COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2963-CR **Cir. Ct. No. 2009CF1512**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARQUES D. ROUNDTREE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON and REBECCA F. DALLET, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Marques D. Roundtree appeals from a judgment, entered upon a jury's verdict, convicting him of armed robbery and attempted first-degree intentional homicide while armed with a dangerous weapon. He also

appeals from an order denying his motion for postconviction relief.[1] Because we conclude that the circuit court did not err when it denied trial counsel's motion to withdraw during jury selection and because we conclude that Roundtree did not receive ineffective assistance from his counsel at sentencing, we affirm.

BACKGROUND

¶2 On March 15, 2009, a Milwaukee police detective interviewed Danyell L. Johnson in a hospital trauma room where Johnson was receiving treatment for multiple gunshot wounds. Johnson said that he had been robbed and shot by his girlfriend's former boyfriend, "Marques." The State charged Roundtree with armed robbery and attempted first-degree intentional homicide. Roundtree demanded a jury trial.

¶3 Attorney Paul Ksicinski assumed responsibility for Roundtree's defense in June 2009.[2] Roundtree subsequently requested a speedy trial, and jury selection began in December 2009. During a recess in the jury selection process, Ksicinski moved to withdraw, stating that he and Roundtree had a "difference in the[ir] theories of defense." Ksicinski further stated that Roundtree's mother "would be putting up money to retain an attorney today and that she wanted it very clear that she wished the new attorney." The circuit court denied the motion after finding that Ksicinski was prepared for trial and that Roundtree was using manipulative tactics in an attempt to delay his case.

[1] The Honorable Patricia D. McMahon presided over the jury trial and sentencing in this matter. The Honorable Rebecca F. Dallet presided over the postconviction proceedings.

[2] Attorney Paul Ksicinski was Roundtree's second appointed trial attorney. The circuit court permitted Roundtree's first trial attorney to withdraw based on an alleged breakdown in the attorney-client relationship.

¶4 The trial proceeded. The State presented evidence that, on March 15, 2009, Johnson was sitting in a parked car in a Milwaukee neighborhood when Roundtree approached and demanded money. After Johnson gave Roundtree approximately $400, Roundtree shot Johnson multiple times at close range. Johnson struggled out of the car and called for help, but Roundtree fired more shots, ultimately shooting Johnson thirteen times.

¶5 Roundtree took the stand and denied trying to rob or kill Johnson. Roundtree testified that he was in Chicago on March 15, 2009. He also presented evidence suggesting that Johnson was jealous of Roundtree because Roundtree had a past romantic relationship with Johnson's girlfriend. Roundtree contended that Johnson therefore had a motive for falsely naming Roundtree as the gunman.

¶6 The jury found Roundtree guilty. Shortly thereafter, the circuit court permitted Ksicinski to withdraw based on a conflict of interest that arose after trial. The state public defender appointed successor counsel for Roundtree, and the matter proceeded to sentencing approximately six weeks later.

¶7 At sentencing, successor counsel told the circuit court that he had reviewed the presentence investigation report, the charging documents, and the discovery. Counsel also advised the circuit court that he and Roundtree had met and conferred before the hearing. Counsel then discussed Roundtree's background and accomplishments, reminded the circuit court that Roundtree maintained his innocence, and recommended a ten-year sentence. The circuit court, however, imposed an aggregate of fifty years of imprisonment, bifurcated as thirty-five years of initial confinement and fifteen years of extended supervision.

¶8 Roundtree moved for resentencing, claiming that the lawyer who represented him at sentencing was constitutionally ineffective by failing to obtain the trial transcripts. The circuit court denied the claim without a hearing.

¶9 Roundtree now appeals, raising two issues. He contends that the circuit court erred when it required him to proceed to trial represented by Ksicinski and that the circuit court erred again when it denied Roundtree's motion for resentencing.

DISCUSSION

¶10 Roundtree claims that he wished to substitute retained counsel for appointed counsel, but the circuit court thwarted his efforts when it denied Ksicinski's motion to withdraw during jury selection. Roundtree alleges that the decision violated his right to representation by his counsel of choice guaranteed under the United States and Wisconsin constitutions. *See* U.S. CONST. amend VI; WIS. CONST. art. I, § 7. We disagree.

