COURT OF APPEALS
DECISION
DATED AND RELEASED

November 28, 1995

NOTICE

No. 95-0283-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KELVIN GRIFFIN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Kelvin Griffin appeals from a judgment entered after he pled guilty to one count of kidnapping, while armed, as party to a crime; four counts of first-degree sexual assault, while armed, as party to a crime; two counts of first-degree sexual assault, while armed; and one count of armed robbery, party to a crime, contrary to §§ 940.31, 939.63, 939.05, 940.225(1)(c), and 943.32(1)(a), STATS. He also appeals from an order denying his postconviction motions, which alleged that he received ineffective assistance of trial counsel and an unduly harsh sentence. Griffin claims: (1) that he did

not receive effective assistance of trial counsel and that the trial court erred when it denied this claim without holding a ***Machner***[1] hearing; and (2) that the sentence imposed was unduly harsh.[2] Because there is no evidence that the representation he received prejudiced the outcome and a ***Machner*** hearing was not required, and because the sentence was not unduly harsh, we affirm.

I. BACKGROUND

On September 9, 1993, Dawn R., the twenty-one-year-old victim, was walking to a party to meet her husband. Griffin and two juveniles approached her with the intent to rob her. Griffin possessed a firearm and threatened the victim. She was ordered to remove her clothing. Griffin grabbed her arm and forced her to the side of a nearby house. She was ordered to get down on her hands and knees and she was sexually assaulted. She was then forced to another area and assaulted repeatedly by each of the three young men. She was also repeatedly threatened that she would be killed if she did not do what the men asked. The incident occurred over approximately a fifty-minute-time-period.

After Griffin and his friends left, Dawn was assisted by a homeowner in the area. The homeowner gave her a robe to wear and phoned police. Griffin and his friends were subsequently arrested and charged. Griffin, who was seventeen years old at the time, was waived into adult court. His friends were adjudicated in the juvenile system.

The State offered to dismiss three of the counts if Griffin would plead guilty to the remaining five counts. Griffin rejected the offer and the case was scheduled for trial. On the date the trial was to commence, Griffin informed the court that he wanted to plead guilty to all eight counts. The State

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

[2] Griffin also claims that his request for new trial counsel was ignored, and that the judgment should be reversed "in the interests of justice." We summarily reject both claims. Griffin waived his claim regarding new counsel when he entered his guilty pleas, *see* ***State v. Skamfer***, 176 Wis.2d 304, 312 n.2, 500 N.W.2d 369, 372 n.2 (Ct. App. 1993), and a § 752.35, STATS., "interests of justice claim" does not apply to a case in this procedural posture. *See* § 752.35, STATS.

agreed to recommend the same sentence it intended to make pursuant to the plea agreement, a prison sentence of 60 to 75 years. The trial court sentenced Griffin to 180 years in prison out of a possible maximum sentence of 195 years.

Griffin filed postconviction motions claiming he received ineffective assistance of trial counsel, and that the sentence imposed was unduly harsh. The trial court denied the motion without a ***Machner*** hearing, reasoning that there was no evidence that Griffin had been prejudiced by the conduct of his trial counsel, and that the sentence was not unduly harsh. Griffin now appeals.

II. DISCUSSION

A. Ineffective Assistance Claims.

Griffin's ineffective assistance claims are essentially threefold: (1) that his trial counsel was ineffective with respect to his conduct at the sentencing hearing; (2) that the trial court erred in denying the motion without an evidentiary hearing; and (3) that his trial counsel was ineffective with respect to the plea agreement originally offered by the State. The trial court denied the motion because Griffin failed to show that trial counsel's conduct prejudiced the outcome. On this basis, the trial court reasoned that it was not necessary to conduct an evidentiary hearing. We agree.

The United States Supreme Court set out the two-part test for ineffective assistance of counsel under the Sixth Amendment in ***Strickland v. Washington***, 466 U.S. 668 (1984). The first prong of ***Strickland*** requires that the defendant show that counsel's performance was deficient. ***Id.*** at 687. This demonstration must be accomplished against the "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The second ***Strickland*** prong requires that the defendant show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. In reviewing the trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "the ultimate determination of whether counsel's performance

was deficient and prejudicial" *de novo*. ***Johnson***, 153 Wis.2d at 127-28, 449 N.W.2d at 848. Further, we review the trial court's denial of a ***Machner*** hearing *de novo*. ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994).

We address first whether trial counsel's conduct with respect to sentencing constitutes ineffective assistance. Specifically, Griffin claims that: trial counsel failed to inform the court of Griffin's uncounseled reaction to these offenses prior to being taken into custody; trial counsel failed to provide the court with any explanation for Griffin's conduct or offer insight into Griffin's character; trial counsel failed to retain an expert to evaluate Griffin to determine whether he is "paraphilic" and to evaluate his potential for rehabilitation; trial counsel failed to inform Griffin's parents that they could make a statement to the court at sentencing; trial counsel failed to prepare Griffin for his allocution at sentencing; and trial counsel did not discuss sentencing strategy with Griffin.

The trial court addressed each allegation, concluding that trial counsel's failure to engage in the conduct referenced above did not affect the sentencing. The trial court reasoned that the conduct that Griffin alleges as being deficient performance was essentially cumulative to material already contained in the record, either in the form of the presentence report, and letters received from Griffin, Griffin's mother and other family members. Accordingly, it concluded that the absence of the materials/statements did not affect the result of the proceedings. We agree.

