

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 02-3309
STATE OF WISCONSIN

Cir. Ct. No. 00 CF 3627

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TODD FUGATE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN and VICTOR MANIAN, Judges.
Affirmed.

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

¶1 PER CURIAM. Todd Fugate appeals, *pro se*, from a judgment entered after he pled guilty to second-degree sexual assault of a child, kidnapping, and second-degree sexual assault by use or threat of force or violence, contrary to

WIS. STAT. §§ 948.02(2), 940.31(1)(a), and 940.225(2)(a) (1999-2000).¹ He also appeals from an order denying his motion for postconviction relief. Fugate claims: (1) his right to due process of law was violated by the erroneous exercise of prosecutorial discretion in the charging of the case; (2) his trial counsel provided ineffective assistance; (3) he should have been granted leave to withdraw his guilty pleas; and (4) the trial court erroneously exercised its discretion during sentencing. Because Fugate's guilty plea waived any defense that the charges against him gave rise to constitutional violations, because Fugate cannot demonstrate that he received ineffective assistance of counsel, because Fugate failed to establish a manifest injustice, and because the court considered all of the required sentencing factors, we affirm.

BACKGROUND

¶2 On the evening of June 23, 2000, at approximately 9:30 p.m., Fugate grabbed fifteen-year-old Jessica F. while he walked past her on a sidewalk in West Allis, Wisconsin. Fugate pulled Jessica up a hill toward some train tracks where he pushed her down on her back and sexually assaulted her, engaging in penis-to-vagina intercourse.

¶3 Based on Jessica's description, a composite sketch was prepared. Several people identified Fugate as the individual in the drawing. Later, Jessica picked Fugate out of a photo line-up. Furthermore, DNA testing confirmed that Fugate was the source of the semen collected from Jessica after the assault.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 On July 21, 2000, a four-count complaint was filed against Fugate. Fugate was charged with: (1) second-degree sexual assault of a child, in violation of WIS. STAT. § 948.02(2); (2) child enticement for the purpose of sexual contact or intercourse, in violation of WIS. STAT. § 948.07(1); (3) kidnapping, in violation of WIS. STAT. § 940.31(1)(a); and (4) second-degree sexual assault by use or threat of force or violence, in violation of WIS. STAT. § 940.225(2)(a).

¶5 Fugate entered into a plea agreement. In return for a guilty plea to the first, third, and fourth counts of the complaint, the State dismissed the second count charging child enticement, and reserved the right to recommend a lengthy period of time to the court upon sentencing.

¶6 The three charges to which Fugate pled guilty carried cumulative maximum sentences of 120 years of imprisonment, eighty years of which could have been initial confinement. Ultimately, the court sentenced Fugate to a total of forty years of initial confinement in prison and thirty years of extended supervision. Fugate filed a motion for postconviction relief asserting a host of grounds and seeking leave to withdraw his guilty pleas or, in the alternative, requesting sentence modification. The trial court denied the motion. Fugate now appeals.

DISCUSSION

A. Erroneous Exercise of Prosecutorial Discretion in the Charging of the Case.

¶7 First, Fugate claims that his right to due process of law was violated by the erroneous exercise of prosecutorial discretion in the charging of the case. Because Fugate's guilty plea waived any defense that the charges against him gave rise to constitutional violations, we reject this contention.

¶8 Fugate argues he should not have been charged with both second-degree sexual assault of a child and second-degree sexual assault by threat or use of force or violence. He also contends that he should not have been charged with both child enticement and kidnapping. This argument is made in response to the fact that some of the elements of the offenses partially overlap. Even though Fugate concedes that the prosecutor was legally entitled to charge both pair of offenses, he asserts that society's interests are not served and his right to due process is violated when a prosecutor's charging decision causes a defendant to be overwhelmed by the sheer length of his or her potential punishment.

¶9 Fugate's argument fails to persuade. First, his plea waived all nonjurisdictional defenses to the charges, including claims that the charges gave rise to constitutional violations. *State v. Riekkoff*, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983). Second, Fugate's argument fails on the merits. In the absence of a plausible double jeopardy claim, there is no violation of a defendant's right to due process if a prosecutor charges multiple counts arising out of a single incident for the express purpose of inducing the defendant to plead guilty to some lesser charge or combination of charges. *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); *State v. Johnson*, 2000 WI 12, ¶¶50-51, 232 Wis. 2d 679, 605 N.W.2d 846.

¶10 Based on the foregoing, Fugate's claim that his right to due process of law was violated by the erroneous exercise of prosecutorial discretion in the charging of the case is rejected.

B. Ineffective Assistance of Trial Counsel.

¶11 Second, Fugate claims that trial counsel was ineffective for not raising the due process argument that comprises the first claim in his appeal.

Furthermore, Fugate asserts he was induced to plead guilty on the basis of his counsel's erroneous prediction "that he would be sentenced to no more than eight to ten years probation, followed by extended supervision and/or probation." Because Fugate's counsel did not perform deficiently by failing to argue that the prosecutor's charging decisions resulted in a violation of his due process rights, and because Fugate was specifically told that the court could impose sentences up to the maximum penalty for each offense regardless of any one else's opinion, we reject these contentions.

