COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1379-CR **Cir. Ct. No. 2008CF3238**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD SCOTT WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Reginald Scott Williams appeals from a judgment, entered upon his pleas of no-contest, convicting him of one count of homicide by

negligent use of a vehicle, contrary to WIS. STAT. § 940.10(1) (2009-10),[1] and one count of reckless driving causing great bodily harm, contrary to WIS. STAT. § 346.62(4). Williams also appeals from the order denying his motion for postconviction relief. Williams argues that his conviction should be vacated and his pleas should be withdrawn, or alternatively, that he should be resentenced, based on trial counsel ineffectiveness and newly-discovered evidence. Williams also contends that his sentence was unduly harsh. We affirm.

BACKGROUND

¶2 Williams was initially charged with one count of homicide by negligent operation of a vehicle and three counts of reckless driving causing great bodily harm, stemming from an accident that occurred on June 14, 2008. On that day, shortly after midnight, a car driven by Williams collided with a car driven by Andrew McDowell at the intersection of North Martin Luther King Drive and West Concordia Street, Milwaukee. McDowell died as a result of the collision. Three children, seated in the back of McDowell's car, were seriously injured.

¶3 According to the complaint, Williams was driving northbound on Martin Luther King Drive, when he began a race with a yellow Ford Mustang that had passed him. McDowell was travelling southbound on Martin Luther King Drive and was attempting to make a left turn onto West Concordia Street when Williams collided with him. Williams told police that he was accelerating and traveling at a high rate of speed when his car struck McDowell's car and that he did not have time to react or brake before the accident. An accident reconstruction

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

expert estimated that Williams was driving between sixty-three and sixty-nine miles per hour in a thirty-mile-per-hour zone.

¶4 Williams retained Attorney Philip Atinsky. At the pretrial conference, Atinsky raised the possible defense of intervening action or causation, stating that at the time of the collision: (1) McDowell failed to wear a seatbelt and failed to restrain the children with car seats or seatbelts; (2) McDowell was attempting an illegal left turn into Williams's path; (3) McDowell's blood alcohol content was .10; and (4) McDowell's blood tested positive for marijuana. The trial court adjourned the case and set a new hearing date.

¶5 The following week, Atinsky told the trial court that he planned to hire experts to determine the relative speeds, causes of the accident, and issues regarding the seatbelts; however, Atinsky also indicated that his client lacked the funds to retain the experts. After hearing arguments from the State regarding the admissibility of Atinsky's potential expert opinions, the trial court adjourned the hearing to allow Atinsky time to obtain expert input. However, the trial court cautioned that with regard to the seatbelt issue it was "going to rule against [Atinsky] on that anyway," in part, based on "applicable, if not controlling" case law.

¶6 Ultimately, Atinsky did not pursue the defense of intervening cause or action and the parties entered into a plea agreement. Pursuant to the agreement, Williams agreed to enter no-contest pleas to the homicide by negligent operation of a vehicle charge, and one charge of reckless driving causing great bodily harm, in exchange for the State's dismissal of the other two reckless driving charges. The State also agreed to limit its sentencing request to a recommendation of incarceration with no specific overall sentence or extended supervision term and

no limitation on Williams's right to argue at sentencing. The trial court accepted the plea agreement. Williams was subsequently sentenced to a seven-year term, consisting of three years of incarceration and three years of extended supervision on the homicide by negligent operation charge, and one year of incarceration on the reckless driving charge, to be served consecutively.

¶7 Williams filed a postconviction motion, through new counsel, asking the trial court to withdraw his no-contest pleas and his conviction, or, alternatively, to resentence him. Williams argued that his trial counsel was ineffective for failing to conduct the necessary defense investigation by failing to retain experts on the issue of causation. Attached to Williams's motion was an accident reconstruction report from Skogen Engineering ("the Skogen report"), which, Williams argued, "provides a clear, affirmative defense to the charges … [s]pecifically, the report shows that McDowell's left turn immediately in front of [Williams] was a separate intervening act that caused the collision." The Skogen report indicates that McDowell must have timed his left turn such that he attempted to turn immediately after the Mustang passed the intersection, but before Williams entered it. Williams argued that had his trial counsel obtained the report prior to negotiating a plea agreement, he (Williams) would not have pled no-contest. He also argued that the Skogen report would have provided substantial mitigation at sentencing if presented to the sentencing court, and could have resulted in a lower sentence. Williams further contended that the Skogen report constituted newly-discovered evidence, providing the basis either for plea withdrawal or resentencing, and that his sentence was unduly harsh.

