COURT OF APPEALS
DECISION
DATED AND RELEASED

October 23, 1997

NOTICE

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

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No. 97-0069-CR-NM
97-0945-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. CAPPS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Robert J. Capps pled no contest to six counts of second-degree sexual assault of a child, contrary to § 948.02(2), STATS., to two counts of child enticement, contrary to § 948.07(1), STATS., and to one count of sexual exploitation of a child, contrary to §§ 948.05(1)(b) and 948.01(7)(e),

STATS.[1] The court imposed consecutive eight-year prison terms on two of the sexual assault counts, one of the child enticement counts, and the sexual exploitation of a child count. The court withheld sentence on the other counts, placed Capps on fifteen years of probation on each count, to run concurrent to each other and consecutive to his incarceration.

Capps filed a postconviction motion to withdraw his pleas in which he contended that he did not understand the elements of the offenses and that the court did not adequately explain the elements. Capps also argued that his trial counsel was ineffective because she did not explain the elements of the crimes to him and because she did not correct several inaccuracies in the presentence investigation. After an evidentiary hearing, the court denied Capps's motion. He now appeals.

Capps's appellate counsel, Attorney Patrick J. Stangl, has filed a no merit report pursuant to RULE 809.32, STATS., and ***Anders v. California,*** 386 U.S. 734 (1967). Capps received a copy of the report, and he was advised of his right to file a response. Capps has not filed a response. Based on our review of the no merit report and the record, we conclude that there are no arguable appellate issues. Therefore, we affirm the judgment of conviction and postconviction order.

Capps's No Contest Pleas

Capps was initially charged with twelve felony counts stemming from sexual contact over a twenty-month period with J.M.Y., who was younger than sixteen-years-old. After the preliminary hearing, the State filed an

[1] The number and nature of the convictions are misidentified in appellate counsel's no merit report.

Information charging Capps with twenty-one felony counts. Capps faced a possible 194 years in prison.

The State and Capps entered into a plea agreement under which Capps agreed to plead no contest to nine of the counts and the State agreed to dismiss the remaining counts. Under the agreement, Capps's prison exposure was reduced to ninety years. The agreement also provided that a presentence investigation would be prepared and the parties remained free to argue at sentencing.

This court has reviewed the transcript of the plea colloquy. At the outset, the plea agreement was outlined to the circuit court. The court explained the maximum penalty facing Capps, and informed Capps that it was not bound by the recommendations of the parties. Capps completed and signed a plea questionnaire. The court reviewed the various constitutional rights affected by the no contest pleas, and Capps told the court that he understood that he was waiving those rights.

Part of a trial court's obligation at a plea hearing is to "establish that the defendant has an awareness of the essential elements of the crime." ***State v. Johnson,*** 210 Wis.2d 197, 201, 565 N.W.2d 191, 193 (Ct. App. 1997), quoting ***State v. Bangert,*** 131 Wis.2d 246, 267, 389 N.W.2d 12, 23 (1986). In ***Bangert,*** the supreme court described various methods by which the trial court could fulfill that obligation, including "expressly refer[ring] to the record or other evidence of defendant's knowledge of the nature of the change." ***Bangert,*** 131 Wis.2d at 268, 389 N.W.2d at 23. A trial court is not confined to the three methods suggested in ***Bangert,*** so long as the trial court does more than "merely … perfunctorily

question the defendant about his understanding of the charge" or record "a perfunctory affirmative response by the defendant." ***Id.*** at 268, 389 N.W.2d at 24.

In this case, the trial court asked Capps if he were "willing to acknowledge that … [he] had oral sexual intercourse with a juvenile male, whose initials are J.M.Y., who was at that time under the age of 16?" Capps replied, "yes." The court asked a similar question for each count to which Capps was pleading, and Capps gave the identical answer of "yes."[2]

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[2] The colloquy continued as follows:

> THE COURT: Did the same thing happen on another occasion between June and July, 1993, in the Town of Madison, with the same juvenile?
>
> MR. CAPPS: Yes.
>
> THE COURT: And in those months with regard to Count 6, in the Town of Madison, having knowledge of the character and content of the sexually explicit conduct involving the same juvenile, did you photograph that child in a sexually explicit manner, with specifically a lewd exhibition of the child's genitals?
>
> MR. CAPPS: Yes.
>
> THE COURT: And with regard to Count 7, during those same months, in the Town of Madison, with the intent to have sexual contact with that child, did you cause the child to go into a building?
>
> MR. CAPPS: Yes.
>
> THE COURT: With regard to Count 10, did you between October and November of '93, in the Town of Madison, again have oral sexual intercourse with the same juvenile?
>
> MR. CAPPS: Yes.
>
> THE COURT: And between October and November of '93, in the Town of Madison, with the intent to have sexual contact with that child, did you cause the child, who was less than 18 years of age, to go into a building?

(continued)

Capps expressly admitted each offense in the factual context of the crimes. In ***Bangert,*** the supreme court noted that a trial court may "refer to and summarize any signed statement of the defendant which might demonstrate that the defendant has notice of the nature of the charge." ***Id.*** at 268, 389 N.W.2d at 23. Capps's oral admissions at the plea colloquy is as conclusive as a previously-signed statement.

