

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 2007

David R. Schanker
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. 2007AP155-CR
2007AP156-CR**

**Cir. Ct. Nos. 2003CF1161
2004CF841**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS B. SOMERHALDER,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Marcus Somerhalder appeals two judgments of conviction and an order denying his motion for postconviction relief. He argues

he is entitled to withdraw his pleas and his sentence was unduly harsh and based on improper factors. We reject his arguments and affirm.

BACKGROUND¹

¶2 In December 2003, Somerhalder was charged with two counts of second-degree sexual assault and three counts of making a visual representation of nudity. *See* WIS. STAT. §§ 940.225(2), 949.09(2)(a). Later that month, the State amended the complaint to include a total of twelve sexual assault counts and six counts of making a visual representation of nudity. In August 2004, in a separate complaint, the State charged Somerhalder with two additional counts: second-degree sexual assault and possessing a visual representation of nudity.

¶3 The complaints alleged crimes from March 2000 through December 2003 involving a total of fifteen different victims. While the circumstances varied from count to count, most of the allegations involved sexual intercourse in Somerhalder's apartment in the early morning hours. Many of the victims reported drinking with Somerhalder at bars he owned or at his apartment, then waking up in his apartment in the morning without a clear memory of what had

¹ Somerhalder's statement of facts omits the circuit court's findings of the facts underlying his claims. Facts must be stated with "absolute, uncompromising accuracy." *Arents v. ANR Pipeline Co.*, 2005 WI App 61, 84 n.2, 281 Wis. 2d 173, 696 N.W.2d 194 (citation omitted). By substituting his own testimony for the circuit court's contrary fact findings, Somerhalder misrepresents the record in violation of WIS. STAT. RULE 809.19(1)(d). We also note that while the State was not required to include a statement of facts, it may wish to consider doing so in the future where, as here, its argument section includes a substantial disagreement with the appellant's recitation of the facts. *See* Michael S. Heffernan, APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN § 11.20 (4th ed. 2006).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

transpired there. Several counts were based on videotapes depicting sexual intercourse between Somerhalder and women who appeared to be unconscious or nearly so.

¶4 Ultimately, Informations were filed charging Somerhalder with a total of thirteen counts of sexual assault and seven counts involving videotaping. As part of a plea agreement, Somerhalder pled no contest to five sexual assault counts and two counts involving videotaping. The remaining counts were dismissed with prejudice.² In the plea agreement, the State also agreed to keep the presentence investigation (PSI) writer from having contact with Scott Schermitzler, the investigating officer.³

¶5 Somerhalder also submitted a letter by his attorney containing a factual basis for his no contest pleas. The letter indicated Somerhalder denied any allegations that he had administered any date rape drug to any of the victims, and stated that the State “has agreed to acknowledge that no date rape drugs were ever found in [Somerhalder’s] residence, business, vehicle or anywhere for that matter.”

¶6 The court accepted Somerhalder’s pleas, ordered a PSI and set the matter for sentencing. However, the PSI writer did in fact discuss the case with

² At the time Somerhalder entered his plea, five counts of making a visual representation of nudity had already been dismissed because they were based on an unconstitutional statute. *See State v. Stevenson*, 2000 WI 71, ¶21, 236 Wis. 2d 86, 613 N.W.2d 90.

³ The agreement also limited the State’s sentence recommendation. That part of the agreement is not at issue here.

Schermitzler.⁴ Soon after the PSI was completed, and before sentencing, Somerhalder moved to withdraw his pleas. In his motion, he alleged the State had breached the plea agreement by allowing the PSI writer to meet with Schermitzler. He also alleged, among other things, that he had discovered new evidence and that he had not understood the ramifications of truth in sentencing when he entered the pleas. The court ordered an evidentiary hearing on the latter two issues, and ordered a new PSI prepared by a different writer who would have no contact with Schermitzler.

¶7 Somerhalder then filed a motion asking the court to reconsider its decision to order a new PSI. Somerhalder argued the new PSI would be insufficient to cure the State's breach, and that he had entered his pleas in part because he believed the PSI writer and the court would not consider dismissed counts.

