COURT OF APPEALS DECISION DATED AND FILED

December 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

No. 00-1585-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN F. BRAZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] John F. Braz appeals from the sentencing provisions of a judgment of conviction for criminal damage to property following the revocation of his probation. Braz also appeals from a postconviction order

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version.

rejecting his challenges to the sentence. Braz contends that his trial counsel at the sentencing was ineffective. Alternatively, he argues that he was entitled to a sentence modification because of new factors and because the trial court erred in the exercise of its sentencing discretion. We disagree with the trial court's holding that trial counsel was effective, but we hold that Braz has not demonstrated that counsel's failing was prejudicial. We also reject Braz's other arguments. We affirm the judgment and order.

Facts and Procedural History

¶2 The State charged Braz with attempted felony escape and misdemeanor criminal damage to property as party to the crimes. As to the criminal damage to property charge, the complaint alleged that Braz was a repeat offender and recited a maximum penalty of "up to three years imprisonment …." On December 7, 1992, the trial court conducted the initial appearance on these charges in conjunction with a sentencing proceeding on a pending charge of second-degree sexual assault. Braz was represented by counsel at this proceeding. The court sentenced Braz to a five-year prison term on the sexual assault charge.

¶3 After a short recess, the parties advised the trial court that they had reached a plea agreement regarding the attempted escape and criminal damage to property charges. Pursuant to the agreement: (1) Braz pled guilty to the attempted escape charge and no contest to the criminal damage to property charge; (2) the trial court sentenced Braz to a six-month term of imprisonment on the attempted escape charge consecutive to the five-year term which the court had previously imposed on the sexual assault conviction; and (3) the court withheld sentence on the criminal damage to property charge and placed Braz on probation consecutive to the six-month term. The judgment of conviction on the criminal damage to

property charge recited the three-year probation term, but it did not state that Braz had been convicted as a repeat offender.

¶4 Braz was released from prison on August 4, 1996, under supervision by the Department of Corrections both as a parolee in the sexual assault case and as a probationer in the criminal damage to property case. Thereafter, the Department began revocation of probation proceedings against Braz based upon a domestic abuse charge. Braz retained new counsel, Attorney John Schaan, to represent him on these matters. Schaan incorrectly advised Braz that he was subject to a maximum sentence of nine months if the probation was revoked. Schaan based this advice on the judgment of conviction, which did not reveal that Braz had been convicted as a habitual criminal. Braz did not contest the revocation and he was returned to the trial court for sentencing on September 2, 1999, nearly seven years after having been originally placed on probation. At this sentencing proceeding, the trial court sentenced Braz to three years' imprisonment.

¶5 Represented by his current counsel, Braz brought a postconviction motion alleging that Schaan was ineffective for failing to investigate and learn the correct sentence exposure that Braz faced. Braz also alleged that Schaan was ineffective for failing to fully investigate sources that would allegedly have revealed mitigating information regarding the sentence. Alternatively, Braz sought a resentencing, claiming that the trial court had misused its sentencing discretion.

¶6 Following a hearing, including a ***Machner***[2] proceeding, the trial court denied Braz's motion. Braz appeals.

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

Discussion

1. Ineffective Assistance of Counsel

¶7 Braz first argues that Schaan was ineffective for failing to investigate and learn that he was subject to a three-year, not a nine-month, term of imprisonment following the revocation of his probation on the criminal damage to property conviction. There is no dispute that Schaan incorrectly advised Braz on this point. Schaan sought a new sentencing as a result.[3]

¶8 The law regarding ineffective assistance of counsel is well known, and we will not repeat it in detail here. Suffice it to say that Braz's burden is to establish both ineffective performance by trial counsel and prejudice as a result of that performance. *See* ***State v. Cleveland***, 2000 WI App 142, ¶9, 237 Wis. 2d 558, 614 N.W.2d 543, *review denied*, ___ Wis. 2d ___, ___ N.W.2d ___ (Wis. Oct. 17, 2000) (No. 99-2682-CR). When reviewing an ineffective assistance of counsel claim, we will not disturb the trial court's factual findings unless they are clearly erroneous, but we review the ultimate determination of whether counsel was ineffective de novo. *See* ***id***.

