COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP846 **Cir. Ct. No. 2008JV21**

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

IN THE INTEREST OF JENNIFER Z., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JENNIFER Z.,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Taylor County: ANN KNOX-BAUER, Judge. *Affirmed in part*; *reversed in part*.

¶1 BRUNNER, J.[1] Jennifer Z. appeals a delinquency adjudication on five counts and an order denying her postdisposition motion to dismiss for the State's failure to prove venue. She contends she received ineffective assistance of counsel when her attorney failed to challenge venue in Taylor County and elicited incriminating testimony that led to an additional count of delinquency for misdemeanor theft. We conclude defense counsel's failure to challenge venue does not constitute ineffective assistance of counsel, but reverse the delinquency finding on the misdemeanor theft count because it resulted from testimony her attorney elicited for no discernible tactical purpose. We therefore affirm Jennifer's delinquency adjudication on all counts but that relating to the additional misdemeanor theft count.

¶2 Jennifer was alleged delinquent on three counts of operating a motor vehicle without the owner's consent and one count misdemeanor theft as party to a crime. The charges arose from events occurring on May 15, 2008, when Jennifer and John V. fled Jennifer's foster home on foot. During their flight, the pair stole a Jeep. They used money stolen from a jar of change to purchase gas and Gatorade before they abandoned the vehicle. They stole a second car, which they abandoned after smashing it into another vehicle, and fled on foot from responding authorities. The pair was apprehended following their third vehicle theft. The circuit court found Jennifer delinquent on all charges alleged in the petition.

¶3 During the trial, Jennifer's defense attorney elicited testimony from Jennifer and an investigating officer suggesting she also stole a sweatshirt from one of the vehicles. At the defense attorney's request, the investigating officer

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

described all personal property taken from the vehicle, including a Wisconsin Badgers sweatshirt. When Jennifer testified, her attorney asked her to testify regarding her acquisition and possession of the sweatshirt. Jennifer testified she took the sweatshirt from the car, wore it, and retained possession of it until she was taken into custody. At the close of the testimony, the court permitted the State to amend the delinquency petition to add a fifth count for theft of the sweatshirt. The circuit court rejected Jennifer's argument that she did not intend to permanently deprive the owner of the sweatshirt and found Jennifer delinquent on that count.

¶4 Jennifer filed a postdisposition motion claiming defense counsel provided ineffective assistance for, among other things, failing to challenge venue in Taylor County and eliciting incriminating testimony about the stolen sweatshirt.[2] The circuit court determined venue in Taylor County was appropriate. The court noted the Taylor County Human Services Department was granted legal custody of Jennifer in December 2006 and had made eight to twelve different placements, at no time with the intent to make those placements Jennifer's permanent home. Analyzing the statute controlling venue, WIS. STAT. § 938.185(1), the court concluded Jennifer resided in Taylor County even though she lived elsewhere. In addition to denying her motion to dismiss, the court also denied her motion for a new trial, speculating her attorney's questioning related to restitution and finding Jennifer's disposition would have been the same without the amended theft charge.

[2] Jennifer does not appeal the circuit court's rulings on the other matters raised in her postdisposition motion, and we therefore do not consider them.

¶5 Jennifer appeals the circuit court's denial of her motion to dismiss and her motion for a new trial, contending the circuit court incorrectly concluded her defense counsel provided effective representation. An attorney is ineffective only if his or her representation was deficient and the defendant was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***Thiel***, 264 Wis. 2d 571, ¶19. Counsel's deficient performance is constitutionally prejudicial if there is a reasonable probability that the result of the proceeding would have been different absent counsel's errors. ***Id.***, ¶20. Whether defense counsel rendered ineffective assistance is a mixed question of law and fact. ***Id.***, ¶21. We will uphold factual findings, including those related to counsel's strategy, unless clearly erroneous, but whether the attorney's performance satisfies the constitutional ineffectiveness standard is a question of law that we review de novo. ***Id.***

¶6 Jennifer first argues her attorney was ineffective for failing to challenge venue in Taylor County. The parties agree the only possible basis for venue in Taylor County is WIS. STAT. § 938.185(1)(a), which locates venue in the county where the juvenile resides. In ***State v. Corey J.G.***, 215 Wis. 2d 395, 415-16, 572 N.W.2d 845 (1998), our supreme court concluded the term "resides" refers to the juvenile's legal domicile. Although the term "domicile" refers to living in a particular locality with intent to make it a fixed and permanent home, ***id.*** at 415, a legal custodian has the right to establish the legal domicile of the child, ***Patrick v. Patrick***, 17 Wis. 2d 434, 437, 117 N.W.2d 256 (1962). Hence, a minor child's domicile is generally that of his or her parent or parents. ***Corey J.G.***, 215 Wis. 2d at 418. In interpreting the statute to provide venue where the juvenile is

domiciled, the court emphasized local courts are particularly well-suited to establish a suitable program for delinquent children:

> [C]ourt and social services personnel may be familiar with the child and the family. The local court is sensitive to community values and is prepared to fashion dispositions to community needs and resources. Finally, the local juvenile court is equipped to determine whether or not dispositional alternatives or supervision programs are helping the child overcome his/her problem.

Id. at 417-18 (quoting WISCONSIN COMMITTEE TO REVISE THE JUVENILE COURT SERVICES HANDBOOK, HANDBOOK FOR JUVENILE COURT SERVICES 11 (1977)).

¶7 Here, Jennifer's legal custodian was the Taylor County Human Services Department in Taylor County. The Department had, among other responsibilities, the obligation to "provide food, shelter, legal services, education and ordinary medical and dental care." WIS. STAT. § 48.02(12). Although the Department shared some responsibility for these tasks, the decision of placement rested with the Taylor County agency. Any determination of Jennifer's final placement would occur in that location, and the Department was the primary authority responsible for establishing Jennifer's domicile. *See* ***Patrick***, 17 Wis. 2d at 437. We therefore conclude Jennifer "resides" in Taylor County for the purposes of venue under WIS. STAT. § 938.185(1)(a). Jennifer's attorney was not deficient for failing to challenge venue because the action was properly before the circuit court.

¶8 Jennifer also claims her delinquency adjudication for the sweatshirt theft must be reversed because it resulted from ineffective assistance of her defense attorney. Although both the investigating deputy and Jennifer testified regarding the items stolen from the vehicles, in both instances Jennifer's defense attorney elicited the incriminating testimony. Of course, there would be no basis

for reversal if the testimony was elicited as part of counsel's ultimately unsuccessful trial strategy. ***State v. Oswald***, 2002 WI App 2, ¶¶68-69, 232 Wis. 2d 62, 606 N.W.2d 207 (Ct. App. 1999). The State claims defense counsel's questions regarding the stolen items served the dual purpose of impeaching the testimony of John V. and determining the amount of restitution. Yet the State fails to identify the testimony Jennifer sought to impeach, and defense counsel's questioning would have *increased* any restitution owed, not decreased it. Moreover, defense counsel could not recall at the postconviction hearing why he elicited the incriminating responses from Jennifer. We conclude defense counsel's elicitation of the incriminating testimony was an objectively unreasonable act that constitutes deficient performance. *See* ***Oswald***, 232 Wis. 2d 62, ¶¶63-66.

¶9 The deficient performance led to obvious prejudice in the form of an additional delinquency adjudication for misdemeanor theft. The State argues Jennifer has failed to show prejudice because she would have received the same placement even without the additional theft count. In the State's view, "[d]efense counsel's questioning, leading to the State adding another count of misdemeanor theft, is minimal error, and does not affect the outcome of the trial." This position is untenable. A defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (quoting ***Strickland***, 466 U.S. at 694). No evidence independent of statements elicited by defense counsel supported the delinquency adjudication for misdemeanor theft of the sweatshirt. When requesting the amendment, the prosecutor conceded the only basis for the additional theft charge was Jennifer's incriminating statements. The circuit court also acknowledged "the basis for … misdemeanor theft involving the sweatshirt, came directly from the juvenile in this

case." Without the deficient performance of her defense counsel, Jennifer would not have been adjudicated delinquent on the additional theft charge. Whether she may have received the same placement on the other charges is irrelevant. Jennifer has therefore shown she received ineffective assistance of counsel.

¶10 Ordinarily, the remedy for ineffective assistance of counsel is a new trial. *See* ***State v. Lentowski***, 212 Wis. 2d 849, 857, 569 N.W.2d 758 (Ct. App. 1997). However, the remedy for a deprivation of Sixth Amendment protections "should be tailored to the injury suffered from the constitutional violation." ***United States v. Morrison***, 449 U.S. 361, 364 (1981). The injury suffered here relates to a specific charge and does not affect the other charges for which Jennifer was adjudicated delinquent. We reverse only the delinquency adjudication for misdemeanor theft resulting from Jennifer's incriminating testimony.

By the Court.—Judgment and order affirmed in part; reversed in part.

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