COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP914-CR **Cir. Ct. No. 2006CF259**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHERYL L. GASZAK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Cheryl L. Gaszak appeals from an order denying her postconviction motion for resentencing. She contended that her trial counsel provided ineffective assistance at sentencing because he did not provide her with a

copy of the presentence investigation (PSI) report, did not object to the court's conclusion that she understood the PSI contents, failed to guide her toward a more appropriate allocution statement and did not move to withdraw as counsel when their relationship soured. We disagree and affirm.

¶2 A jury convicted Gaszak of thirty-eight counts of theft amounting to hundreds of thousands of dollars from a woman and her estate. The trial court sentenced her to a bifurcated fifteen-year sentence composed of seven years' initial confinement followed by eight years' extended supervision. Represented by new counsel, Gaszak filed a postconviction motion for resentencing on the basis that her trial counsel, Attorney Thomas Brown, rendered ineffective assistance at sentencing. Gaszak and Brown both testified at a hearing held pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The court concluded that Brown's performance was not deficient and—even if deficient—was not prejudicial and denied Gaszak's motion. She appeals.

¶3 To establish that counsel was constitutionally ineffective requires that a defendant demonstrate that counsel's performance was deficient and that the deficient performance was prejudicial to the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115. The test for deficient performance is whether counsel's performance fell below objective standards of reasonableness, and we apply a presumption that counsel's performance was satisfactory. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). The test for prejudice is whether our confidence in the outcome is sufficiently undermined. *See* ***id.*** When a defendant fails to prove either prong of the test, we need not consider the other. ***Mayo***, 301 Wis. 2d 642, ¶61. The ineffective assistance of counsel analysis presents a mixed question of law and fact. ***Id.***, ¶32. We will uphold the trial court's findings of fact

regarding what happened unless they are clearly erroneous, but review de novo whether counsel's performance was deficient and prejudicial. ***Id.***

¶4 Gaszak first asserts that because Brown read the PSI to her instead of giving her a copy, she was denied her due process right to read and review it before sentencing. *See* ***State v. Skaff***, 152 Wis. 2d 48, 53, 447 N.W.2d 84 (Ct. App. 1989). ***Skaff*** did not establish an affirmative duty either on the court to insure that a copy of the PSI is timely delivered to the defendant or on defense counsel to share the PSI with the defendant. ***State v. Flores***, 158 Wis. 2d 636, 642, 462 N.W.2d 899 (Ct. App. 1990), *overruled on other grounds*, ***State v. Knight***, 168 Wis. 2d 509, 519 n. 6, 484 N.W.2d 540 (1992). Rather, it held that denying a defendant access to the PSI could not be premised upon a "blanket rule" denying such access. *See* ***Skaff***, 152 Wis. 2d at 58. The purpose for safeguarding a defendant's right to review the PSI is to ascertain the presence of inaccuracies so as to reduce the chance of a skewed sentence. *See* ***id.***

¶5 The trial court found that Gaszak reviewed the PSI by virtue of Brown having "read it to her word for word" and evidently understood it because she made a correction. These findings are not clearly erroneous. Further, Gaszak points to no facts that the PSI was denied based on a "blanket rule" or that she ever requested access to it beyond Brown's reading it to her. She acknowledged to the court at sentencing that she had reviewed the PSI, corrected one factual error and denied that there were others, and does not claim here that it contained inaccurate information. No basis for relief exists under ***Skaff***.

¶6 Similarly, Gaszak contends that because the PSI was only read to her, she could not digest the import of the PSI author's conclusions or keep track of the report's points and then had to write her statement without it. She also

asserts that her history of bipolar disorder and medication status impeded her understanding. The record suggests otherwise.

¶7 Gaszak was entitled to a meaningful review of the PSI report, which we already have concluded she received through Brown's word-for-word reading. She was not entitled to retain a copy of it. *See* ***State v. Parent***, 2006 WI 132, ¶5, 298 Wis. 2d 63, 725 N.W.2d 915; *see also* WIS. STAT. § 972.15(4m) (2007-08). Also, Gaszak offers no evidence beyond her own testimony that her mental state might have hindered her grasp of the contents. Brown testified that he knew she took medication for bipolar disorder and saw nothing to indicate any affect on her ability to communicate or defend herself. Indeed, Gaszak testified Brown was instrumental in getting her medications restarted.

¶8 Gaszak points to nothing to show that reading the PSI herself would have afforded better comprehension under circumstances she describes as "extremely stressful [and] agitated." She faults Brown for not ensuring she understood "the full tone, tenor, and contents" of the PSI yet rejected his advice to show remorse. Indeed, she admitted at the ***Machner*** hearing that at sentencing she still believed herself innocent, did not accept responsibility and did not recognize her accountability until being at Taycheedah. Frankly, we think Gaszak overstates the role of the PSI in her sentencing. The court said it considered the PSI comments and recommendation but that it believed Gaszak's conduct—repaying an elderly woman's "extreme generosity" by taking hundreds of thousands of dollars from her in thefts spanning years—called for a stiffer sentence.

¶9 Gaszak's next claim of error concerns her exercise of her right to allocution when she delivered an hour-long statement aiming to convince the court of her innocence. She contends that Brown deficiently failed to impress upon her

that such a lengthy excuse-filled statement would work against her interest. The record does not bear this out.

¶10 According to her ***Machner*** hearing testimony, before preparing her statement Gaszak did not believe that she had done wrong and conveyed to Brown that she felt no responsibility. She said that while Brown "didn't expect me to admit that I was guilty," he did advise her that she "need[ed] to somewhere in the statement state that I was remorseful for my actions." Brown testified that he told Gaszak that when writing her statement she "needed to make sure she accepted responsibility[,] … to indicate that she was sorry[,] … and that she should indicate in some fashion that she would not be involved in such conduct in the future." The court found Brown's testimony credible that Gaszak had given him an idea of her planned allocution, that they had discussed how it might affect the court and that once Gaszak began speaking, Brown had no power to stop her. These findings are not clearly erroneous, and we accept them.

¶11 A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). At the ***Machner*** hearing, Gaszak said she realized she was unremorseful, "angry" and "arrogant" when she gave her statement. She does not specify what she believes Brown should have done beyond what he already did through his advisements. We see no deficient performance. In any event, the court also found that it likely would have been fruitless for Gaszak to profess having had a profound change of heart after steadfastly denying culpability throughout the trial.

¶12 Gaszak next contends that Brown should have moved to withdraw as her counsel because their relationship deteriorated after a "heated argument," leading, in turn, to Brown's various claimed failings. Brown testified that he believed Gaszak understood the contents of the PSI. No provable facts show that a successor attorney would have permitted Gaszak to read it to herself or that doing so would have enhanced her understanding. Brown testified that he told Gaszak her statement had to reflect remorse, acceptance of responsibility and a promise to refrain from like conduct in the future. No provable facts show that a successor attorney would have been able to persuade Gaszak to follow that advice, given her failure to recognize her responsibility and her desire to convince the court she was innocent. Simply put, no provable facts show that another attorney would have taken any different steps or that any change in strategy would have resulted in a sentence more favorable than the fifteen years she got, in light of the nearly three hundred she faced.

¶13 Finally, Gaszak argues that while allegations of deficiency individually viewed may be insufficient to show prejudice their cumulative effect may be enough. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. The fault in that logic, however, is that she has not shown any of Brown's performance to be deficient. Accordingly, we need not examine the prejudice prong. *See* ***Mayo***, 301 Wis. 2d 642, ¶61.

By the Court.—Order affirmed.

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