¶9 At the ***Machner*** hearing, Schaan testified that because the original judgment of conviction withholding sentence and placing Braz on probation did not recite that Braz had been convicted as a habitual offender, he concluded that Braz's maximum sentence exposure was nine months. The trial court concluded that Schaan's reliance on the judgement of conviction was reasonable and that Schaan therefore had provided effective assistance of counsel.

[3] Braz did not challenge the revocation of his probation based on this misinformation. Instead, he limited his request to a new sentencing hearing.

¶10 We disagree. Schaan was retained to represent Braz for purposes of sentencing. We think it self-evident that competent counsel must know the applicable penalties when providing representation at a sentencing. Here, the criminal complaint and the information expressly revealed that Braz was charged as a repeater. In addition, both pleadings recited the maximum sentence as three years, a period of confinement beyond the maximum nine-month jail term which would, absent a repeater situation, ordinarily apply to the misdemeanor offense of criminal damage to property. Given this backdrop, we conclude that Schaan was required to at least investigate whether Braz may have been convicted as a habitual criminal.[4] We hold that Schaan was ineffective.

¶11 Thus, we move to the prejudice prong of the analysis. The prejudice prong is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. *See* ***Cleveland***, 2000 WI App 142, ¶11. But this is not a pure outcome-determinative test. *See* ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997). This is because "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). Stated differently, but to the same effect, proof of prejudice requires a showing that the defendant was deprived of a fair proceeding whose result is reliable. *See* ***Smith***, 207 Wis. 2d at 275.

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[4] Schaan indicated that he assumed that the repeater allegations in the complaint had been eliminated by the plea agreement since the judgment of conviction did not recite that Braz had been convicted as a repeater. While that was a possibility, we hold that Schaan was obligated to ascertain that this was so. At a minimum, Schaan should have consulted with the district attorney or predecessor defense counsel to learn what had happened regarding the repeater allegations. Or counsel could have obtained a transcript of the original sentencing hearing or reviewed the notes of the proceeding with the court reporter.

¶12 Here the trial court observed that Schaan's duty, like any defense attorney, was to argue for the least amount of confinement. And the court concluded that Schaan had done just that. Schaan testified that he was retained by Braz's grandfather to represent Braz on both the domestic abuse charge and the resultant probation revocation matter. Schaan explained that he consulted with Braz, obtained copies of materials from the probation department, spoke with Braz's probation agent, reviewed and copied materials in the probation file, and reviewed the transcript of the sentencing in the sexual assault case. He relied on all of this information in preparing for the sentencing hearing.

¶13 At the sentencing hearing, Schaan spoke to the sexual assault, felony escape and criminal damage to property convictions, stressing that the latter was a misdemeanor and represented the least serious of the three charges. He disagreed with the State's dismal representation of Braz's conduct in prison and while on supervision. He contended that some of the conduct reports from the prison were "technical violations." He stated that Braz was now living with his grandfather, and that Braz had obtained a "better job and was doing productive things." Schaan attempted to minimize the domestic dispute that had precipitated the revocation of Braz's probation, and he pointed to Braz's cooperation by not contesting the revocation proceeding. Ultimately, Schaan asked the trial court to impose county jail time with Huber privileges.

¶14 Despite Schaan's plea on Braz's behalf, the trial court sentenced Braz to a three-year prison term. In its sentencing remarks, the court noted Braz's continuing antisocial conduct both during his imprisonment and after his release while on parole and probation supervision. The court stated that it had hoped that the five-year sentence on the sexual assault charge and the consecutive six-month sentence on the felony escape charge "would drive the point home to you and that

you'd probably try to turn around for the next three years. It hasn't proven successful and it's unfortunate, very unfortunate, because we've got 10 years of juvenile and criminal behavior that just keeps dragging out."

¶15 Given this record, we harbor no lack of confidence in the outcome of this sentencing proceeding, even though Schaan was mistaken as to Braz's confinement exposure. Schaan had a very difficult case to make on Braz's behalf. Although only nineteen years of age, Braz was already a career criminal in the making. He had a ten-year juvenile and adult record. He had continued his antisocial conduct both while in prison and after his release while on supervision. The trial court noted that its prior sentencing structure, which mandated prison time followed by supervision time, created an opportunity for Braz to demonstrate to the court that he had rehabilitated and could behave responsibly when returned to society. But Braz had spurned that opportunity.