¶8 In a written decision, the trial court partially denied Williams's motion, and ordered an evidentiary hearing for the issue of whether trial counsel was ineffective for not presenting an expert report at sentencing. The trial court

found that under WIS. STAT. § 939.14, McDowell's civil liability in the collision could not constitute a defense because Williams's conduct was still a substantial cause of McDowell's death and of the injuries sustained by the children. As such, Atinsky's failure to retain an expert was not ineffective. The trial court further found that the Skogen report, regardless of whether it met the elements of the newly-discovered evidence test, would not have been admissible as an affirmative defense to the charges. If the Skogen report was admissible, the trial court found, there was not a reasonable probability that a jury would have found that Williams's conduct was not a substantial factor in the accident.

¶9 The trial court conducted a ***Machner***[2] hearing to determine whether Atinsky's performance at the sentencing hearing was ineffective. Atinsky testified that he did not retain an expert for mitigation at sentencing because all of the information pertaining to McDowell's negligence was known to the trial court at the time of sentencing. As such, Atinsky stated that he did not think that retaining an expert would have made a difference. The trial court found Atinsky's reason to be sound strategy, and further noted that Atinksy's arguments at sentencing focused on Williams's acceptance of responsibility, rather than "appearing as though he's engaged in any sort of unfair or undue blaming of the victim." The trial court denied the remainder of Williams's motion. Williams now appeals the trial court's denial of his postconviction motion in its entirety. Additional facts are included as relevant to the discussion.

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

DISCUSSION

¶10 On appeal, Williams reiterates the arguments presented in his postconviction motion. He contends that: (1) Atinsky was ineffective for not retaining accident reconstruction experts both prior to negotiating a plea and at sentencing; (2) the Skogen report is newly-discovered evidence of McDowell's liability in the collision; and (3) his sentence was unduly harsh. Williams contends that he is entitled to withdraw his plea and have his judgment vacated, or, alternatively, to resentencing. We disagree.

Plea Withdrawal

¶11 Decisions on plea withdrawal requests are discretionary and will not be overturned unless the trial court erroneously exercised its discretion. ***State v. Spears***, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). A motion that is filed after sentencing should only be granted if it is necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). Williams has the burden of proving by clear and convincing evidence that a manifest injustice exists. *See* ***State v. Schill***, 93 Wis. 2d 361, 383, 286 N.W.2d 836 (1980).

I. Ineffective Assistance of Counsel.

¶12 Ineffective assistance of counsel can constitute a manifest injustice. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). 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). To prove deficient performance, the defendant must identify specific acts

or omissions of his or her attorney that fall "outside the wide range of professionally competent assistance." ***Id.*** 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.

A. The Plea Agreement

¶13 Williams argues, in essence, that he would not have entered no-contest pleas if Atinsky had retained an expert to provide input as to McDowell's role in the accident. Rather, he asserts, he would have chosen to go to trial. Williams contends that expert evidence, such as that provided by the Skogen report, would have directly challenged the cause of the accident because the evidence would have revealed that McDowell's driving conduct, namely, his attempt to make a left turn in front of Williams, actually caused the collision. Williams is mistaken.

¶14 A defendant may be found guilty of homicide by negligent operation of a vehicle under WIS. STAT. § 940.10 if: "(1) the defendant operated a vehicle; (2) the defendant operated the vehicle in a criminally negligent manner; and (3) the defendant's criminal negligence caused a person's death." ***State v. Schutte***, 2006 WI App 135, ¶19, 295 Wis. 2d 256, 720 N.W.2d 469. WISCONSIN JI—CRIMINAL 1170 explains that "cause," as it pertains to this case, "means that the defendant's act was a substantial factor in producing the death." "The existence of multiple causes of a particular outcome does not remove criminal liability if the criminal conduct was a 'substantial factor' contributing to the ultimate result." ***State v. Payette***, 2008 WI App 106, ¶17, 313 Wis. 2d 39, 756 N.W.2d 423 (citation omitted). Our supreme court has held that "[a] 'substantial factor' need

not be the sole cause of death." ***State v. Oimen***, 184 Wis. 2d 423, 436, 516 N.W.2d 399 (1994).

¶15 It is undisputed that Williams was racing another vehicle at a rate at least thirty miles per hour over the speed limit. Williams himself admitted that he was unable to react or brake before the accident due to his speed. Any negligence McDowell may have displayed does not remove the fact that Williams's driving was a substantial cause of the resulting death and injuries. The Skogen report confirms that Williams was driving at a rate at least twice above the legal speed limit. While the report may provide additional details about the collision, it does not negate Williams's driving as a substantial cause. A substantial factor need not be the sole cause of the collision. *See* ***id.*** Because the information obtained from the Skogen report does not provide a defense for Williams's actions, *i.e.*, racing and speeding, Atinsky was not ineffective for failing to retain an expert. *See* ***State v. Toliver***, 187 Wis. 2d 346, 359-60, 523 N.W.2d 113 (Ct. App. 1994) (An attorney is not ineffective for failing to make meritless arguments.).

