COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3081-CR **Cir. Ct. No. 2008CF5237**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID DERRELL MORGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. David Derrell Morgan appeals the judgment entered on his guilty plea to third-degree sexual assault, *see* WIS. STAT. § 940.225(3), and the order denying his motion for postconviction relief. Morgan claims that: (1) he

was sentenced on inaccurate information; and (2) his lawyer gave him constitutionally deficient representation. We disagree and affirm.

I.

¶2 Morgan sexually assaulted C.W. while she was asleep on a loveseat at a relative's home. He was later charged with second-degree sexual assault (unconscious victim), *see* WIS. STAT. § 940.225(2)(d), and bail jumping, *see* WIS. STAT. § 946.49(1)(a), because he was on bail on a disorderly-conduct charge at the time of the sexual assault. DNA evidence confirmed the assault.

¶3 The case was plea bargained and Morgan was allowed to plead guilty to third-degree sexual assault. The bail-jumping charge was dismissed. The circuit court accepted the plea and ordered a presentence-investigation report. Morgan told the presentence-investigation writer that he worked: "as a butcher at the Family Super Saver. I've been there over 12 years on and off." The presentence writer reported that when she talked to the owner of Family Super Saver, the owner said Morgan: "would come in now and then and clean the back, but he did not work here that much." The writer also reported that the phone number Morgan had provided for his best friend, Robert J. Brown, "was an invalid number." Morgan told the presentence investigator that he had four children with four different mothers but that: "'child support has never been ordered on any of them. I've always been part of their lives and get along with the mothers.'" Morgan gave the writer contact numbers for two of the mothers, Roberta May and Rokisha Blue, but the writer found that the numbers were "disconnected" or "no longer in service."

¶4 At the start of the sentencing hearing, the circuit court asked: "Is there any correction to the material provided in the pre-sentence report?"

> [PROSECUTOR]: Not to the State's knowledge, your Honor.
>
> [DEFENSE LAWYER]: None from the defense. Mr. Morgan and I did read the PSI in its entirety. He did take exception with some of the statements that people provided, but there's nothing factually inaccurate.
>
> THE COURT: Is that correct Mr. Morgan?
>
> THE DEFENDANT: Yes, sir.

Later during the sentencing, Morgan's lawyer told the circuit court:

> A couple of things I do want to bring up with regards to the [presentence-investigation report] I mentioned earlier that there were things that he took exception with, not necessarily that they were factually inaccurate, but they somewhat are. …
>
> … the State's references in her argument … the issue with regards to how long Mr. Morgan had worked at Super Saver, what kind of work he had done. As the Court is aware, the owner of that [store] says that he worked a little bit here and there, but it was certainly nothing as what Mr. Morgan claimed. Mr. Morgan explained to me yesterday while I was going over the [presentence-investigation report] that it was a cash job. He worked there quite a bit. I don't think it was above the board, and perhaps the owner didn't want tax implications or something like that.
>
> He did tell me repeatedly, had told me since the very beginning of the relationship together he did work full-time and he did work at Super Saver. I would note that I do recall in [a previous criminal matter] that the owner of the Super Saver did write a letter on behalf of Mr. Morgan so I don't know if there was some kind of falling out or something since that, but in the past he's been very helpful.

¶5 The circuit court sentenced Morgan to fifty-four months of initial confinement, followed by thirty months of extended supervision. Morgan filed a motion for postconviction relief seeking resentencing, attaching affidavits from four persons in support:

- Brown, the friend whose telephone number Morgan gave to the presentence writer, averred that: "he has had a cell phone with the same number for years but that on occasion [it] would be temporarily out of service when he did not pay his bill on time," and he "has observed David Morgan working as a butcher at Family Super Saver."

- Blue averred that: "she is the mother of Joshua Morgan, son of David Morgan," "Morgan was active in … Joshua's … life and had regular visitation prior to his incarceration," and her phone numbers changed "during the time that David Morgan was in jail." She further averred that she "has observed David Morgan on numerous occasions working as a butcher at Family Super Saver."

