COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP457-CR **Cir. Ct. No. 2004CF101**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD H. NIPPLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: WILLIAM D. JOHNSTON, Judge. *Affirmed*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Ronald Nipple appeals a judgment convicting him of repeated sexual assault of the same child. He also appeals an order denying his postconviction motion. Nipple contends that he is entitled to plea withdrawal or resentencing based on claims of ineffective assistance of counsel, erroneous

exercise of sentencing discretion, and the interest of justice. We reject each of his arguments and affirm for the reasons discussed below.

BACKGROUND

¶2 Nipple was charged with four counts of repeated sexual assault of the same child based on allegations that he molested his girlfriend's daughter, Megan, from the time that she was eight years old until the age of fourteen and beyond, and had two children by the child. Nipple eventually entered a no contest plea to the count covering a time period when Megan was fourteen,[1] in exchange for the outright dismissal of the other three counts and the State's agreement to recommend a withheld sentence with five years of probation.

¶3 In accordance with the plea agreement, the parties offered a joint sentencing recommendation for probation without any conditional jail time, but the circuit court chose not to follow that recommendation. The court instead sentenced Nipple to an indeterminate term of not more than twenty years in prison. Nipple then moved to withdraw his plea or, in the alternative, for a modification of his sentence. The circuit court denied the motion following an evidentiary hearing, and Nipple appeals. More specific facts regarding the grounds for the postconviction motion will be set forth as relevant in our analysis.

[1] Throughout the plea, sentencing, and postconviction proceedings, the parties and court all indicated that Megan would have been fifteen at the time of the crime of conviction. Megan's date of birth, however, was August 11, 1982, and Count 4 alleges three or more sexual acts between August 11, 1996, and August 10, 1997, at which time Megan would have been fourteen.

STANDARDS OF REVIEW

¶4 In order to withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, such as ineffective assistance of counsel. ***State v. Krieger***, 163 Wis. 2d 241, 250-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). In turn, the test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. Applying the ineffective assistance standard in the plea withdrawal context, a defendant may establish a manifest injustice by showing that counsel's conduct or advice was objectively unreasonable and that, but for counsel's error, the defendant would not have entered the plea. *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985); ***State v. Bentley***, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996).

¶5 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them unless those findings are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. ***Id.*** at 634.

¶6 Sentence determinations are accorded a presumption of reasonableness and will not be set aside unless the circuit court has erroneously exercised its discretion. ***State v. Schreiber***, 2002 WI App 75, ¶7, 251 Wis. 2d 690, 642 N.W.2d 621. In order to properly exercise its discretion, the circuit court

should discuss relevant factors, such as the severity of the offense and character of the offender, and relate them to sentencing objectives, such as the need for punishment, protection of the public, general deterrence, rehabilitation, restitution, or restorative justice. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & nn.9-12, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court may decide what weight to give each factor, however. ***Schreiber***, 251 Wis. 2d 690, ¶8. Applying the ineffective-assistance-of-counsel standard in the sentencing context requires a showing that, if counsel had provided the court with the argument or evidence the defendant asserts should have been made or introduced, there is a reasonable probability that the sentence would have been different. *See* ***State v. Giebel***, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995).

DISCUSSION

Plea Withdrawal

¶7 Nipple alleges that counsel's performance was ineffective in two respects. First, he claims counsel "never followed up on [the victim's] allegations that her statement to detectives was coerced by a threat to arrest her and take her children away." However, one of Nipple's attorneys testified that she spoke to Megan's lawyer to find out what Megan was going to say at trial. In addition, counsel learned that Megan was claiming police told her they would take her kids away if she did not implicate Nipple, and that Megan would no longer say that she was eight when the molestation started. Instead, Megan was apparently willing to testify that she had not had intercourse with Nipple until she was fifteen. Because Nipple had already admitted to his attorney that he had had sexual relations with Megan when she was fourteen and fifteen and possibly thirteen, counsel had concerns that Megan might be subject to a perjury charge if she changed her story

on the stand. Counsel also discussed with Nipple that the jury might consider Megan's original statement to the police to be more credible than her later recantation. Counsel did not pursue a suppression motion because the defense had obtained the plea agreement Nipple was seeking—namely, a recommendation for probation with no conditional jail time.