¶11 "Decisions related to the substitution of counsel are within the sound discretion of the circuit court." ***State v. Prineas***, 2009 WI App 28, ¶13, 316 Wis. 2d 414, 766 N.W.2d 206. When we consider whether the circuit court properly exercised its discretion, "we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***State v. Wanta***, 224 Wis. 2d 679, 689, 592 N.W.2d 645 (Ct. App. 1999). Our review under this standard is deferential. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶12 "The Sixth Amendment guarantee of assistance of counsel includes a qualified right to representation by counsel of the accused's choice."[3] ***Wanta***, 224 Wis. 2d at 702. A circuit court considering a belated request to allow the defendant's counsel of choice to participate at trial must balance the defendant's constitutional right to select a lawyer "against the public's interest in the prompt and efficient administration of justice." ***Prineas***, 316 Wis. 2d 414, ¶13. The factors that the circuit court may consider when conducting the balancing test include: (1) the length of the delay requested to accommodate the substitution of counsel; (2) whether competent counsel is presently available and prepared to try the case; (3) any prior continuances that the defendant has requested and received; (4) the inconvenience to the parties, the witnesses, and the court; and (5) whether the delay seems to be for legitimate reasons or for dilatory purposes. ***Id.***

¶13 As a preliminary matter, we note that only a very generous construction of the circuit court proceedings allows the conclusion that Roundtree preserved a Sixth Amendment claim for review. No attorney of Roundtree's choice moved for leave to appear at trial on his behalf. Rather, Roundtree's appointed counsel, Ksicinski, moved to withdraw during jury selection. In support of the motion, Ksicinski explained that he and Roundtree disagreed about trial strategy in ways that Ksicinski could not disclose and that Roundtree's mother "indicated that she would be putting up money to retain an attorney [that day]." The circuit court denied the motion, deeming it manipulative.

[3] Roundtree does not suggest that the analysis of the right to counsel of choice under the Wisconsin Constitution is different from the analysis of that right under the Sixth Amendment to the United States Constitution. Accordingly, we do not consider whether different analyses are required. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we consider only issues that are briefed).

¶14 Assuming that these facts are sufficient to preserve a Sixth Amendment claim, we conclude that the arguments Roundtree presents to support the claim lack merit. He complains that the circuit court too quickly concluded that the motion to withdraw would entail an adjournment of the trial. He faults the circuit court for failing to inquire "whether the newly retained [lawyer] was present in the courthouse, whether [Roundtree] was prepared to proceed with the trial that day or whether he would be requesting a delay of the proceedings, and if so the reasons for the delay."

¶15 Roundtree misunderstands his role as a moving party in the circuit court. The burden rested with him to offer reasons for granting his counsel's motion to withdraw. *See* ***id.***, 316 Wis. 2d 414, ¶25 (court cannot be faulted for failing to undertake an inquiry into an area that neither defense counsel nor defendant discussed). The circuit court could assume that if a new lawyer was on hand and ready to conduct the trial, Roundtree would have supplied that information. *Cf.* ***State v. Wedgeworth***, 100 Wis. 2d 514, 521, 302 N.W.2d 810 (1981) (fair to assume that defendant would have offered any compelling reasons that existed in support of a continuance to allow representation by counsel of choice). Here, neither trial counsel nor Roundtree himself told the circuit court that a successor attorney was prepared to step in and continue the jury selection process that was underway when counsel moved to withdraw.