¶8 A hearing on this issue took place November 23, 2005. At the hearing, the following exchange took place during Somerhalder's testimony:

[SOMERHALDER'S ATTORNEY]: I believe I was focusing on ... the allegation that you administered drugs to one or more of these individuals?

[SOMERHALDER]: Correct.

Q: And your concern with that fact as it relates to the PSI or sentencing is what?

A: That still exists. ... I thought that ... by entering into this agreement that issue was put to rest. Obviously it is not put to rest and I think the only way that it's going to be put to rest is if we go to trial.

⁴ According to the State, the State allowed Schermitzler to meet with the PSI writer after the writer insisted on a meeting to clarify the chronology of the case.

....

THE COURT: Mr. Zakowski, do you think that I have the authority to consider charges that have been dismissed for purposes of sentencing if the State agrees to dismiss them? There are four charges of depicting nudity that couldn't be brought under the statute because at that time ... the Supreme Court determined that those statutes or that statute was unconstitutional. I certainly couldn't consider that at sentencing, could I?

[DISTRICT ATTORNEY] ZAKOWSKI: You couldn't, Your Honor.

THE COURT: And how could I consider a charge that's been dismissed at sentencing?

MR. ZAKOWSKI: I would not expect you to, Your Honor.

THE COURT: No, no, not what you expect, how could I? I don't know of any such possibility that would exist that if in fact a charge has been dismissed how could I consider it?

MR. ZAKOWSKI: You're correct, Your Honor, that's why you have read-ins and outright dismissals.

THE COURT: There's a difference between read-ins and outright dismissals. Read-ins are things I can consider. Outright dismissals are things that I can't. Now it sounds to me like we're having more of a discussion here about the contours of an appropriate PSI at this point....

At the conclusion of the hearing, the court took Somerhalder's plea withdrawal motion under advisement and allowed his attorney to withdraw so that the attorney could testify. Somerhalder was then appointed another attorney.

¶9 The day before a scheduled hearing on Somerhalder's plea withdrawal motion, Somerhalder withdrew the motion, and the matter was set for sentencing. The court imposed consecutive sentences on all counts totaling twenty

years in confinement and forty-six years on extended supervision.⁵ The court indicated it was not treating the case as a “date rape drug case,” stating that there were not “any facts to support that.” The court did, however, discuss the dismissed counts:

I can’t ignore all of those other crimes that were alleged that were dismissed as part of this plea. You know, you apologized to a series of women who were the victims in this case, but there are a group of other women out there who deserve that apology just as much. ... I’m not dealing here with a case where this happened once and it was over. I have a situation here where over a period of three years that we know about, that you were raping women.

¶10 Somerhalder filed a postconviction motion seeking plea withdrawal or, in the alternative, resentencing. He argued the November 23 discussion between the court and the State amounted to an agreement that dismissed counts would not be considered at sentencing, and the State had breached that agreement. He also argued counsel provided ineffective assistance, and his sentence was unduly harsh and based on improper factors. After a *Machner*⁶ hearing, the court denied the motions.

DISCUSSION

I. Plea withdrawal

¶11 A defendant may withdraw a plea after sentencing if he or she can prove that enforcement of the plea would work a “manifest injustice.” *State v.*

⁵ The court later reduced the extended supervision on one count by five years because the original sentence on that count had exceeded the statutory maximum.

⁶ See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Booth, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). Whether plea withdrawal is necessary to prevent a “manifest injustice” is committed to the circuit court’s sound discretion. *Id.* at 237.

¶12 Somerhalder first alleges a manifest injustice based on the court’s comments at the November 23 hearing. He argued the comments led him to believe the court would not consider dismissed or uncharged counts—specifically, counts related to date rape drugs—at sentencing. Somerhalder contends he abandoned his pre-sentencing plea withdrawal motion because of that mistaken belief.

