COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0918-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID A. BRADEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. David Braden appeals his eight-year prison term for first-degree sexual assault of an eleven-year-old child, having pled guilty to the charge. As part of the original plea agreement, the State promised to recommend no prison time, provided that Braden's presentence report (PSI) revealed no new sexual misconduct. Because the PSI revealed other sexual misconduct, the State

asked the trial court for a five-year prison term at sentencing. Braden makes four basic arguments in an effort to reduce his eight-year prison term to no confinement: (1) the State breached the plea agreement, and the trial court should have therefore sentenced him to no prison time; (2) the PSI contained false information on prior sexual misconduct, some of which he claims was thirty-five-years old; (3) trial counsel ineffectively failed to disprove this prior sexual misconduct; and (4) trial counsel ineffectively failed to apprise Braden of his guilty plea's potential use as an enabling, predicate act under Wisconsin's sexual predator law. We reject Braden's arguments and therefore affirm his eight-year prison sentence.

We first see no basis for Braden to attack the State's compliance with the plea agreement. Braden has shown no breach of the plea agreement. The State's promise was conditional when it agreed to recommend no prison time provided the PSI revealed no other sexual misconduct. On its face, this gave the State freedom to seek confinement if the PSI found new evidence. In that event, the State had a duty to safeguard the public interest. The prosecution sought confinement only when the PSI revealed more sexual misconduct. Viewed from this standpoint, the State faithfully executed the agreement, in keeping with the intent of the parties. *See* ***State v. Jorgensen***, 137 Wis.2d 163, 171, 404 N.W.2d 66, 69 (Ct. App. 1987). In addition, had the State breached the plea agreement, Braden waived the matter in open court. The trial court gave him the chance to withdraw his plea. Braden reaffirmed it, and that act ended the matter. *See* ***State v. Paske***, 121 Wis.2d 471, 475, 360 N.W.2d 695, 697-98 (Ct. App. 1984) (Accused waives breach if he declines offer to take back plea.).

Next, the trial court did not sentence Braden with false PSI information. We agree that due process requires the trial court to sentence Braden

with correct information. *See* ***State v. Perez***, 170 Wis.2d 130, 138, 487 N.W.2d 630, 632-33 (Ct. App. 192). However, if the trial court had inaccurate information, that by itself does not put Braden's sentence in doubt. Rather, such errors are irrelevant unless they play a large role in the trial court's sentencing calculus. Here, the trial court based its sentence mainly on the nature of the crime itself and the public's need for protection. Braden's crime showed a high degree of culpability and a great risk of ongoing danger to the public. Other factors played a small role in the sentence, including the PSI's claims of prior sex acts. Moreover, Braden refuted some of the PSI's claims at the sentencing hearing and failed to disprove others at the postconviction hearing. If Braden had proof of PSI errors, he had to bring out that proof no later than the postconviction stage. *See* ***State v. Littrup***, 164 Wis.2d 120, 127, 132, 473 N.W.2d 164, 166, 168-69 (Ct. App. 1991). Otherwise, he acquiesced to the truth of those charges. In short, we see no due process violation.

Next, we reject Braden's contention that he had ineffective representation. Braden needed to show both deficient performance and resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). He states that his trial counsel ineffectively failed to investigate the errors in the PSI. This claim, if true, would not be controlling under ***Strickland***. Rather, we must look at trial counsel's overall performance. Here, Braden's trial counsel conducted himself well at the sentencing hearing. He had witnesses refute some of the prior sexual misconduct allegations and argued that other such claims were not true or "ancient history." This was effective representation under the circumstances. Moreover, as noted above, Braden failed to disprove other incidents at the postconviction hearing. That was his chance to correct those errors. In the absence of such proof, Braden never put the truth of these incidents in serious

doubt. Last, trial counsel put character witnesses on the stand on Braden's behalf, and this brought before the court some favorable aspects of Braden's character. These may have neutralized some of Braden's character defects, for Braden, facing a forty-year sentence, received only eight years.

We also reject Braden's remaining ineffective counsel claim that trial counsel wrongly failed to advise him of the risks his plea and conviction would pose under the sexual predator law. Braden also states that trial counsel failed to advise him of counsel's affiliation with a family services entity then caring for the victim. Braden never gave the trial court any facts to bolster these claims. He had an obligation to do this at the postconviction stage. *See* ***State v. Caban***, 210 Wis.2d 597, 604-05, 563 N.W.2d 501, 504-05 (1997). Moreover, future, hypothetical steps under the sexual predator law are a collateral consequence of Braden's conviction and sentence; they have no relevance to the conviction and sentence itself. *See* ***State v. Myers***, 199 Wis.2d 391, 394-95, 544 N.W.2d 609, 610 (Ct. App. 1996). As a result, Braden cannot try to use these as a basis for an ineffective assistance of counsel claim. Braden has not shown how he was prejudiced from his trial counsel's affiliation with the family services entity caring for the victim. We see no evidence that this in any way compromised counsel at sentencing. As noted above, Braden's counsel put forward a vigorous defense at that time.

By the Court.—Judgment and order affirmed.

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