COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2519-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD W. HENDRICKSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Following conviction upon his ***Alford***[1] plea to one count of first-degree sexual assault, Richard Hendrickson moved for permission to withdraw his plea and for sentence modification. Hendrickson appeals the order denying his motion. He argues that he was denied the effective assistance of trial counsel; that the trial court considered improper factors at sentencing; and that he is entitled to sentence modification. We reject his arguments and affirm the order.

BACKGROUND

¶2 Hendrickson, age fifty, was charged with two counts of first-degree sexual assault of a child under the age of thirteen. The complaint, issued in September 1998, alleges that A.L.R., born November 15, 1985, claimed that Hendrickson's first sexual contact occurred when she was in kindergarten and Hendrickson was living with her mother. A.L.R. stated that at that time, he touched her breast and vaginal areas and that she touched his penis with both her hands and her mouth. She reported that the last incident of contact occurred when she was starting sixth grade and he engaged her in sexual intercourse. She added that they had sexual intercourse on several occasions.

¶3 In addition, the complaint alleges that A.L.R. claimed to have witnessed Hendrickson having sexual intercourse with another child, J.D.B, born May 24, 1986. J.D.B. reported to officers that when she was approximately ten years old, Hendrickson rubbed his penis on her vagina over her pajamas and made her touch his penis with both her hands and her mouth.

[1] An ***Alford*** plea permits a defendant to plead guilty to a charge while maintaining his claim of innocence. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970) (no constitutional error in accepting a guilty plea which contained a protestation of innocence).

¶4 Following a preliminary hearing, at which A.L.R.'s mother testified to the events described to her by A.L.R., the trial court bound Hendrickson over for trial. The information charged Hendrickson with two counts of sexual contact occurring in September 1997.

¶5 The State and Hendrickson reached a plea agreement that called for dismissal of the count of sexual contact with J.D.B. in exchange for Hendrickson's ***Alford*** plea to the count involving A.L.R. With counsel's assistance, Hendrickson completed a comprehensive plea questionnaire and waiver of rights form. It provided that the dismissed count would be "read in" and that the "State will bring no charges based on evidence involving [C.B.] and [K.H.] – copy of this evidence placed in court file." With respect to an agreement on sentencing, it stated: "None except for PSI – but any prison time will be concurrent with any time imposed upon revocation of current probation."

¶6 During the plea hearing, the circuit court inquired of defense counsel whether he believed there had been full discovery. Defense counsel replied: "I do believe that I have obtained everything that the State has in its possession." After a thorough plea colloquy, the court accepted Hendrickson's ***Alford*** plea to one count of first-degree sexual assault and entered the judgment of conviction. The court accepted an exhibit containing the victim's statement, the criminal complaint and the preliminary hearing transcript as factual bases for Hendrickson's plea.

¶7 At sentencing, the court referred to investigative reports of the charged sexual assaults and inquired whether the prosecutor had provided discovery of the reports to defense counsel. The prosecutor stated that he had. The trial court observed that despite Hendrickson's continued protestations of innocence, the record contained strong evidence of guilt. The court also

considered Hendrickson's extensive criminal record and personality test results, showing a hostile, impulsive, egocentric, and unreliable personality. The tests also showed poor judgment, resentment to authority, immaturity and an opportunistic and manipulative individual. Additionally, the court referred to other crimes evidence involving sexual conduct with other eleven and twelve-year-old children. The court further considered Hendrickson's long-term alcohol and substance abuse.

¶8 As mitigating factors, the court took into account that Hendrickson had entered a plea, thereby not exposing the children to additional injury due to the rigors of testifying at trial. The court also noted that the assaults did not involve threats of harm or violence and that there was no evidence of premeditation. Accordingly, the court sentenced Hendrickson to twenty-four years in prison.

