

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2016AP1990-CR
2016AP1991-CR**

**Cir. Ct. Nos. 2015CF50
2015CF51**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGETTE C. MARTINEZ,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Sawyer County: GERALD L. WRIGHT and EUGENE D. HARRINGTON, Judges. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Georgette Martinez appeals judgments convicting her of delivering heroin and an order denying her postconviction motion,¹ in which she alleged ineffective assistance of trial counsel. Martinez contends: (1) her attorney was ineffective because he misplaced a written statement Martinez intended to read at the sentencing hearing, thereby requiring her to speak extemporaneously, compromising her right of allocution; and (2) counsel failed to withdraw after Martinez allegedly notified him that she wanted to hire a different attorney for the sentencing hearing, violating her right to an attorney of her choosing. We reject these arguments and affirm the judgments and order.

¶2 Whether counsel's assistance was constitutionally ineffective and whether his behavior was prejudicial are questions of law that we review without deference to the circuit court. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). A defendant claiming ineffective assistance of counsel has the burden of proving both deficient performance and prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. *Id.* at 691. To establish prejudice, Martinez must show a reasonable probability that, but for her counsel's error, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one that is sufficient to undermine our confidence in the outcome. *Id.* Because Martinez must show both deficient performance and prejudice as to each of her issues, we need not address both components if she makes an insufficient showing as to one. *See id.* at 697.

¹ Judge Wright presided over the plea and sentencing, and Judge Harrington presided over the postconviction motion hearing.

¶3 Martinez has not met her burden of showing prejudice from her counsel's misplacing the document she intended to read at the sentencing hearing. Her extemporaneous statement apologized for her crimes, acknowledged she was wrong, and asked the circuit court to impose probation and treatment rather than prison. The statement she intended to read likewise expressed remorse, admitted she was wrong, stated she needed help with her addiction, and asked the court to give her a chance to rehabilitate herself. The written statement contained no facts or considerations that were not covered in Martinez's extemporaneous statements, and the record reflects no basis for believing the sentences would have been different had she read her written statement.

¶4 Martinez has not established deficient performance from her attorney's failure to withdraw as counsel before the sentencing hearing. The attorney testified Martinez never advised him that she wanted to discharge him and he was not contacted by substitute counsel before the sentencing hearing. Martinez never asked him to seek a continuance for the purpose of substituting counsel. When Martinez was asked whether she told her attorney she was hiring a different attorney, she responded, "Yeah. I said I wanted to get Rafferty to represent me because I felt like trying to get a hold of him -- I had Wes try to call because it was hard when I was in jail to get a hold of him." When asked whether she told her attorney at a meeting six days before the sentencing hearing that she wanted to discharge him because she was hiring another attorney, she responded, "I don't really remember." Martinez admitted she had not signed a contract with Attorney Rafferty, and Rafferty told her he would only represent her if she fired her present counsel. Rafferty confirmed that Martinez, through a friend, made inquiries about retaining him. Based on this testimony, the circuit court found

Martinez failed to present clear and unequivocal evidence that she told her attorney she wanted a different lawyer.

¶5 A lawyer is not required to be a mind reader. Rafferty had instructed Martinez to discharge her attorney if she wanted to be represented by Rafferty. Martinez's own confusing and inconsistent testimony was refuted by her attorney's categorical denial that she ever told him she wanted another attorney. Martinez did not inform the sentencing court that she wanted another attorney. Judging her counsel's performance in light of Martinez's own failure to clearly inform her attorney that she wanted a different lawyer, we cannot conclude that counsel performed deficiently by failing to withdraw or seek a continuance for that purpose.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