¶16 Even if Schaan had known of Braz's correct confinement exposure, we are at a loss to see what Schaan would have, or could have, done differently. And Braz offers us no help on this point other than to allege in conclusory terms that the result of the proceeding was unreliable. In summary, Schaan's failure to persuade the trial court to his way of thinking as to the appropriate sentence had nothing to do with his failure to know of Braz's true sentencing exposure. Therefore, we conclude that despite Schaan's mistake, Braz has not demonstrated that he was deprived of a reliable, fair sentencing proceeding. *See **id***. As a result, we do not lack confidence in the outcome of this sentencing proceeding. *See **id***. at 275-76.

¶17 Braz also contends that Schaan was ineffective for failing to more fully investigate the conduct reports issued against Braz while he was imprisoned.

Braz contends that this investigation would have revealed that many of the reports were for minor violations and that Schaan then could have made this point to the trial court. But, as we have already noted, Schaan did argue that some of the reports were for technical violations. Moreover, a memo prepared for the trial court by the Department noted that of the forty-four conduct reports, thirty-nine were minor violations. In short, Braz has not demonstrated that Schaan was ineffective as to this matter, and, in any event, he has not demonstrated any prejudice because the nature of the violations was already known to the court.

2. New Factors and Sentencing Discretion

¶18 Alternatively, Braz seeks a new sentencing based on the law of "new factors" and on grounds that the trial court erred in the exercise of its sentencing discretion.[5] We address these claims in a single discussion because both arguments are directed at the trial court's references to the conduct reports issued by the Department while Braz was imprisoned.

¶19 Braz reasons that these reports are "new factors" warranting a new sentencing because they pertain to events occurring after the original sentence in this case.[6] On a related theme, Braz argues that the court erred by focusing too

[5] We seriously question whether Braz has preserved the "new factors" argument for appellate review. Neither his postconviction motion nor his memorandum in support of the motion raised this issue. During the postconviction proceeding, Braz did utter the phrase "new factor," but he never developed any argument on this theory. That probably explains why the trial court did not address this issue. A party must raise an issue with sufficient prominence such that the trial court understands that it is requested to make a ruling. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (1984). The State, however, does not make any claim of waiver as to this issue. We therefore address the issue on the merits.

[6] A "new factor" refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

much on these reports to the denigration of the original offense—criminal damage to property.

¶20 Braz's "new factors" argument overlooks the "bifurcated" sentencing proceedings which occur in a case such as this where the defendant is originally placed on probation under a withheld sentence and then is later sentenced following a revocation of that probation. In this kind of case, there are really two sentencing proceedings, each of which stands on its own separate merits.

¶21 The original 1992 sentence placing Braz on probation under a withheld sentence was a full, final and complete adjudication of the matter as things stood at that time. If any "new factors" came to light thereafter, Braz was entitled to seek a resentencing. But since that judgment of conviction withheld the imposition of a sentence, it also allowed the possibility of a future sentence if Braz's probation should be revoked. When that occurred, seven years had passed since the original sentencing and the trial court now had Braz's track record during this period of time. The court was required to fashion a new and further sentence. And in so doing, the court was fully entitled, indeed duty-bound, to consider all of the factors *relevant to the sentencing issues as they existed at that time.*

¶22 Thus, the "new factors" represented by Braz's conduct while in prison are not "new factors" at all. This information was before the trial court in the latter of the sentencing proceedings, and the court properly weighed this information when making its sentencing decision.

¶23 In addition, the trial court did not misuse its discretion in focusing on this intervening history since it bore directly upon two of the primary factors influencing a sentencing decision—Braz's character and the need to protect the

public. *See* ***State v. C.V.C.***, 153 Wis. 2d 145, 163, 450 N.W.2d 463 (Ct. App. 1989). The weight to be placed on the relevant sentencing factors is committed to the trial court's discretion. *See* ***id***.

Conclusion

¶24 Although we disagree with the trial court that Schaan provided effective assistance of counsel, we hold that Braz has failed to demonstrate that he was prejudiced by counsel's failing. We further hold that Braz has failed to satisfy the "new factors" test. Finally, we hold that the trial court did not err in the exercise of its sentencing discretion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.