COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1760-CR **Cir. Ct. No. 2012CF579**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TURNELL Q. LEWKOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN A. DiMOTTO and WILLIAM W. BRASH, Judges. *Affirmed.*

Before Curley, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Appellant Turnell Q. Lewkowski appeals a judgment convicting him of one count of armed robbery with threat of force. He also appeals the circuit court's order denying his postconviction motion without a

hearing. Lewkowski argues that: (1) the circuit court should have held an evidentiary hearing on his motion for resentencing; and (2) he received ineffective assistance from his trial lawyer during the sentencing hearing. We affirm.[1]

¶2 Lewkowski was charged with multiple crimes, which he committed over a 24-hour period. Pursuant to a plea agreement, all of the charges against him, except for one count of armed robbery, were dismissed and read in. The circuit court sentenced him to twelve years in prison, with eight years of initial incarceration and four years of extended supervision. The circuit court found Lewkowski eligible for the Wisconsin Substance Abuse Program after serving four years of initial confinement. Lewkowski filed a postconviction motion, seeking resentencing. The circuit court denied the motion without a hearing.

¶3 Lewkowski first argues that the circuit court should have held an evidentiary hearing before denying his motion for resentencing. A circuit court *must* hold an evidentiary hearing if a motion alleges facts which, if true, would entitle the defendant to relief. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (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.*** However, if the motion "fails to allege sufficient facts … 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 circuit court has the discretion to deny the motion without a hearing. ***Id.*** at 309-10 (citation omitted). When we review a

[1] The Honorable Jean A. DiMotto entered the judgment of conviction. The Honorable William W. Brash entered the order denying the postconviction motion.

circuit court's discretionary act in this regard, we will affirm the circuit court unless it misuses its discretion. ***Id.*** at 311.

¶4 Lewkowski contends that the circuit court should have held a hearing before denying his motion for resentencing so he could present meaningful information about his character from various witnesses. He points out that he had no prior record and these witnesses would have testified about his accomplishments and good character before he began to use drugs. Lewkowski's lawyer attached an affidavit to the postconviction motion in which he states that Lance Marifke, Lewkowski's former basketball coach, and John Riggins, another coach, would testify about the reasons why Lewkowski dropped out of Colby College and provided examples of Lewkowski's good character and efforts to assist others. Lewkowski's lawyer also states that Ivory Morehouse would testify that Lewkowski assisted him in his efforts to provide care to the handicapped in South Milwaukee and Oak Creek.

¶5 The circuit court denied the motion for resentencing without holding a hearing because it concluded that, even if Lewkowski had presented this information at sentencing, it would not have changed the sentence he received; that is, the circuit court concluded Lewkowski had not provided information in support of his motion that, if true, would have entitled him to relief. We agree with the circuit court's analysis of the information the sentencing court considered and its conclusion that the additional information would not have changed the result:

> Judge DiMotto was presented with a lot of information about the defendant, both good and bad, at the time of sentencing. The court had the benefit of a presentence report, which disclosed that the defendant had no prior juvenile or adult criminal record. The defendant was a high school graduate and had pursued some post-

> secondary education at Colby College in Kansas on a full basketball scholarship. He had a history of full-time employment, making an hourly wage of $20. The defendant was cooperative with authorities and readily admitted to his participation in these offenses. He was emotional when discussing the offenses with the presentence writer and expressed remorse.
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> At sentencing, the defendant's mother stated that the defendant was her oldest child, that he took on a lot of responsibility after she had his father removed from the home and that the defendant never got in trouble. She said that things "started going downhill" when she noticed that the defendant was no longer playing basketball and hanging out with friends. He would stay at home and do nothing. She stated that drugs made him hurt the people that he did. The defendant's girlfriend stated that the defendant "lost a lot of himself" when he stopped playing basketball and that he got started on drugs from a co-worker. She stated that she and the defendant both became addicted. The defendant expressed his remorse for his actions and empathy for what he put the victim through.
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> ….
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> Given all the information the court had about the defendant and the factors that it considered relevant to sentencing, there is no reason to believe that the statements from the additional witnesses as set forth in the postconviction counsel's affidavit would have affected the court's sentencing decision. The court understood that the defendant had done a lot of positive things for himself and others before he became involved in drugs and lost track of what was important to him. The court considered that the defendant had a number of opportunities to address his drug problem before it escalated into criminality and that he needed to be placed in confinement for a sufficient length of time in the interests of punishment, community protection and rehabilitation.

Because the additional information would not have changed the sentence in light of the information the sentencing court considered, the circuit court properly denied the motion for resentencing without a hearing.

¶6 Lewkowski next argues that he received ineffective assistance from his trial lawyer during the sentencing hearing. To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness. ***State v. Carter***, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the 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.'" ***Id.***, ¶37 (citation omitted).

¶7 Lewkowski contends that his lawyer was unprepared for the sentencing hearing—he made no effort to prepare family members to speak on his behalf at the sentencing hearing so that they could testify about his accomplishments and good character before he began to use drugs and he did not present witnesses, like the three men mentioned in counsel's affidavit, who would have testified to the same effect.

¶8 Assuming for the sake of argument that Lewkowski's lawyer was insufficiently prepared for the sentencing hearing, Lewkowski cannot show that he was prejudiced by his lawyer's actions. The bottom line is that Lewkowski robbed a gas station, pulling out a gun and demanding money from the clerk, who was terrorized, and he was charged with several other criminal acts that were dismissed, but considered by the circuit court in framing its sentence as bearing on the circumstances and Lewkowski's character. Under these circumstances, there is no reasonable probability that the result of the proceeding would have been different had counsel prepared more for the sentencing hearing and presented the testimony of the additional witnesses.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).