¶9 Following sentencing, Hendrickson moved to withdraw his plea and for sentence modification. He also filed a copy of an Oneida County Sheriff Department's investigative report, stating that when A.L.R. had been questioned by an Illinois social services department, she had denied Hendrickson's assaults.[2] The trial court denied Hendrickson's motions and this appeal follows.

[2] The report also stated that A.L.R. told Oneida County officers that "she did not tell [the Illinois social services department] the truth at the time, and that she knows that she now has to be truthful."

DISCUSSION

1. Ineffective assistance of counsel

¶10 Hendrickson argues that he was denied effective assistance of trial counsel. He claims that trial counsel failed to make appropriate discovery demands for exculpatory evidence and did not thoroughly investigate A.L.R.'s denial of the assault.[3] He further argues that trial counsel was ineffective because counsel failed to discuss with him A.L.R.'s denial of the assault.

¶11 Ineffective assistance of counsel claims present questions of mixed law and fact. ***State v. Moffett***, 147 Wis. 2d 343, 352, 433 N.W.2d 572 (1989). On review, we will not reverse the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** at 352-53. Whether counsel's performance was deficient and whether that deficiency prejudiced the defense are questions of law that we decide de novo. ***Id.***

¶12 To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance was deficient and that this deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). When reviewing a claim of ineffective assistance, this court may avoid the

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[3] In his factual statement, Hendrickson provides a record reference to a report showing that A.L.R. denied the assault to the Illinois social service department. His record citation identifies one denial. Without adequate record citation, however, in the argument section of his brief and the "introduction" to his reply brief, Hendrickson refers to A.L.R.'s denials and repeated denials. Because Hendrickson's record citation, and our review of the record as well, fail to support his characterization of plural denials, we refer to A.L.R.'s denial in the singular.

Inaccurate factual representations, whether deliberate or careless, are misleading to the court and waste its time. The judge's time is scarce and must not be "frittered away trying to get at facts that are ready to the hand" of appellant's lawyer. ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 819 (7th Cir. 1987).

deficient performance analysis altogether if the defendant fails to show prejudice. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶13 With respect to ineffective assistance of counsel claims premised on counsel's alleged failure to investigate or discover potentially exculpatory evidence, the Supreme Court has ruled:

> [T]he determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Hill v. Lockhart, 474 U.S. 52, 59 (1985).

¶14 We reject Hendrickson's assertion that he was denied effective assistance of trial counsel due to counsel's alleged failure to make appropriate discovery demands and to adequately investigate A.L.R.'s denial of the sexual assaults. Hendrickson fails to identify what further discovery or investigation would have revealed. Absent any showing what further additional discovery or investigation would have demonstrated, Hendrickson fails to demonstrate prejudice.

¶15 We are also unpersuaded by Hendrickson's claim that trial counsel failed to discuss with him A.L.R.'s denial of the assaults. The record supports the trial court's express finding that counsel in fact did discuss A.L.R.'s denial with Hendrickson. The record contains a copy of a letter dated December 28, 1998, from the Oneida County District Attorney showing that pursuant to defense counsel's discovery demand, it enclosed copies of various investigative reports, including one written by sergeant John Sweeney. Sweeney's report referred to

A.L.R.'s denial of an assault when questioned by the Illinois social service department.[4] At the postconviction hearing, trial counsel testified that although he had no specific recollection, it was his general practice to discuss the reports with his clients and believes he did so in this case.

¶16 Although Hendrickson testified that he never received this information, the trial court determined that Hendrickson's postconviction testimony lacked credibility. The court noted discrepancies in his testimony. Also, at the postconviction hearing, Hendrickson showed a lapse of memory. When asked, "When is the first that you read that [A.L.R.] denied any improper touching to authorities in Illinois?" Hendrickson responded, "I don't remember." Hendrickson also claimed to have difficulty remembering what counsel said, and testified: "I have difficulty remembering a lot of things."

