

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 02-0795

Cir. Ct. No. 00-CI-1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE COMMITMENT OF DENNIS C. MARTH:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

DENNIS C. MARTH,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Dennis C. Marth appeals from a judgment committing him under WIS. STAT. ch. 980 (2001-02)¹ as a sexually violent person and from an order rejecting his ineffective assistance of trial counsel claim. On appeal, Marth argues that his trial counsel was ineffective. We disagree and affirm.

¶2 In 1986, Marth was convicted of two counts of first-degree sexual assault. He received a prison sentence followed by probation, which was subsequently revoked. As Marth approached his release date, the State filed a petition for commitment under WIS. STAT. ch. 980 on the grounds that Marth was a sexually violent person. At the jury trial, the State presented two experts who testified to their findings and conclusions. The State's experts administered standardized tests to Marth and relied upon those tests to determine that Marth met the ch. 980 criteria for commitment as a sexually violent person. Marth did not present any witnesses. The jury found that Marth was a sexually violent person under ch. 980, and the court committed him to a secure treatment facility. Post-commitment, Marth brought an ineffective assistance of trial counsel claim, which the court rejected. Marth appeals.

¶3 Marth had the right to the effective assistance of counsel. *State ex rel. Seibert v. Macht*, 2002 WI 12, ¶2, 249 Wis. 2d 702, 639 N.W.2d 707 (on reconsideration). In order to prevail on his claim that counsel rendered ineffective assistance, Marth had to show that trial counsel's representation was deficient and that he was prejudiced by counsel's deficient performance. *State v. Thiel*, 2003

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Counsel’s representation is constitutionally deficient if it falls below an objective standard of reasonableness. *Id.*, ¶19. This standard encompasses a wide range of professionally competent assistance. *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). We presume that counsel’s performance was satisfactory. *Id.*

¶4 We “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.’ A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.” *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted).

¶5 An ineffective assistance of counsel claim presents a mixed question of law and fact. *Thiel*, 264 Wis. 2d 571, ¶21. We will uphold the circuit court’s findings of fact regarding the circumstances of the case and counsel’s conduct and strategy unless they are clearly erroneous. *Id.* However, whether counsel’s performance satisfies the constitutional standard for ineffective assistance of counsel presents a question of law, which we decide de novo. *Id.*

¶6 On appeal, Marth argues that although his trial counsel retained experts to counter the State’s presentation at the WIS. STAT. ch. 980 trial, counsel did not speak with those experts or present their opinions at trial. Specifically, Marth alleges that trial counsel failed to present the testimony of Dr. Lynn Maskel, who was hired to review and comment upon the predictive tests given to Marth by

the State's experts, and Dr. Robert Alvarez, who examined and tested Marth and concluded that he did not meet the ch. 980 sexually violent person criteria.²

¶7 At the hearing on Marth's ineffective assistance claim, trial counsel testified that he did not speak with Drs. Maskel and Alvarez because he reviewed their written reports. Trial counsel did not present Dr. Maskel's testimony because counsel believed that cross-examination of the State's experts would be an effective means of addressing the reliability and level of general acceptance of the predictive tests used to evaluate the probability that Marth would commit sexually violent acts in the future. The record bears out this strategy.

¶8 One of the State's experts, Dr. Deborah Collins, testified on direct examination that there is a debate over the trustworthiness of the actuarial risk instruments used to evaluate Marth. Counsel elicited on cross-examination specific problems with the instruments, or predictive tests: how specifically they apply to individuals being tested, and how the instruments make assumptions regarding an offender that did not apply to Marth. For example, two of the instruments did not take into account that Marth participated in sex offender treatment while in prison.

¶9 Another expert for the State, Dr. Sheila Fields, testified that the actuarial instruments or predictive tests had about a seventy percent accuracy rate, meaning they were incorrect thirty percent of the time. Dr. Fields noted that she and Dr. Collins reached different scores for Marth using the same instruments and that the instruments did not account for a reduction in risk as Marth aged. Dr.

² These experts were hired by trial counsel's predecessor.

Collins conceded that the instruments for predicting future behavior were rudimentary. In light of this testimony, counsel did not believe that he needed to present Dr. Maskel's opinions regarding the predictive tests. Counsel discussed this strategy with Marth.

¶10 Trial counsel further testified that he was familiar with the risk instruments, how they were scored and their value. Counsel conferred with predecessor counsel and both determined that Dr. Alvarez had under-scored the tests he administered. This explained why Dr. Alvarez determined that Marth had a lower risk of reoffense than the State's experts determined and why Dr. Alvarez concluded that Marth did not meet WIS. STAT. ch. 980 sexually violent person criteria.

¶11 Trial counsel explained that he made a strategic decision to argue to the jury that the predictive tests should not be relied upon at all, and that it would not have been helpful to present the testimony of Dr. Alvarez, whose opinion was based on the same tests. Presenting Dr. Alvarez's testimony would concede that the tests should be given weight, while counsel wanted to argue the contrary position. Counsel discussed this strategy with Marth and explained to him that he could not take inconsistent positions.

¶12 At the hearing, Marth testified that he wanted Dr. Alvarez to testify. Marth also believed that Dr. Maskel was going to testify until he learned that counsel was not going to call her as a witness.

¶13 The court determined that trial counsel did not perform deficiently and made a strategic decision with regard to Drs. Maskel and Alvarez. During cross-examination by Marth's counsel, the State's witnesses conceded that the tests were problematic. Therefore, counsel did not require the testimony of

Dr. Maskel on that point. The court also noted the inconsistency of presenting Dr. Maskel's criticism of the testing instruments and Dr. Alvarez's opinions regarding Marth's potential for recidivism which were based on the tests criticized by Dr. Maskel. The court noted that counsel "did a masterful job" at the lengthy trial.

¶14 The court's findings are not clearly erroneous and are supported in the record. We turn to the legal standards for deficient performance and conclude that the standards are not met in this case. Here, Marth's counsel made a strategic decision not to present evidence from Drs. Maskel and Alvarez at the WIS. STAT. ch. 980 hearing because their opinions either were not helpful to Marth or were elicited from the State's witnesses on cross-examination. Counsel's strategy of attempting to discredit the testing instruments was rationally based on the facts and the law and neither Dr. Maskel nor Dr. Alvarez furthered this strategy. Counsel did not perform deficiently.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

