COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP907-CR **Cir. Ct. No. 2007CF227**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY HUNT, SR.,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

Before Vergeront, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Ricky Hunt appeals from judgments of conviction and an order denying his motion for postconviction relief. The main issue is ineffective assistance of counsel. We affirm.

¶2 After a trial, Hunt was convicted on several counts of second-degree recklessly endangering safety, reckless injury, and reckless driving arising out of one incident in which the vehicle he was driving collided with several others. The circuit court denied his postconviction motion.

¶3 He first argues that his trial counsel was ineffective by not informing him of the possibility of entering a plea of not guilty by reason of mental disease or defect. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

¶4 The test for deficient performance is an objective one that asks whether trial counsel's performance was objectively reasonable under prevailing professional norms. ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. Therefore, even if trial counsel lacked a strategic reason at the time, a claim of deficient performance fails if counsel's action was one that, viewed objectively, an attorney could reasonably have taken after considering the question, in light of the information available to trial counsel at the time. Trial counsel's own subjective explanation of his reasons for acting or not acting, or trial counsel's lack of any reason at all, is not relevant to the analysis.

¶5 Hunt's argument on deficient performance proceeds through these steps: the decision to enter a plea of not guilty by reason of mental disease or defect is for the defendant to make, not counsel; a mental disease or defect plea

was a reasonable option in this case; counsel did not inform Hunt of this possible plea; therefore, counsel's performance was deficient. To show prejudice, Hunt argues that he would have entered such a plea if he had known about it, and that the result of the trial might have been different.

¶6 We conclude that Hunt's argument on deficient performance fails because he has not shown that a mental disease or defect plea was an available option in this case. Hunt argues that he would have attempted to establish at trial that an epileptic seizure before the collision kept him from appreciating the wrongfulness of his acts or conforming his conduct to the requirements of law. In response, the State points out that its theory of the case was partly that Hunt knew he was not properly taking his medication for seizures, and knew that it was dangerous for him to drive in that condition. Thus, the "conduct" for which he was prosecuted was not so much the specific driving behavior that produced the collision, but more the decision to be driving in the first place.

¶7 Hunt does not explain how his epileptic condition would have impaired his ability to decide whether to drive in an improperly medicated condition. In the absence of such a connection, it would have been reasonable for an attorney to conclude that a mental disease or defect plea was not an available choice, because at trial the defendant could offer no evidence to support it. Indeed, as the State points out, in the absence of evidence the court would be unlikely to submit this theory to the jury at trial. Therefore, counsel could reasonably conclude that it was not necessary to discuss this issue with Hunt.

¶8 Hunt also frames the above issue in terms of discretionary reversal under WIS. STAT. § 752.35 (2009-10)[1] because the real controversy was not fully tried. We conclude that Hunt's proposed trial on mental disease or defect is not the real controversy. As we discussed above, Hunt does not explain how his medical condition impaired his ability to decide whether to drive.

¶9 Hunt next argues that the circuit court erred by denying his motion for release on bail pending appeal. We already decided that issue in our order of October 8, 2009. Like Hunt's original motion in this court, his argument on appeal shows considerable confusion about the procedure for seeking that relief. His motion was captioned "Petition for Permission to Appeal Denial of Postconviction Release." The petition stated that it was based on WIS. STAT. RULE 809.31, "and is guided by" WIS. STAT. RULE 809.50, the rule on petitioning for leave to appeal from nonfinal orders.

¶10 On appeal, Hunt views our order as one that merely denied him permission to appeal the release issue. However, the procedure for seeking release under WIS. STAT. RULE 809.31 has no connection with leave to appeal from nonfinal orders. A motion under RULE 809.31 does not ask permission to raise the issue, it *does* raise the issue, and in our order we decided it. Hunt asserts that the issue remains open because we did not "affirm" the circuit court, but merely denied his "petition." However, we ended the text of our order by stating: "We conclude that the court properly exercised its discretion when it denied Hunt's

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

motion." The word "affirm" is not required to make that an unambiguous disposition of Hunt's motion.

¶11 Finally, Hunt argues that the circuit court erred in awarding restitution to an insurance company. The award was under WIS. STAT. § 973.20(5)(d), which allows the court to order reimbursement to an insurer who compensated a victim for a loss otherwise compensable with restitution, "[i]f justice so requires." He argues that the court erred because it did not state that justice required the award, and did not otherwise explain its reason for the award. Because he did not object to the award in circuit court, he argues based on a theory of plain error. The State points out Hunt's attorney actually stipulated to the restitution amounts. Hunt does not explain why it would be error for the circuit court to accept that stipulation. Nor does he argue that the award was in any way unjust. Therefore, we reject this argument.

By the Court.—Judgments and order affirmed.

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