¶17 The trial court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. ***State v. Wyss***, 124 Wis. 2d 681, 694, 370 N.W.2d 745 (1985). Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court did not but could have reached. ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. ***Id.*** at 151-52. Based on this record, the trial court was entitled to find that Hendrickson failed to prove that counsel neglected to discuss A.L.R.'s denial with him. Because Hendrickson fails to prove

[4] The trial court noted that the report was part of a packet of exhibits received by the court at the time of the plea hearing to support the plea.

ineffective assistance of counsel, we do not reach his claim that had counsel performed adequately, he might not have entered an ***Alford*** plea.

¶18 Next, Hendrickson argues that at sentencing, the trial court inappropriately referred to other acts evidence to determine guilt. This argument proceeds from a flawed premise. The determination of guilt does not take place at sentencing. The court determined guilt at the plea hearing on the basis of Hendrickson's ***Alford*** plea. "Whatever the reason for entering an ***Alford*** plea, the fact remains that when a defendant enters such a plea, he becomes a convicted sex offender and is treated no differently than he would be had he gone to trial and been convicted by a jury." ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 633, 579 N.W.2d 698 (1998). Hendrickson's premise that a valid ***Alford*** is insufficient to determine guilt is erroneous.

¶19 Also, Hendrickson concedes the rules of evidence relating to other acts, WIS. STAT. §§ 904.04 and 904.03, do not apply at sentencing. *See* WIS. STAT. § 911.01(4)(c); *see also* ***State v. Mosley***, 201 Wis. 2d 36, 45, 547 N.W.2d 806 (Ct. App. 1996). If Hendrickson means to argue that uncharged and unproven offenses may not be considered by a sentencing court, he is wrong. These factors may indicate whether the crime was an isolated occurrence or a pattern of conduct and go to the issue of rehabilitation. These are appropriate considerations. ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980).

¶20 Hendrickson also suggests that the court's consideration of other offenses somehow may have violated his plea agreement. This claim finds no support in the record. The plea agreement made no mention of the court's ability to consider other acts at sentencing. Rather, with respect to a sentencing agreement, Hendrickson signed a plea questionnaire that stated: "None except for

PSI – but prison time will be concurrent with any time imposed upon revocation of current probation." In any event, the court is not bound by a plea agreement. ***State v. McQuay***, 154 Wis. 2d 116, 128, 452 N.W.2d 377 (1990).

¶21 Finally, we reject Hendrickson's claim that he is entitled to sentence modification based on new factors. A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing either because it was not then in existence or because, even though it was in existence, was unknowingly overlooked by all the parties. ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

¶22 None of the issues Hendrickson raises amounts to a new factor within the meaning of ***Rosado***. He contends that although his sentence contemplates probation revocation, his probation has not yet been revoked. This is not a new factor because, at the time of sentencing, all parties knew that probation revocation had not yet occurred. In addition, Hendrickson refers to his ill health. This is not a new factor because it was also known to the court at the time of sentencing. Hendrickson further complains that one of the witnesses at sentencing falsely identified herself as A.L.R.'s great-aunt, when in fact she was not a family relative. This fact was not highly relevant to sentencing.

¶23 Hendrickson's other alleged new factors allude to previous arguments. For example, he complains that the court improperly considered other acts evidence at sentencing. We have rejected this argument in our previous discussion. Without belaboring the opinion, we have scrutinized Hendrickson's new factors and summarily conclude that none provides a basis for sentence

modification.[5] Accordingly, the court properly denied Hendrickson's postconviction motion.

By the Court.—Order affirmed.

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

[5] They include: (1) the court concluded Hendrickson was less than candid with the presentence investigation; (2) Hendrickson was not advised that his mandatory release date "meant less" in cases involving WIS. STAT. § 948.02(1); (3) he was not advised of WIS. STAT. ch. 980; (4) the ***Alford*** plea waived his right to challenge on appeal the sufficiency of the evidence adduced at the preliminary hearing; and (5) his ***Alford*** plea waived his right to confront witnesses and challenge the addition of count 2 to the information.