At the postconviction hearing, the trial court stated that it "essentially reviewed in somewhat summary fashion the various constituent elements of each offenses … and put them in the context of the facts of the case and asked the defendant if that's in fact what happened in each and every instance." We concur in the trial court's assessment that such a procedure is

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> MR. CAPPS: Yes.
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> THE COURT: And with regard to Count 17, between September or October, 1994, in the City of Madison, did you have sexual intercourse with the child, using an object in the child's anus?
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> MR. CAPPS: Yes.
>
> THE COURT: And between November and December, 1994, did you again have oral sexual intercourse with the child?
>
> MR. CAPPS: Yes.
>
> THE COURT: And did the same thing happen in terms of Count 21 between November and December, 1994, in the City of Madison, wherein you had sexual intercourse with the child, oral sexual intercourse with the child?
>
> MR. CAPPS: Yes.

"probably more meaningful to the average defendant than to go over [the crimes] element by element."[3]

The transcript of the plea hearing establishes that Capps entered his no contest pleas knowingly, voluntarily, and intelligently. The colloquy between Capps and the trial court satisfies the requirements set forth in ***Bangert*** and § 971.08, STATS. Further challenge to the validity of the pleas would lack arguable merit.

Sentencing

There are two potential appellate issues relating to sentencing: (1) whether trial counsel was ineffective by not correcting claimed inaccuracies in the presentence investigation; and (2) whether the trial court properly exercised its sentencing discretion. We first address whether Capps received effective assistance of counsel at sentencing. In his postconviction motion, Capps contended that his trial counsel was ineffective when she failed to object at sentencing to "several inaccuracies and misstatements of fact" in the PSI.

At the postconviction hearing, Capps testified that he told counsel that the agent who prepared the PSI was his probation agent from a prior child enticement conviction and that the agent did not like him. Capps also testified that he was not a chronic alcoholic or a pedophile as suggested in the PSI.[4] Capps testified that he asked his attorney to specifically challenge those descriptions.

[3] Because we conclude that Capps understood the elements of the offenses, we need not address his claim that trial counsel was ineffective because she did not adequately explain the elements to him.

[4] The presentence investigation is not in the appellate record. The description of its contents are taken from the comments of the parties and the circuit court at sentencing.

Capps's trial counsel testified that her client was concerned that the agent preparing the PSI "already thought the worst of him." Counsel did not recall that Capps told her of any factual mistakes in the PSI, other than the listing of past sexual contacts.

To succeed on a claim of ineffective assistance of counsel, Capps must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984) . A defendant must satisfy both prongs of the ***Strickland*** test, and if the defendant fails to meet one prong, the court need not address the other prong. *See* ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

In this case, the trial court focused on the prejudice prong and concluded that Capps had failed to establish "that there was anything … factually inaccurate about the Presentence." Capps presented expert testimony at sentencing that countered the opinion expressed in the PSI that Capps was a pedophile and a high-risk sexual offender. The court concluded that any failure on counsel's part to expressly attack the PSI had no "material adverse consequence" to Capps. As to the complaints about the agent who prepared the PSI, the court noted that Capps had not shown that counsel could have done anything to get another agent assigned to the task. And, the court recognized that "the substantive assertions of the PSI" were "all hashed out at the time of sentencing." We agree with the trial court's conclusion that Capps had not shown that he was prejudiced by his counsel's performance. Therefore, a further appellate challenge to the effectiveness of trial counsel would lack arguable merit.

We next address whether the trial court properly exercised its sentencing discretion. Sentencing lies within the sound discretion of the trial

court, and a strong policy exists against appellate interference with that discretion. *See* ***State v. Haskins,*** 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987). The trial court is presumed to have acted reasonably and the defendant has the burden to show unreasonableness from the record. *See* ***id.***

The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender, and the need for the protection of the public. ***State v. Harris,*** 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The weight to be given the various factors is within the trial court's discretion. ***Cunningham v. State,*** 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

Additional factors that the trial court may consider include: (1) the defendant's past record of criminal offenses; (2) any history of undesirable behavior patterns; (3) the defendant's personality, character, and social traits; (4) the presentence investigation; (5) the nature of the crime; (6) the degree of the defendant's culpability; (7) the defendant's demeanor at trial; (8) the defendant's age, educational background and employment record; (9) the defendant's remorse and cooperativeness; (10) the defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. ***Harris,*** 119 Wis.2d at 623-24, 350 N.W.2d at 639.

The sentencing transcript shows that the trial court considered proper and relevant factors. To Capps's credit, the court noted that Capps had cooperated with police, that he was employed, and that he had a minimal criminal record. On the other hand, however, the court noted that Capps knew that the victim was only fourteen-years-old, yet Capps pursued the repeated sexual contacts. The court also acknowledged the apparent failure of prior treatment offered to Capps after a 1989

child enticement conviction. The court felt that Capps had serious alcohol and drug abuse problems. The court concluded that a "significant period of incarceration" was warranted "both as a punishment for these past serious acts and because … the defendant cannot be safely treated within the community without a substantial risk of reoffense."

The court's comments show that it considered proper and relevant factors. The sentences are not harsh or excessive. Therefore, a postconviction challenge to the sentences would lack arguable merit.

Based on an independent review of the record, this court finds no basis for reversing the judgment of conviction. Any further appellate proceedings would be without arguable merit within the meaning of ***Anders*** and RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and appellate counsel is relieved of any further representation of the defendant on this appeal.

By the Court.—Judgment affirmed.