B. Sentencing

¶16 Williams also contends that Atinsky was ineffective for failing to retain a defense expert at sentencing. Williams argues that the availability of an expert report at sentencing addressing McDowell's role in the accident, such as the Skogen report, could have resulted in a lesser sentence.

¶17 As stated, Atinsky testified at the ***Machner*** hearing. Atinsky stated, in essence, that he did not retain an expert because information and evidence relating to McDowell's negligence—the left turn in front of Williams, the presence of alcohol and marijuana in McDowell's system, the failure to wear a seatbelt and the failure to properly secure the children in his vehicle—was already

known to the sentencing judge. Atinsky stated that evidence of McDowell's negligence, which was not disputed, "was all brought up to the sentencing judge … it didn't seem … that an expert would make any difference because … at sentencing … the judge had that [information] readily available to her." The trial court also pointed out that Atinsky's arguments at sentencing strategically focused on Williams's willingness to take responsibility for the collision, rather than "[give] the impression or appearance that his client wanted to blame the victim."

¶18 This court "will not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.'" ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted). "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***Id.*** at 464-65.

¶19 A review of the sentencing transcript indicates that the sentencing judge was, indeed, aware of the mitigating factors at issue. Atinsky's decision not to pursue a defense expert to reiterate those factors, but rather to focus on Williams's positive qualities, was neither deficient performance, nor prejudicial to Williams's case. Atinsky's decision was strategic, and we will not second-guess it.

II. Newly-Discovered Evidence.

¶20 Williams also contends that the Skogen report is newly-discovered evidence. For newly-discovered evidence to constitute a manifest injustice and warrant the withdrawal of a plea, a defendant must prove "by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in

the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the evidence meets these criteria by clear and convincing evidence, the trial court must then determine "whether a reasonable probability exists that a different result would be reached in a trial." ***Id.***

¶21 The Skogen report does not constitute newly-discovered evidence. As stated, the sentencing court was aware of McDowell's attempted left-turn, the intoxicants in his system, and his failure to secure a seatbelt on both himself and the children. The Skogen report confirms that Williams was driving way in excess of the speed limit, consistent with the police report. Indeed the report provides little information that is not revealed in the criminal complaint and police reports. Any additional details in the report, namely, details pertaining to McDowell's attempted left-turn, were easily inferable. Specifically, it was readily inferable that McDowell was driving at a slower speed than Williams while attempting to turn. It was also readily inferable that McDowell timed his attempted turn in between the Mustang crossing the intersection and Williams approaching it, leaving no room or time for Williams to react given Williams's speed and proximity to the intersection. Simply stated, the evidence in the Skogen report is cumulative.

Resentencing

¶22 Finally, Williams alternatively argues for resentencing based on ineffective assistance of counsel, the presence of a new factor (the Skogen report) and his contention that his sentence was unduly harsh and unconscionable. We disagree.

¶23 Sentencing decisions are committed to the discretion of the trial court and our review is limited to determining whether the trial court erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). A strong public policy exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). To obtain relief on appeal, the defendant has the burden to "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992).

¶24 We have concluded that Williams did not receive ineffective assistance of counsel. Therefore, he is not entitled to resentencing on that ground. We have also stated that the Skogen report presents no new information that is relevant to Williams's sentence. Although the report in and of itself was not available at the time of sentencing, relevant information from the report was either known to the sentencing court, or was readily inferable. *See* ***State v. Franklin***, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989) (A new factor is information highly relevant to the sentence, but unknown at the time of sentencing because it did not then exist or was unknowingly overlooked.).

¶25 A court may find an erroneous exercise of sentencing discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). However, "[a] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the

circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983); *see also* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

¶26 This is a case in which one person died and three children were seriously injured. Williams's penal exposure under the original charges—one count of homicide by negligent operation of a vehicle and three counts of reckless driving causing great bodily harm—was twenty and one-half years. *See* Wis. Stat. §§ 940.10(1), 346.62(4)-(5), 939.50(2)(g), (i). The trial court reviewed the transcript of Williams's sentencing hearing in detail, noting that the sentencing court addressed the objectives of Williams's sentence, as well as the factors necessary for consideration under ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. Specifically, the trial court referenced the sentencing court's acknowledgment of Williams's "generally good character," and his willingness to accept responsibility. The trial court also recognized the sentencing court's emphasis on the nature and gravity of Williams's offense, the need to protect the public, and "the terrible decision-making on the part of [Williams]." Williams's seven-year sentence was well within the limits of the maximum possible sentence and, although a first offense by Williams, was not unduly harsh or unconscionable in view of the death and multiple serious injuries. We conclude that the trial court properly exercised its discretion in upholding the sentence imposed by the sentencing court.

¶27 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.