The last allegation, that trial counsel did not discuss sentencing strategy with Griffin, is refuted by the plea questionnaire and waiver of rights form in the record. These forms, which Griffin acknowledged that he read and understood, discussed the ramifications of entering a guilty plea. Griffin also admitted that he understood that the judge is not bound by any plea agreement or by the State's sentence recommendation when imposing sentence.

We conclude that Griffin has not alleged a valid claim for ineffective assistance with respect to the conduct of his trial counsel regarding the sentencing hearing.

We next address whether the trial court erred in refusing to hold a ***Machner*** hearing. A trial court must hold an evidentiary hearing on ineffective assistance of counsel claims if a defendant alleges sufficient facts in his motion to raise a question of fact for the court. ***Toliver***, 187 Wis.2d at 360, 523 N.W.2d at 118 (citation omitted). Because of the two-prong ***Strickland*** test, the defendant must raise a question of fact as to both prongs, i.e., whether his counsel's performance was deficient, *and* whether the deficient conduct rendered the resulting conviction unreliable. Although Griffin raised a question of fact as the performance prong, he failed to raise a question of fact as to the prejudice prong. His motion did not allege specific facts to show that additional argument from counsel at sentencing, or better preparation by counsel for the sentencing hearing, or additional discussion regarding the plea agreement would have altered the outcome of this case. The trial court explained in its decision denying the postconviction motion that its decision was based on the gravity of the offense and the need to protect the public. The trial court indicated that even if trial counsel had provided the information that Griffin alleges should have been provided, it would not have affected sentencing. Accordingly, it was not erroneous to refuse to hold an evidentiary hearing because Griffin failed to raise a question of fact with respect to the prejudice prong of the ineffective assistance test.

Finally, Griffin claims he received ineffective assistance because his trial counsel inadequately advised him with respect to a plea offer made by the State. The allegation in Griffin's motion papers in this regard was:

> Mr. Griffin also requests that he be allowed to amend this motion if warranted by his appellate counsel's ongoing investigation. Specifically, Mr. Griffin will allege that his trial counsel's performance was deficient either because counsel advised Mr. Griffin to reject the state's offer to dismiss and read-in counts 3, 4 and 7, or because counsel failed to advise Mr. Griffin to accept the state's offer, if either allegation can be substantiated.

The motion was filed on December 28, 1994, and the trial court issued its decision on January 17, 1995. During that time, Griffin did not submit an amendment to actually make this allegation. He did not submit an affidavit

swearing that his trial counsel advised him to reject the State's offer or that his trial counsel failed to advise him of the offer. Because this allegation was never actually made at the trial court level, we reject it. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (we generally will not review issues raised for the first time on appeal).[3]

B. Unduly Harsh Sentence Claim.

Griffin claims that the sentence imposed of 180 years in prison out of a potential maximum of 195 years constitutes an unduly harsh sentence. Although we note that a 180 year prison term is long, we agree with the trial court that the sentence was not *unduly* harsh.

Griffin admits that the trial court did not erroneously exercise its discretion in imposing sentence—that it considered all the appropriate factors. *See* ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633, 639 (1984) (The sentencing court must consider three primary factors; 1) the gravity of the offense, 2) the character of the offender and 3) the need to protect the public.). He argues, however, that the sentence imposed was unduly harsh and excessive.

When a defendant argues that his or her sentence is unduly harsh or excessive, we will remand for resentencing "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

[3] We further decline to address Griffin's argument that he received ineffective assistance of trial counsel under the Wisconsin Constitution because he does not submit any Wisconsin authority post-***Strickland v. Washington***, 466 U.S. 668 (1984) in which the Wisconsin Supreme court actually applied a different standard than that articulated in ***Strickland***. *See* ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992) (arguments that are not supported by legal authority will not be considered).

Griffin argues that his sentence satisfies this standard because: (1) his co-actors, who were 13 years old and 15 years old at the time, will only be under supervision until age 21; (2) the 180 year sentence is meaningless because he will not live long enough to serve 180 years; (3) the multiple crimes committed were closely related and occurred in a short time span; (4) the trial court did not have certain information at the time of sentencing regarding Griffin's psychological evaluation; (5) the trial court applied non-applicable aggravating circumstances in imposing the sentence; (6) the trial court did not consider applicable mitigating circumstances; and (7) Griffin eventually told his co-actors to leave the victim alone. We are not persuaded that any of these factors transform the sentence that Griffin received into one that "shocks public sentiment and violates the judgment of reasonable people concerning what is right and proper."

Our conclusion is based on the following grounds:

(1) The sentence is within the limits of the maximum sentence. ***State v. Daniels***, 117 Wis.2d 9, 22, 343 N.W.2d 411, 417-18 (Ct. App. 1983) (a sentence within the limits of the maximum sentence is not so disproportionate that it shocks the public sentiment).

(2) Griffin and his co-actors are not similarly situated and, therefore, the disparity of the sentences between them is irrelevant. They are not similarly situated because Griffin is an adult.

(3) The 180 year sentence is not meaningless. Griffin will be eligible for parole when he is 62 years old. *See* 304.06(1)(b), STATS.

(4) The crimes, although closely related, were shockingly savage and entirely devoid of even the most elemental positive human instincts.

(5) Griffin's remaining arguments are rejected for those reasons expressed by the trial court in its order denying his postconviction motions.

By the Court.—Judgment and order affirmed.

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