COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0419-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH M. WESTCOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

BROWN, J. Joseph M. Westcott appeals from a judgment of conviction for second-degree sexual assault and an order denying him postconviction relief. Westcott raises three issues. He first contends that the prosecutor breached the plea agreement and that his counsel was ineffective for not objecting to the breach. Second, he argues that the circuit court misused its

sentencing discretion by considering his lack of remorse after he entered an ***Alford***[1] plea. Third, he asserts that the circuit court used speculative factors in sentencing him. Because the breach of the plea agreement was not material, trial counsel's lack of objection was not ineffective assistance. Also, in sentencing, our supreme court has just recently held that a circuit court may consider a defendant's failure to accept responsibility for the offense, even if the defendant has entered an ***Alford*** plea. Finally, we hold that the court did not sentence based partly on speculative assertions of fact. We affirm.

This case involves Westcott's sexual assault of a long-time family friend. After going to a bar together, Westcott and the victim returned to Westcott's home. Because she had been drinking, Westcott suggested she spend the night. She fell asleep on the floor. The victim testified that she awoke to find her pants pulled down and Westcott on top of her with his pants off. Westcott claimed that she woke up from nightmares about sexual abuse in her past and started hitting him and screaming. Pursuant to a plea agreement, Westcott entered an ***Alford*** plea and the State recommended probation. The circuit court sentenced Westcott to eight years in prison.

We first turn to Westcott's claim of ineffective assistance of counsel. The United States Supreme Court set forth the test to assess the adequacy of counsel's representation in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test has two prongs: (1) a showing that counsel's performance was deficient, and (2) a showing that the deficient performance prejudiced the defendant. *See* ***id.*** Both components of the standard are mixed questions of law and fact. *See* ***State v.***

[1] An ***Alford*** plea is one in which the defendant pleads guilty while still maintaining his or her innocence. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

Pitsch, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). A circuit court's findings of fact regarding trial counsel's performance will not be overturned unless clearly erroneous. *See* ***id.*** at 634, 369 N.W.2d at 714. Whether that performance fell below an objective standard of reasonableness is a question of law we review de novo. *See* ***id.*** at 634, 369 N.W.2d at 715. If the defendant makes an insufficient showing on one prong of the test, the reviewing court need not address the other. *See* ***Strickland***, 466 U.S. at 697.

We hold that trial counsel's performance was not deficient because there was no material breach of the plea agreement to which counsel should have objected. Before explaining our conclusion, we note that the standard of review for the question of whether there was a breach varies with the circumstances of the case. *See* ***State v. Wills***, 193 Wis.2d 273, 277, 533 N.W.2d 165, 166 (1995). When, as here, there are no disputed facts, the question is one we review de novo. *See* ***id.***

On Westcott's waiver of rights form, the State agreed to recommend "probation with some condition time." At the plea hearing, the prosecutor said, "[The] State will be recommending ... probation and ... time in the county jail .... We are not saying how much." The circuit court confirmed this, asking the prosecutor, "Unspecified probation and unspecified jail?" The prosecutor responded, "Right." Later, at sentencing, the prosecutor said, "My recommendation is for unspecified probation and unspecified condition time." He also referred to his recommendation as "probation and condition time." He then stated that in light of the presentence investigation, Westcott "needs to be supervised for as long as possible, as long as the offense which he has committed will allow him to be supervised for." Finally, he asked the court to sentence Westcott to supervision "for as long as possible." Westcott claims the last two

comments breached the plea agreement and that counsel was ineffective for not objecting to this breach.

When a defendant has pled guilty pursuant to a plea agreement, due process mandates that the agreement be enforced. *See* ***State v. Smith***, 207 Wis.2d 258, 271, 558 N.W.2d 379, 385 (1997). An agreement may be vacated where there is a material and substantial breach. *See* ***State v. Bangert***, 131 Wis.2d 246, 289, 389 N.W.2d 12, 33 (1986). The burden is on the defendant to show that the breach amounted to manifest injustice. *See* ***id***. at 288, 389 N.W.2d at 32. The breach must not be merely technical; it must deprive the defendant of a substantial and material benefit for which he or she bargained. *See* ***id.*** at 290, 389 N.W.2d at 33.

Any breach that did occur in Westcott's case was not substantial and material. As noted above, the waiver form and the prosecutor's statements at the plea hearing differed from some of the prosecutor's statements at sentencing. However, the waiver form and all of the prosecutor's statements had one thing in common: the prosecution consistently promised to, and did, recommend probation. Probation was the substantial and material benefit for which Westcott bargained, and probation was what the prosecution recommended. Any technical breach, if it did occur, was not material and substantial. Therefore, because there was no material breach of the plea agreement, there was no ineffective assistance of counsel for failure to object.