¶13 This argument ignores the circuit court’s findings and the evidence at Somerhalder’s postconviction hearing. At the close of that hearing, the court found that while Somerhalder could potentially have formed an incorrect belief based on the November 23 remarks, he had not in fact done so.⁷ The court based this finding on evidence that (1) Somerhalder had considered introducing a summary of all videotapes seized by police, even though many of the tapes related to dismissed and uncharged offenses; (2) Somerhalder’s attorneys had told him dismissed charges could be considered; and (3) Somerhalder knew the State was free to discuss date rape drugs.⁸ In his brief, Somerhalder ignores these findings and the court’s analysis, and instead repeats his own version of the facts.

⁷ The court indicated the comments were intended to indicate only that the court would not consider the five counts dismissed as unconstitutional, not that the court would not consider counts dismissed as part of the plea bargain.

⁸ Somerhalder admitted knowing that “something” would be said about date rape drugs, but said he did not expect the State to discuss drugs to the extent it did.

Somerhalder therefore does not identify any erroneous exercise of discretion by the circuit court, and we perceive none. *See Booth*, 142 Wis. 2d at 235.

¶14 Somerhalder next argues enforcement of his pleas would work a manifest injustice because his plea agreement is illusory and against public policy. He argues the plea agreement violated public policy because it restricted the PSI writer's inquiry into drug allegations. *See State v. McQuay*, 154 Wis. 2d 116, 131, 452 N.W.2d 377 (1990).

¶15 This argument misconstrues the plea agreement. At his postconviction hearing, Somerhalder testified the agreement was only that the PSI writer would have no contact with Schermitzler, the investigating officer. Somerhalder said he believed Schermitzler was too close to the case⁹ and he insisted on the no-contact term in order to keep the PSI writer unbiased. While Somerhalder said he hoped the no-contact provision would help show he had not given the victims date rape drugs, he did not indicate the plea bargain placed any restrictions on which facts could be included in the PSI. In testimony, Somerhalder's attorneys confirmed that the agreement had been simply that the PSI writer would have no contact with Schermitzler. Somerhalder does not argue the no-contact term, standing alone, was contrary to public policy.¹⁰

⁹ Somerhalder and Schermitzler knew each other personally before the case began.

¹⁰ In general, the PSI writer is an agent of the court, not the State, and is therefore not bound by plea agreements. *State v. McQuay*, 154 Wis. 2d 116, 131, 452 N.W.2d 377 (1990). Here, however, the court ordered the second PSI writer to comply with the no-contact term. Somerhalder therefore received the PSI he had bargained for, even though the State may not have had the authority to deliver it. Under those circumstances, we see no manifest injustice warranting withdrawal of Somerhalder's plea.

II. Breach of the plea agreement

¶16 Somerhalder next argues the State breached the plea agreement. A defendant has a due process right to enforcement of a negotiated plea agreement. *State v. Williams*, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. A material and substantial breach of a plea agreement is a manifest injustice that entitles the defendant to withdraw the plea. *State v. Smith*, 207 Wis. 2d 258, 272, 558 N.W.2d 379 (1997). On review, we will uphold the circuit court's findings of fact of the terms of the agreement and the circumstances of the alleged breach unless clearly erroneous. *Williams*, 249 Wis. 2d 492, ¶5. Whether those facts amount to a material and substantial breach is a question of law reviewed without deference to the circuit court. *Id.*

¶17 Here, the court specifically found credible Somerhalder's attorneys' testimony as to the terms of the agreement. Both attorneys testified the agreement did not include any term limiting consideration of dismissed and uncharged counts. They also testified the agreement allowed the State to discuss circumstantial evidence of date rape drugs. The court also found the November 23 discussion did not add any terms to the plea agreement. In his brief, Somerhalder recites other facts that support his position, but does not argue any of the court's findings are clearly erroneous. He therefore has not shown the State breached any term of the agreement. *See id.*

III. Ineffective assistance

¶18 Somerhalder argues his attorneys were ineffective for failing to conclusively determine whether the November 23 discussion indicated the court

would not consider dismissed counts.¹¹ Ineffective assistance of counsel is a manifest injustice allowing the defendant to withdraw his or her plea. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). On appeal, we will uphold the circuit court’s findings of historical fact unless clearly erroneous. *State v. Wright*, 2003 WI App 252, ¶30, 268 Wis. 2d 694, 673 N.W.2d 386. Whether those facts amount to ineffective assistance is a question of law reviewed without deference to the circuit court. *Id.*

