COURT OF APPEALS DECISION DATED AND FILED

May 29, 2019

Sheila T. Reiff
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 No. 2018AP274-CR

Cir. Ct. No. 2014CF177

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL GENE MAYVILLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: MICHAEL MORAN, Judge. *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. Michael Mayville appeals from his convictions for incest, as well as an order denying postconviction relief. He challenges the circuit

court's denial of his motion for resentencing. Mayville argues his trial counsel was ineffective for failing to object to the use of allegedly inadmissible information at sentencing. He also disputes the court's finding that it would have imposed the same sentences even if counsel had objected. We affirm.

BACKGROUND

¶2 A criminal complaint alleged five counts of incest and one count of strangulation and suffocation. Mayville pleaded no contest to three counts of incest, and the remaining charges were dismissed and read in. The circuit court also dismissed outright, upon the State's motion, nine pending sexual assault charges in another Marathon County case involving a woman Mayville met online, and the court accepted a plea of guilty in yet another case that was amended from battery by prisoner to misdemeanor battery.

¶3 The circuit court ordered a presentence investigation report (PSI).[1] The PSI described Mayville's extensive juvenile and adult criminal history, including over a dozen convictions for various sexually motivated crimes and domestic abuse offenses involving violence, substance abuse, victimization and sexual assault. It also contained additional information unfavorable to Mayville, including Mayville's failure to complete sex offender treatment before his release from prison in 2004, and his frequent violations of the terms of his supervision. The PSI also addressed Mayville's sexual and physical exploitation of the present case victim's mother. The mother described Mayville as obsessed with sexual

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[1] Regarding the court-ordered PSI, the circuit court asked Mayville at the sentencing hearing, "And do you have any corrections that need to be made at this time?" Mayville noted several corrections to the court-ordered PSI, but he did not object to pages 15-17, which contain the information forming the basis for this appeal.

domination, and always seeking new sexual "high[s]." At first, the victim's mother agreed to sex with multiple partners and swapping partners. But she became concerned when Mayville sought to include her four-year-old daughter from a previous relationship in their sexual activity. Mayville also claimed a right to do what he wanted to do with their then-unborn child. She finally reached her "breaking point" when Mayville sexually assaulted her in front of the victim.

¶4 The defense submitted a private presentence investigation report prepared by an expert retained by the defense (defense PSI). The defense PSI also contained information extremely unfavorable to Mayville. It described in detail Mayville's extensive juvenile and adult criminal history, as well as the facts of all the crimes involved in the present cases. The defense PSI acknowledged Mayville's repeated patterns of criminal behavior, including sexually inappropriate and "appalling behavior that needs to be taken seriously and for which he needs to face consequences for [sic]." It also described Mayville's "significant relationships" with various women that included physical violence. Mayville admitted to the writer of the defense PSI that he had ninety-one sexual partners, and "he was physically abusive [toward the victim's mother] all the time and could not stop." Mayville also admitted abusing alcohol and marijuana, as well as other drugs, and that he was fixated on sex.

¶5 Out of a maximum potential punishment totaling seventy-five years' initial confinement and forty-five years' extended supervision, the circuit court imposed sentences totaling thirty-five years' initial confinement and thirty years' extended supervision.

¶6 Mayville filed a postconviction motion alleging ineffective assistance of his trial counsel for not objecting to information found at pages

15-17 of the PSI. This information pertained to Mayville's emotional and physical health, as well as his sexual behavior. The information included statements Mayville made to various healthcare providers during court-ordered therapy and care, and portions of a written as part of sex-offender therapy. Mayville argued the information was compelled and self-incriminatory under the Fifth Amendment, and privileged under WIS. STAT. § 905.04 (2017-18).[2] The circuit court denied the postconviction motion without an evidentiary hearing. Mayville now appeals.

DISCUSSION

¶7 Ineffective assistance claims require proof that counsel rendered deficient performance that resulted in actual prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Mayville must prove that his trial counsel performed below an objective standard of reasonableness under prevailing professional norms. ***Id.*** at 688. We presume counsel exercises reasonable judgment, and we conduct a highly deferential review. ***Kimmelman v. Morrison***, 477 U.S. 365, 381 (1986).

¶8 Mayville also must show a substantial likelihood that, but for counsel's deficient performance, the result of the proceeding would have been different. *See* ***Harrington v. Richter***, 562 U.S. 86, 90 (2011). A defendant challenging trial counsel's effectiveness at sentencing cannot prove actual prejudice if the sentence would have been the same had trial counsel done what the defendant now says he should have done. *See* ***State v. Giebel***, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995). If it is easier to dispose of an

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

ineffectiveness claim on the ground of lack of sufficient prejudice, which will often be so, that course should be followed. ***Strickland***, 466 U.S. at 697.

¶9 Ineffective assistance of counsel involves a mixed standard of review. ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115. Findings of fact are upheld unless clearly erroneous. ***Id.*** Deficient performance and actual prejudice present questions of law we decide independently. ***Id.***

¶10 At Mayville's sentencing, the circuit court indicated it had, among other things, reviewed the PSIs and appeared to briefly mention the contents of the 2004 letter. The court heard statements from the victim, as well as her mother and sister. Following argument from counsel, the court discussed the proper statutory sentencing factors, including Mayville's character, the seriousness of the offenses, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court then said it found few mitigating factors. The court stated that Mayville's thoughts and thought processes "scared" the court, and they caused it to question whether Mayville would benefit from treatment, or whether he would continue to pose an unreasonable threat to public safety. The court considered Mayville a dangerous man with psychopathic and sexually sadistic tendencies. The court distrusted any claims of contrition from Mayville and stated, "I think you will say or do anything to get yourself out of trouble."