¶8 From counsel's testimony, it is plain that Nipple knew, before he entered his plea, that Megan was retracting part of her statement to police and that he would have a potential credibility defense at trial. Nipple did not offer any evidence at the postconviction hearing that was available prior to the entry of the plea that would tend to show that the recantation was more accurate than Megan's original statement. Moreover, Nipple's conduct would still have been a crime, even under the victim's subsequent version of events. Therefore, Nipple has failed to establish prejudice because he has not shown that additional investigation by counsel prior to the plea would have revealed any information that would have made it any less likely that Nipple would enter a plea. *See* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (a defendant alleging counsel failed to investigate his case must specify what the investigation would have revealed and how it would have altered the outcome of the proceeding).

¶9 Second, Nipple claims that a junior attorney at counsel's firm who appeared at the plea hearing erroneously led Nipple to believe that there was a high probability that the court would accept the joint sentencing recommendation. Nipple further asserts that he would not have entered his plea if he believed the court would deviate from the probation recommendation. The record shows, however, that the circuit court conducted an extended colloquy to make sure that Nipple understood that the court was not bound to follow the parties' recommendations and that the court would make its own sentence determination

based on information provided in the PSI and at the sentencing hearing. *See* ***State v. Hampton***, 2004 WI 107, ¶¶20, 38, 274 Wis. 2d 379, 683 N.W.2d 14 (circuit court must personally advise defendant that it is not obligated to follow the terms of a plea agreement). The court also pointed out that it would be difficult for Nipple to withdraw his plea after sentencing even if the court did not follow the recommendation. Nipple acknowledged that he understood. Furthermore, the junior attorney testified at the postconviction hearing that Nipple had expressed concern about the possibility that the court could exceed the recommendation or impose the maximum sentence, and counsel had responded that, while it could happen, it was unlikely, he had never seen it happen, and judges usually follow joint recommendations. In other words, it is plain from the record that Nipple was informed that the court *could* deviate from the sentence recommendation though counsel viewed this as unlikely.

¶10 We are not persuaded that counsel performed deficiently when he informed Nipple that it was unlikely the court would not follow the joint recommendation. Nipple presented no evidence at the postconviction hearing showing it to be untrue, with respect to courts generally, or the particular sentencing judge in this case, that it was likely a joint recommendation would be followed. And, Nipple presented no evidence that the junior attorney had been involved in any prior cases where the court did not follow a joint recommendation. To the contrary, it would have been objectively reasonable for counsel to assume that Nipple had a very good chance of obtaining probation when the State had agreed to make a joint probation recommendation. In short, counsel negotiated a highly favorable deal from the State and reasonably advised Nipple that the State's agreement to recommend probation made it highly likely that the court would impose probation. The fact that in this instance the court did not follow the joint

recommendation does not render counsel's advice deficient *at the time it was made*. We agree with the circuit court's conclusion that Nipple failed to demonstrate any ineffective assistance of counsel warranting plea withdrawal.

Sentencing

¶11 Nipple claims that counsel provided ineffective assistance at sentencing by: (1) failing to adequately investigate mitigating factors or prepare for sentencing; (2) making an inadequate sentencing argument that did not address all of the relevant sentencing factors; and (3) failing to object when the circuit court relied on facts contained in police reports relating to counts that were dismissed with prejudice and to which Nipple never admitted.

¶12 Nipple's first claim fails because he has not identified any mitigating factors that were not, in fact, presented to the court. That is, he has once again failed to specify information that additional investigation would have revealed.

¶13 Nipple's second claim likewise fails on the prejudice prong because he has not explained why any sentencing factors counsel failed to address would have been likely to change the sentence imposed. Given the thoroughness of the court's discussion—which we will address in greater detail below—we do not see any reasonable probability that a different argument by counsel would have been likely to result in a different sentence.

¶14 Next, we see no deficient performance in counsel's failing to object when the circuit court relied on facts contained in Megan's statement. That information was properly before the court both as an attachment to the complaint and in the State's PSI. The court considered at length whether Megan's statement to police was accurate in light of her partial recantation, and concluded that there

did not appear to be any independent signs of coercion, particularly considering that Nipple himself had acknowledged that the probable cause portion of the complaint, which included the statement, could be used as a factual basis for the plea. We further note that the assertions by both Nipple and Megan in the PSIs that they did not have intercourse until Megan was fifteen directly conflicted with the dates alleged for the crime of conviction, when Megan was only fourteen.

