which … is a more serious offense…. As counsel has heard this Court point out before, short of homicide or serious sexual assault, this is one of [the] most serious crimes a citizen can commit in this state.
>
> … [T]he value of the loss here is very significant. The pharmacy had lost some $4,000 of narcotics….
>
> ….
>
> The matter here has had tremendous effect, tremendous emotional harm done to the victim. The victim had to change his employment. He's scared to even do his job. … That is just wrong. There is no pharmacist in this community who should be fearful that he's going, he or she is going to be robbed at gun point of the drugs. They are there to take care of drugs, medication for people who need that, medication that is helpful to people in the community. Pharmacists shouldn't have to be scared while they are trying to help the community someone is going to place their life at risk with an armed robbery. And it does not matter whether it's a 98 year old holding the gun or 17 year old holding the gun. The effect to the victim is just the same.

Judge Konkol carefully explained that Lark-Holland's case differed from someone merely walking into a pharmacy, putting a pack of gum in his or her pocket, and walking out. He also analyzed Lark-Holland's: (1) character and rehabilitative needs; (2) age as it affected Lark-Holland's responsibility; (3) acceptance of responsibility and his "expressed remorse"; (4) "good supportive family"; (5) "religious upbringing"; and (6) lack of a "prior criminal record." Judge Konkol also noted that that Lark-Holland was working on his education while in custody: "He has used this time well. He does have ability. He can do well."

¶14 The trial court concluded:

> Under all of the circumstances of this case, I don't think that probation is appropriate. I think that there does have to be confinement. … I do think confinement is necessary in the state prison, first of all, to underscore the

> very serious nature of this matter; second, to protect the public from further criminal activity of the defendant as well as anyone who is like situated.
>
> People need to know in this community they can't go around robbing pharmacists, that there will be significant consequences to themselves even someone such as Mr. Lark-Holland who does not have any prior record, any prior experience with the Criminal Justice System. Had he had that, I would be giving him far more than the sentence that I'm going to impose.

Lark-Holland had a fair sentencing proceeding.

D. *Alleged entitlement to an evidentiary hearing on Lark-Holland's claims*.

¶15 Lark-Holland also contends that the trial court should have held an evidentiary hearing to allow his trial lawyer to testify. As we have seen, however, none of Lark-Holland's contentions are supported by specific material facts that are in dispute, and the Record here "'conclusively demonstrates that the defendant is not entitled to relief.'" *See* ***Love***, 2005 WI 116, ¶26, 284 Wis. 2d at 123, 700 N.W.2d at 68 (quoted source omitted). Thus, remand for an evidentiary hearing is not warranted.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.