¶16 Moreover, the exchange between the circuit court and Roundtree demonstrates that Ksicinski's motion to withdraw implicitly included both a concession that successor counsel was not presently available and a request to adjourn the trial as a consequence. The circuit court stated that the motion was an apparent effort to manipulate the system because "[w]hen you ask for a speedy trial and get that speedy trial, and then you say 'I don't want the trial,' that is

manipulation." Ksicinski responded that he asked Roundtree "if he wished to waive any speedy trial demand he had in order to have an attorney present." The circuit court explained: "that is not the issue. You made a speedy trial demand.... [W]e get the jury half picked, you say never mind." Neither Roundtree nor his counsel suggested that the circuit court misunderstood the motion or the implications of granting it. Plainly, Roundtree had sufficient opportunity to explain to the circuit court that the motion to withdraw would not impede the progress of the trial and that jury selection could continue uninterrupted with a new defense lawyer. When Roundtree did not offer such an explanation, the circuit court reasonably deduced that his motion included a request to adjourn the trial. *Cf.* ***id.***

¶17 Further, we are satisfied that the circuit court properly exercised its discretion when it denied the motion. First, Ksicinski based his request to withdraw on the assertion that he and Roundtree differed in their preferred theories of defense. "Mere disagreement over trial strategy does not constitute good cause to require the court to permit an appointed attorney to withdraw." ***Wanta***, 224 Wis. 2d at 703. Second, Ksicinski assured the circuit court that he was prepared for trial. When the circuit court probed further, Ksicinski stated that he worked at the public defender's office, that he had represented Roundtree for approximately six months, and that he and Roundtree had conferred both in person and by telephone on multiple occasions. The presence of a competent attorney prepared to try the case militates against permitting that attorney to withdraw in favor of an unidentified lawyer. *See* ***id.*** at 704. Third, the circuit court took into account that the "witnesses are here, ready to go.... We put aside other cases to give [Roundtree] the speedy trial." Inconvenience to the witnesses and disruption of

the court's schedule are significant considerations when a defendant seeks a substitution of counsel. *See* ***id.***

¶18 In the circuit court's view, the totality of the circumstances showed that Roundtree's motion was only a tactic to delay the trial. Our supreme court has observed that such efforts to manipulate the court system are common and problematic:

> an accused must not be permitted to manipulate the right of counsel to delay the orderly procedures for trials or interfere with the administration of justice.... [D]efendants in criminal cases often attempt to secure last-minute substitution of counsel to delay the trial, and the practice has "plagued" the criminal courts in Milwaukee county. As a result of the significant adverse effect that last-minute requests can have on the judicial system, we have directed trial courts to balance the defendant's right to adequate representation against the public interest in the prompt and efficient administration of justice.

State v. Kazee, 146 Wis. 2d 366, 372-73, 432 N.W.2d 93 (1988) (citations omitted). The circuit court conducted the required balancing of interests here. We conclude that the circuit court properly exercised its discretion by refusing to allow competent and prepared counsel to withdraw during jury selection in favor of an unnamed and absent lawyer.

¶19 We turn to the contention that Roundtree received constitutionally ineffective assistance from the attorney who represented him at sentencing. We reject the claim.

¶20 The two-prong test for claims of ineffective assistance of counsel requires a convicted defendant to prove both deficient performance by counsel and prejudice to the defense as a consequence. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show

"that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** To demonstrate prejudice, "[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.*** at 694. Whether the attorney's performance was deficient and whether any deficiency prejudiced the defendant are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to make a sufficient showing as to one ***Strickland*** prong, however, we need not address the other. *See* ***Strickland***, 466 U.S at 697.

¶21 Roundtree claims that the attorney appointed to represent him at sentencing committed prejudicial error by failing to obtain the trial transcripts. The circuit court properly denied the claim without a hearing.

¶22 "[A] postconviction motion for relief requires more than conclusory allegations." ***Allen***, 274 Wis. 2d 568, ¶15. Rather, postconviction motions "must include facts that 'allow the reviewing court to meaningfully assess the defendant's claim.'" ***Id.***, ¶21 (citation and brackets omitted). Further, the facts alleged must be material. ***Id.***, ¶22. "A 'material fact' is: 'a fact that is significant or essential to the issue or matter at hand.'" ***Id.*** (citation and brackets omitted). Motions may be packed with information and yet be inadequate to warrant relief because they depend on conclusory allegations and contain insufficient material facts. *See* ***id.***, ¶29. Absent allegations of sufficient material facts that, if true, would warrant relief, the circuit court may deny a postconviction motion without a hearing. ***Id.***, ¶36.