- Mary E. Taylor, an investigator with the State Public Defender, averred that she interviewed May, who "stated she is the mother of Alicia Morgan, the daughter of David Morgan." She also averred that May confirmed that "Morgan has always been active in Alicia Morgan's life." According to Taylor's affidavit, May also indicated that her home phone had been disconnected recently and "her cell phone number at the time of David Morgan's arrest" was slightly different than the one Morgan gave to the presentence writer.

- David Morgan averred that: "he is [Morgan's] son" and that "as he was growing up and prior to his father's incarceration he had regular contact with his father." The son also: "observed his father working behind the butcher counter [at Super Saver] and wearing a white butcher's coat."

¶6 The circuit court denied Morgan's motion, finding that the information in the affidavits: "would not have caused the court to fashion a different sentence or give such information more weight."

II.

A. *Alleged inaccurate information.*

¶7 As we have seen, Morgan claims that the circuit court sentenced him on inaccurate information about his employment history, and his family and personal relationships. Morgan points to the following in the circuit court's sentencing comments:

- "[Morgan] indicated to the PSI writer that he was employed as a butcher off and on for 12 years at the Family Super Saver. The owner denied that, said that the defendant only came in occasionally to clean up in the back and never worked as a butcher."[1]

- "[Morgan] gave the agent his best friend's phone number and the agent found that to be invalid."

- "The defendant claims he has four children, states no child support was ordered. But he's always been a part of their lives and gets along with the mothers. Yet he doesn't even know where two of the children live."

[1] Although not discussed at sentencing or on appeal, the Record also reflects that at both the initial appearance and the bail hearing, Morgan's defense lawyer represented that Morgan "works full time. He's a butcher at Family Super Saver. He's had that job for *five* years.", and "He's been working for the past *five* years full-time at Super Saver Grocery Store as a butcher." (Emphasis added.)

- "What I'm pointing out is there seems to be a lot of discrepancies in the way the defendant would like to be perceived as opposed to what reality is. I don't think this is just simply a matter of, well, gee, he had a lot of alcohol. I think that there's more to it."

Morgan argues that the circuit court thus violated his right to due process. We disagree.

¶8 A defendant claiming that a sentencing court denied him or her due process by relying on inaccurate information must show that: (1) the information was inaccurate; and (2) the sentencing court actually relied on the inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 192–193, 717 N.W.2d 1, 7. We review the matter *de novo*. ***Id.***, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

¶9 As noted, although Morgan's lawyer told the circuit court that there were things in the presentence report with which Morgan took exception, Morgan affirmed his lawyer's representation that there was "nothing factually inaccurate" in the presentence report. As we have also seen, Morgan's lawyer told the circuit court that despite what the Super Saver employer indicated, Morgan had worked for the shop: "repeatedly, [Morgan] had told me since the very beginning of the relationship together he did work full-time and he did work at Super Saver." Thus, Morgan's lawyer told the circuit court at sentencing about the employment situation. Insofar as Morgan contends that his trial lawyer should have presented to the circuit court at sentencing the material Morgan submitted in support of his postconviction motion that was not brought out at the sentencing hearing, we analyze those contentions in an ineffective-assistance-of-counsel context. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41–42

(in the absence of an objection, we address issues under the ineffective-assistance-of-counsel rubric); ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986) (unobjected-to error must be analyzed under ineffective-assistance-of-counsel standards, even when error is of constitutional dimension). As we show below, Morgan has not shown that the circuit court *relied* on inaccurate information in sentencing Morgan for the sexual assault.

¶10 To establish ineffective assistance of counsel, a defendant must show that the lawyer's representation was deficient and that the defendant was prejudiced as a result. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 689. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. We need not address both aspects of the ***Strickland*** test if the defendant fails to make a sufficient showing on either one. *See* ***id.***, 466 U.S. at 697.