Westcott next claims that it was impermissible for the sentencing court to consider his failure to accept responsibility for the offense because he had maintained his protestations of innocence by entering an ***Alford*** plea.

Sentencing lies within the discretion of the sentencing court. *See* ***State v. Macemon***, 113 Wis.2d 662, 667, 335 N.W.2d 402, 405 (1983). While this court may review a sentencing decision, there is a strong policy against interference with the circuit court's discretion in passing sentence. *See* ***State v. Tuttle***, 21 Wis.2d 147, 150, 124 N.W.2d 9, 11 (1963). Nevertheless, the record should reveal that the sentencing court did in fact consider appropriate factors. *See* ***Macemon***, 113 Wis.2d at 667, 335 N.W.2d at 405. In imposing sentence, the primary factors that the court must consider are the gravity of the offense, the character of the defendant and the protection of the public. *See* ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). However, the court may also consider a variety of other factors. *See* ***id.*** at 264-65, 493 N.W.2d at 732-33 (listing factors sentencing court may consider).

Westcott's argument is that it was impermissible for the court to consider lack of remorse when sentencing him because the court had accepted Westcott's ***Alford*** plea, in which he did not admit guilt. We hold, however, that a recent Wisconsin Supreme Court decision is controlling on this issue. In ***State ex rel. Warren v. Schwarz***, Nos. 96-2441, 97-0851 (Wis. July 1, 1998), the defendant entered an ***Alford*** plea to sexual assault. *See* ***Warren***, slip op. at 5. He was placed on probation, with one condition being the completion of counseling. *See* ***id***. at 6-7. Warren thus joined a sex offender group, attending all of the sessions and participating in the group discussions. *See* ***id.*** at 7. However, he refused to admit to the assault. *See* ***id.*** Because he maintained denial during treatment, his parole was revoked. *See* ***id***. at 7-8. The supreme court held that this did not violate Warrren's due process rights. *See* ***id.*** at 16. An ***Alford*** plea is a guilty plea and places the defendant in the same position as if found guilty by a jury. *See* ***Warren***, slip op. at 13. The defendant's assertion of innocence extends only to the plea

itself. *See* ***id***. at 14. "There is nothing inherent in the nature of an ***Alford*** plea that gives a defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction." ***Warren***, slip op. at 15 (quoting ***State ex rel. Warren v. Schwarz***, 211 Wis.2d 710, 720, 566 N.W.2d 173, 177 (Ct. App. 1997)).

Westcott's ***Alford*** plea did not grant him any special rights at sentencing. *See* ***Warren***, slip op. at 15. Lack of remorse and refusal to accept responsibility for the offense are permissible factors to consider at sentencing. *See* ***Macemon***, 113 Wis.2d at 667-68, 335 N.W.2d at 405-06. The court did not misuse its discretion in considering Westcott's continued denial of the offense.

Westcott also objects to the sentencing court's use of alleged speculative factors in its sentencing decision. At sentencing, the court discussed the possibility that Westcott used his friendship with the victim, and his knowledge of her past abuse, to plan the assault and a possible defense. The court acknowledged that Westcott's awareness of the past abuse "ha[d] not been proven." The court stated that its theories were merely possibilities and that it did not know if Westcott had in fact planned the assault. In denying Westcott postconviction relief, the court stated that the scenario referred to at sentencing was "just one possibility of what might have gone through the defendant's mind or what could have occurred to justify a factual basis for conviction of the offense charged."

The circuit court did not misuse its discretion in its sentencing decision. The record shows that the court considered appropriate factors. It noted the severity of the offense and its effect on the victim; it considered the defendant's character, as evidenced by the defendant's psychologist's report and

the presentence investigation; it reviewed the defendant's extensive prior record, his failure to cooperate while on probation and his admitted drug and alcohol abuse. Finally, the court concluded that the defendant posed a high risk to reoffend and would benefit from rehabilitation opportunities if incarcerated. All of these were proper factors to be considered at sentencing. *See* ***id.*** While the court did speculate on Westcott's state of mind, such speculation was not the basis for the sentence imposed. The sentencing judge stated, and a review of the record confirms, that its brief contemplation of Westcott's state of mind was not the basis for the length of the sentence imposed. We reject Westcott's sentencing arguments.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.