¶11 The circuit court determined that a probation order would depreciate the seriousness of the offenses, and that Mayville's best hope for treatment and rehabilitation required a lengthy term of incarceration. The court decided Mayville should remain in prison until he reached age seventy-five. The court explained that it could have followed the State's sentencing recommendation and locked Mayville up for the rest of his life, but Mayville's attorney convinced the

court that remaining in prison until age seventy-five served the need to protect the public while at the same time giving Mayville an opportunity for a safe release back into the community.

¶12 The same circuit court judge who imposed Mayville's sentences decided his postconviction motion. The court denied Mayville's ineffective assistance claim because, regardless of whether the information at pages 15-17 of the PSI was improperly included, Mayville suffered no actual prejudice from counsel's failure to object. The court confirmed that it would not have imposed different sentences even if trial counsel had objected to the information. The court stated, "I sentenced Mr. Mayville, and I can be quite clear and unequivocal—unequivocal that I would not have given him less time." The court reiterated that it wanted to incarcerate Mayville "until the time he was about 75 years old. At that point, I felt that he might have some opportunity to see the light of day again, and I had that specifically in mind …." It further stated, "I believe that he could have been sentenced for the rest of his life away in prison but I chose not to do that." The court concluded:

> Your argument would be … stronger if I far exceeded the recommendations of both the PSI or the State that the recommendations would have influenced me based upon the content of the pre-sentence investigation report. It's just simply not the case. I know that there is no reasonable possibility that I would have sentenced Mr. Mayville differently in this case.

¶13 Our review of the entire sentencing transcript confirms Mayville suffered no prejudice from his trial attorney's failure to object to the information contained at pages 15-17 of the PSI. The sentences imposed by the court reliably reflected Mayville's criminal culpability, and "[a]bsent some effect of the challenged conduct on the reliability of the trial process, the Sixth Amendment

guarantee is generally not implicated." ***Lockhart v. Fretwell***, 506 U.S. 364, 369 (1993).

¶14 Mayville argues that he was entitled to an evidentiary hearing because the circuit court in fact relied upon the challenged information in the court-ordered PSI when it sentenced him. To bolster this argument, Mayville cites ***State v. Anderson***, 222 Wis. 2d 403, 588 N.W.2d 75 (Ct. App. 1998). However, our decision in ***Anderson*** does not help Mayville.

¶15 In ***Anderson***, the defendant argued that the circuit court relied upon inaccurate information in a court-ordered PSI. ***Id.*** at 407. Anderson faulted his trial counsel for not seeking an adjournment to allow counsel to finish reviewing the report before sentencing. ***Id.*** When deciding Anderson's postconviction motion, the court stated it had not relied on that information. We concluded the court's sentencing remarks demonstrated reliance on inaccurate information, and that Anderson had suffered a resulting due process violation. ***Id.*** at 408, 410.

¶16 Actual reliance is a component of claims involving the presence of inaccurate information at sentencing. *See* ***State v. Travis***, 2013 WI 38, ¶¶21-23, 347 Wis. 2d 142, 832 N.W.2d 491. However, reliance is not the test here. The ***Strickland*** test for actual prejudice focuses on the probability that, but for trial counsel's unprofessional errors, the results of the proceeding would have been different. ***Strickland***, 466 U.S. at 694.

¶17 Mayville fails to show that, but for the information Mayville challenges at pages 15-17 of the PSI, there is a reasonable probability the circuit court would have imposed different sentences. Although the court appeared to briefly mention the letter at issue, it did not rely upon the information contained at pages 15-17 of the PSI. The court relied upon proper sentencing factors. It

explained at sentencing, and in its decision denying postconviction relief, the basis for imposing the substantial—yet less than maximum—sentences the court imposed in Mayville's case.

¶18 Indeed, the circuit court specifically noted the "recommendations made by the pre-sentence investigation report writer [were] significantly higher than what I gave Mr. Mayville … as a sentence. The recommendations requested by the District Attorney were significantly higher than what I gave Mr. Mayville." The court stated in its decision denying the postconviction motion:

> There are certain things that, when you talk about, you know, what influenced me, and I'll be quite honest with you, my influence was what Mr. Mayville did to – that formed the basis for the incest charges. I note in the pre-sentence investigation that … the victim explained that the defendant would mention random things to her in bizarre times of day. Obsessed with sex. Instances where he talked about acquiring a sex slave to hold captive in his basement. Going on crime sprees and placing his penis in her mouth … and manipulation that occurred in this case that has nothing to do with any letters that he wrote to anyone at any time prior to this. This is the information that put the hairs up on the back of my neck. The information in here of what he did to the victim is what got me particularly to feel that a lengthy prison term was absolutely necessary and I continue to feel that way, absolutely, that the sentence that I gave Mr. Mayville was absolutely appropriate.

Thus, even if Mayville's trial counsel had made the objection Mayville claims he should have made, Mayville suffered no actual prejudice because he would have received the same sentences. *See* ***Giebel***, 198 Wis. 2d at 219.

¶19 A circuit court may deny a postconviction motion without a hearing if the record demonstrates that the defendant is not entitled to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Mayville fails to adequately indicate what additional evidence would have been produced if a

hearing was held, or how such evidence would have affected the outcome. As such, Mayville's argument regarding entitlement to an evidentiary hearing is underdeveloped, and we will not further address it. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).[3]

By the Court.—Judgment and order affirmed.

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

[3] Because we affirm on the basis that Mayville cannot prove that he suffered actual prejudice, we need not decide whether the challenged information in the PSI falls within the Fifth Amendment and statutory privilege.