¶19 To prove ineffective assistance, a defendant must show that “counsel’s actions or inaction constituted deficient performance and that the deficiency caused him prejudice.” *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Counsel’s performance is deficient only if counsel’s actions fall outside the “wide range of reasonable professional assistance.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¶20 At the postconviction hearing, Somerhalder’s first attorney testified he told Somerhalder the court could legally consider dismissed counts. That attorney withdrew soon after the November 23 hearing, while Somerhalder’s plea withdrawal motion was still pending. The attorney who replaced him testified he told Somerhalder that while the hearing made him hope dismissed and uncharged counts would not be considered, the court could legally consider those counts. Somerhalder agreed with the substance of that testimony, although he characterized the statements as a “disclaimer.” He also said both attorneys told

¹¹ Somerhalder also argues counsel should have argued the State breached the plea agreement with its sentencing argument regarding date rape drugs. However, as noted above, nothing in the plea agreement precluded the State from making the argument it did.

him he was “in a good position” as a result of the November 23 comments and advised him to continue to sentencing.

¶21 We see nothing deficient in either attorney’s actions. At the close of the November 23 hearing, Somerhalder had three alternatives: (1) attempting to force a trial on all counts; (2) clarifying the November 23 comments, likely resulting in a ruling that dismissed and uncharged counts could be considered; or (3) proceeding to sentencing without clarifying the comments, hoping to take advantage of the apparent error over what charges could be considered. Both attorneys correctly explained the law, suggested a reasonable option, and allowed Somerhalder to decide whether to continue attempting to withdraw his plea. Their performance was not deficient simply because the calculated risk they advised did not pay off.

IV. The sentence imposed

¶22 Finally, Somerhalder challenges the sentence imposed. We will affirm the circuit court’s sentencing decision unless the court erroneously exercises its discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court properly exercises its discretion when it provides a “rational and explainable” basis for the sentence. *Id.*, ¶39. To do so, the court must explain, by reference to the relevant facts and sentencing factors, the “linkage” between the sentence and its objectives. *Id.*, ¶¶40-46. The most important factors are the gravity of the offense, the character of the offender, and the need for protection of the public. *State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). A variety of other factors may also be considered if relevant. *See Gallion*, 270 Wis. 2d 535, ¶43 n.11. The weight to be

given each factor is committed to the court's discretion. *State v. Steele*, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 750, 632 N.W.2d 112.

¶23 In this case, the court first discussed the serious nature of the offense, noting the effect the crimes had on the victims and the fact that the assaults had taken place over an extended period and involved numerous victims. The court described the conduct depicted on the videotapes as “sick” and “horrible.” The court next pointed out the need to deter others from committing similar crimes. The court noted that Somerhalder's character was positive in other respects, and gave him credit for sparing the victims from testifying at trial. The court discussed the expert testimony on recidivism, and concluded the risk was high enough to be cause for concern. The court rejected the defense recommendation of three to five years in confinement, finding a longer period of time was necessary for protection of the public, punishment, and for Somerhalder to receive treatment.

¶24 Somerhalder argues the court ignored or did not give enough credit to mitigating factors, such as his decision to spare the victims from testifying, his good character aside from the assaults, and “two strong mitigating expert witnesses for the defense.” However, as indicated above, the court did in fact discuss the mitigating factors Somerhalder argued. Somerhalder was facing a possible sentence of over 100 years, and the court imposed a sentence of sixty-six years, with over two thirds of the sentence to be spent on extended supervision. To the extent this indicates the court gave mitigating factors less weight than aggravating factors, it acted within its discretion. *See Steele*, 246 Wis. 2d at 750, ¶10. In addition, because the sentence was well within the maximum, it was not

so harsh or excessive as to shock public sentiment. *See State v. Stenzel*, 2004 WI App 181, ¶22, 276 Wis. 2d 224, 688 N.W.2d 20.

By the Court.—Judgments and order affirmed.

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