¶11 Our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Ibid.*** Its legal conclusions whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we

review *de novo*. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, a circuit court must hold an evidentiary hearing on a defendant's ineffective-assistance claim if the defendant alleges facts that, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53. If, however:

> "[T]he defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing."

Id., 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (quoted source omitted). Under these standards, Morgan's contentions fail because he did not show any prejudice.

¶12 Morgan has not shown that the circuit court actually relied on the allegedly inaccurate information. First, as we have seen, the circuit court's observations about the inconsistencies between what Morgan represented and what the presentence-investigation writer reported is not by itself unfair *reliance* and, significantly, Morgan points to nothing that the circuit court said during sentencing that shows that *reliance*. Moreover, the circuit court tells us in the postconviction order that it did not rely on the allegedly inaccurate information: "The discrepancies noted by the court went minimally to the defendant's character, but did not play a significant role in the amount of time imposed for this offense," and that the "information attached" to Morgan's postconviction motion "would not have caused the court to fashion a different sentence." We may, of course, consider a sentencing court's postconviction order in determining whether it relied on alleged inaccurate information during sentencing. *See* ***State v. Fuerst***,

181 Wis. 2d 903, 915, 512 N.W.2d 243, 247 (Ct. App. 1994); ***State v. Schael***, 131 Wis. 2d 405, 414, 388 N.W.2d 641, 645 (Ct. App. 1986).

¶13 Second, a circuit court has broad sentencing discretion and may give the various elements of a defendant's character the weight it deems appropriate. *See* ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 750, 632 N.W.2d 112, 116. The circuit court's sentencing remarks here showed that it relied, appropriately, on the three primary factors material to a rational sentence: (1) the seriousness of the crime, (2) the defendant's character; and (3) the need to protect the public. *See* ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512, 519 (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d 535, 565–566, 678 N.W.2d 197, 211. It considered the seriousness of the offense, describing it as "very aggravated" both because Morgan was a longtime family friend of the victim, and because Morgan assaulted C.W. while she was asleep in her sister's home, "depriv[ing C.W.] of her personal sense of security."

¶14 The circuit court also considered Morgan's character, noting that Morgan had "an issue with alcohol" and a prior record, but on the positive side, he "got his [high school equivalency diploma] while he was in the Job Corps." The circuit court, however, found the fact that Morgan committed this crime while out on bail for drug possession to be a "flagrant" factor.

¶15 The circuit court also emphasized the need to protect the public: "the public does need to be protected from his conduct from ever doing this type of conduct again," that this crime was "one of the most serious offenses within the third degree sexual assault," and that Morgan's "risk for reoffending" was "at least

intermediate severity."[2] The circuit court properly exercised its sentencing discretion. Moreover, we agree with the circuit court that the matters encompassed by Morgan's motion for postconviction relief were, in the context of the crime and circuit court's sentencing analysis, *de minimis*. Thus, Morgan has not satisfied the requirement in ***Tiepelman*** to prove actual reliance. *See* ***Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d at 192–193, 717 N.W.2d at 7.

B. *Alleged ineffective assistance of Morgan's trial lawyer.*

¶16 Morgan claims his lawyer was deficient because he did not investigate or present evidence to correct the circuit court's "erroneous understanding of his employment history and family and personal relationships." (Capitalization omitted.) We have already analyzed and rejected that claim. Morgan has not, therefore, shown ***Strickland*** prejudice.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.

[2] Further, although the circuit court mentioned the employment discrepancy before commenting that the "reality" was different than how Morgan "would like to be perceived," it also mentioned other non-challenged discrepancies supporting Morgan's lack of honesty, including: (1) denying that he ever drove drunk when his criminal record showed a first offense for operating while intoxicated; and (2) the fact that Morgan initially denied having any sexual contact with C.W. until seeing the DNA results.