¶23 Roundtree alleges that his counsel's performance at sentencing suffered from various inadequacies stemming from counsel's failure to obtain the trial transcripts, but he does not identify anything that appears solely in the transcripts that his counsel could have or should have relied on during the sentencing hearing. Instead, he offers broad complaints that his counsel did not: (1) discuss "the facts of the shooting itself;" (2) discuss who did and who did not identify Roundtree as the gunman; (3) discuss Roundtree's trial testimony; (4) "attempt[] to counter the prosecutor's description of the defendant's testimony as ... incredible"; or (5) highlight the victim's alleged motive to accuse Roundtree falsely.

¶24 Roundtree fails to explain why his counsel could not participate in any necessary discussions about the case using information available through the sources that counsel concededly reviewed, such as the discovery and the presentence investigation report. Roundtree also fails to explain why his counsel could not rely on information gathered from meetings with Roundtree to present Roundtree's version of events and to assert, if warranted, that the jury should have believed him. Because Roundtree's complaints do not demonstrate that anything necessary for his sentencing presentation appears solely in the transcripts, his complaints are merely conclusory assertions that are inadequate to warrant any relief. *Cf.* ***id.***, ¶29 (allegation that counsel failed to seek a document is insufficient to support a claim of counsel's ineffectiveness absent a showing that the document exists).

¶25 Roundtree next objects to counsel's rhetorical inquiry: "how do we get to the point where he was involved in such a vicious shooting such as this?" Roundtree deems this a "personal statement ... show[ing] that [counsel] believed his client was guilty," and he claims that if counsel "had access to the trial

transcripts, [counsel] would have been much more aware of the defendant's protestations of innocence and in fact, [counsel] would have been aware of the defendant's actual defense at the trial."

¶26 Roundtree does not show that his counsel required the transcripts to understand Roundtree's defense or to recognize that he maintained his innocence. His counsel's sentencing argument included many reminders that Roundtree: (1) "disagrees with the [jury's] verdict"; (2) "does feel, frankly, [that] he doesn't deserve [a lengthy sentence] because he feels he didn't do it"; (3) "feels he's going to prison for something he didn't do"; and (4) "doesn't say he doesn't have remorse for what the victim went through[,] but he's not the one who did it." Counsel plainly had a robust awareness that Roundtree claimed innocence. Roundtree was an obvious source of that information. No deficiency is shown. *Cf.* ***State v. Jones***, 2010 WI App 133, ¶33, 329 Wis. 2d 498, 791 N.W.2d 390 (claim that counsel was ineffective by failing to hunt for information that defendant can easily disclose is wholly without merit).

¶27 Because Roundtree demonstrates no deficiency in his counsel's decision to proceed to sentencing without the trial transcripts, we need not consider this matter any further. *See* ***Strickland***, 466 U.S. at 697. For the sake of completeness, however, we note that Roundtree also demonstrates no prejudice from the alleged deficiency. He asserts: "since the defendant had received almost the maximum sentence he could have received for these crimes, it was clear that the defendant suffered prejudice due to defense counsel's deficient performance." Roundtree's conclusion does not follow from his premise.

¶28 To prevail on a claim of ineffective assistance of counsel, a defendant must do more than demonstrate that he or she obtained an unfavorable

outcome in a court proceeding. The defendant must demonstrate a reasonable probability that, but for the alleged error, "'the result of the proceeding would have been different.'" ***Johnson***, 153 Wis. 2d at 129 (citation omitted). Reviewing courts consider the totality of the evidence available to the fact finder when assessing whether a defendant was prejudiced by counsel's performance. ***Id.*** at 129-30.

¶29 Here, the sentencing court presided over the trial, heard the testimony, and saw the witnesses. Roundtree has not alleged any specific facts showing that the sentencing court lacked information in the trial transcripts necessary for sentencing, nor has he shown that the sentencing court relied on inaccurate information that his counsel could have corrected by reference to the transcripts. In sum, nothing in Roundtree's postconviction motion demonstrates a reasonable probability that his sentence would have been different if his counsel had included citations to the trial transcripts in the sentencing remarks. Accordingly, Roundtree has not satisfied the prejudice prong of the ***Strickland*** analysis. We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).