¶15 More to the point, the fact that many of the allegations in Megan's original statement related to the dismissed charges to which Nipple did not admit did not bar the court from considering them. To the contrary: "'In determining the character of the defendant and the need for his incarceration and rehabilitation, the court must consider whether the crime is an isolated act or a pattern of conduct. Evidence of unproven offenses involving the defendant may be considered by the court for this purpose.'" ***State v. Fisher***, 211 Wis. 2d 665, 678, 565 N.W.2d 565 (Ct. App. 1997) (quoting ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990)); *see also* ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. Nipple's reliance on ***Shepard v. United States***, 544 U.S. 13 (2005), for the proposition that a defendant may only be sentenced based on conduct specifically admitted is misplaced. That case addressed what level of proof is required before applying a sentence enhancer—which increased the maximum sentence the judge was authorized to impose—based on conduct the defendant has not admitted. Here, there was no such increased maximum. Therefore, there was no need for a higher standard of proof regarding Nipple's past conduct than that which generally applies at sentencing hearings.

¶16 A defendant may be entitled to resentencing or sentence modification if it can later be shown that the information relied upon by the court was inaccurate. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717

N.W.2d 1. Again, however, we note that there was no evidence presented at the postconviction hearing that would show that Megan's partial recantation was more accurate than her original statement. Instead, counsel's testimony that Nipple had already admitted portions of the statement, before Megan recanted, reinforces rather than undermines the accuracy of the information upon which the court relied. In sum, we agree with the circuit court's conclusion that Nipple failed to establish that he was denied the effective assistance of counsel at sentencing, or that he was sentenced based on inaccurate information.

¶17 Nipple also argues that the circuit court erroneously exercised its sentencing discretion by failing to adequately explain why probation was inadequate and why it was imposing a twenty-year sentence. However, the circuit court's discussion at sentencing revealed that it had reviewed the information presented in both PSIs and had thoroughly considered all of the relevant sentencing factors. The court viewed this as a case of grooming, since Nipple had been giving the victim expensive gifts like horses and cows from a young age. According to the police reports, Megan stated that Nipple bought her cows and horses for continuing to have sex with him. Megan's mother also noted that Nipple bought Megan a vehicle each time she got pregnant. The court noted that various people had reported that Nipple had a manipulative and controlling personality. The court said that probation would unduly depreciate the seriousness of the offense, given the young age of the victim, her vulnerability living with a single mother, Nipple's exploitation of his parent-like relationship with the victim, the amount of time the inappropriate behavior had continued, and the pregnancies of the victim. The court rejected Nipple's success as a farmer and the victim's continuing economic dependence upon him as a reason not to be held accountable for his crimes. The court concluded that a substantial prison sentence was

required for punishment, deterrence, and the protection of the community. We are satisfied that the circuit court properly exercised its discretion in sentencing Nipple.

Discretionary Reversal

¶18 Finally, Nipple asks this court to exercise its discretionary reversal power under WIS. STAT. § 752.35 (2005-06). This court may set aside a judgment under that section when the record shows that the real controversy has not been fully tried or it is probable that justice has miscarried. In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (internal citations omitted). To establish a miscarriage of justice, there must be "a substantial degree of probability that a new trial would produce a different result." ***Id.*** (citations omitted). We will exercise our discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶19 Since Nipple waived his right to a jury trial by entering a plea, he cannot complain that the controversy was not fully tried. Nor has he provided any information that leads this court to believe that going to trial would have led to an acquittal. The physical evidence that Nipple impregnated Megan when she was only sixteen is entirely consistent with her initial statement to police that Nipple began molesting her when she was eight and began having intercourse with her when she was eleven or twelve up until the time she turned twenty-one. As the circuit court noted, Nipple's gifts of horses and cows to Megan circumstantially

supported the theory that Nipple had been grooming Megan from a very young age, and her economic dependence on him undermined her partial recantation. In sum, we are not persuaded that there has been any miscarriage of justice here.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5. (2005-06).