¶12 The two-pronged test for ineffective assistance of counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Id.* at 690. There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Id.* at 687. The defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

¶13 Our standard for reviewing an ineffective assistance of counsel claim involves a mixed question of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Findings of fact will not be disturbed unless clearly erroneous. *Id.* The legal conclusions as to whether counsel's performance was deficient and prejudicial, however, are questions of law that we review *de novo*.

Id. at 128. Lastly, we need not address both *Strickland* prongs if the defendant fails to make a sufficient showing on either one. *Strickland*, 466 U.S. at 697.

¶14 First, Fugate alleges that trial counsel was ineffective for not raising the due process argument that comprises the first claim in his appeal. However, as explained in the previous section of this opinion, that argument lacks any colorable merit. Fugate’s counsel’s failure to raise a legal argument that lacks colorable merit is not outside the wide range of professionally competent assistance. Accordingly, Fugate’s counsel was under no obligation to assert such a claim and Fugate was not prejudiced by the fact that the trial court did not have an opportunity to reject it prior to his postconviction motion. *State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

¶15 Second, Fugate alleges he was induced to plead guilty on the basis of his counsel’s erroneous prediction “that he would be sentenced to no more than eight to ten years probation, followed by extended supervision and/or probation.” This claim was rejected by the trial court on the grounds that Fugate was specifically told that the court could impose sentences up to the maximum penalty for each offense regardless of any plea agreement or recommendation and regardless of anyone else’s opinion. Accordingly, the trial court reasoned that Fugate could not have been prejudiced by any inaccurate sentencing prediction by his trial counsel, because he was specifically informed by the court that he could not rely on any such prediction. The trial court’s reasoning was correct. “It has long been settled as a general rule that where an adequate guilty plea hearing has been conducted, an erroneous prediction or assurance by defense counsel regarding the likely sentence does not constitute grounds for invalidating a guilty plea on grounds of ineffective assistance of counsel.” *Brown v. United States*, 75 F. Supp. 2d 345, 355 (D.N.J. 1999).

¶16 For these reasons, we conclude that Fugate failed to establish that his trial counsel's performance was deficient and prejudicial.

C. Leave to Withdraw his Guilty Pleas.

¶17 Third, Fugate claims that he should be granted leave to withdraw his guilty pleas based on a manifest injustice flowing from his claim of a due process violation and ineffective assistance of counsel. We are not persuaded. Fugate's claims of a due process violation and ineffective assistance of counsel are meritless. Therefore, we cannot grant relief on his plea withdrawal request.

¶18 When a defendant moves to withdraw a plea after sentencing, the defendant "carries the heavy burden of establishing, by clear and convincing evidence, that the trial court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. "The 'manifest injustice' test requires a defendant to show 'a serious flaw in the fundamental integrity of the plea.'" *Id.*

¶19 Based on the foregoing, Fugate's claim that he should be granted leave to withdraw his guilty pleas due to a manifest injustice is rejected.

D. Erroneous Exercise of Sentencing Discretion.

¶20 Fourth, Fugate claims that the trial court erroneously exercised its discretion during sentencing on two grounds. First, Fugate argues that the trial court erroneously exercised its sentencing discretion because it imposed consecutive sentences for offenses that resulted from the same act. Second, Fugate argues that the trial court erroneously exercised its sentencing discretion because the total length of the sentences he received exceeds his life expectancy. Because the trial court adequately explained its reasoning in imposing consecutive

sentences, and because the trial court properly addressed the primary sentencing factors while deciding Fugate's ultimate sentence, we reject these contentions.

¶21 A trial court is accorded wide discretion in determining an appropriate sentence. *State v. Jackson*, 110 Wis. 2d 548, 552, 329 N.W.2d 182 (1983). This court will presume that the sentences the trial court imposes are reasonable. *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). To overcome this presumption, a defendant must demonstrate that the court erroneously exercised its discretion. See *Ocanas v. State*, 70 Wis. 2d 179, 183-84, 233 N.W.2d 457 (1975). A defendant may discharge this burden by showing that: (1) the sentence was imposed without the underpinnings of explained judicial reasoning; (2) the sentencing court relied upon factors that were totally irrelevant or immaterial to the type of decision to be made; (3) it placed too much weight upon one factor in the face of other contravening considerations; or (4) the sentence was so disproportionate to the crime as to shock public sentiment. *State v. Johnson*, 74 Wis. 2d 26, 44, 245 N.W.2d 687 (1976); *State v. Wickstrom*, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

¶22 Fugate argues that the trial court erroneously exercised its discretion by failing to adequately explain why it imposed consecutive sentences as occurred in *State v. Hall*, 2002 WI App 108, 255 Wis. 2d 662, 648 N.W.2d 41. *Hall* concerned a sentencing court that acted obliviously to the cumulative impact of the consecutive sentences that were imposed. *Id.*, ¶15. However, Fugate's sentencing court addressed the range of its sentencing options within the context of the maximum terms of imprisonment possible upon the imposition of consecutive sentences. Furthermore, the court considered the primary sentencing factors of (1) the gravity of the offenses, (2) Fugate's character and rehabilitative needs, and

(3) the need for protection of the public. *State v. Echols*, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶23 Fugate next argues that the trial court erroneously exercised its discretion by imposing a sentence whose length exceeds his life expectancy. The age of the defendant is a factor that the court may appropriately take into account at sentencing. *Id.* However, the weight that is attached to any particular factor in sentencing is within the wide discretion of the sentencing court. *State v. Perez*, 170 Wis. 2d 130, 143, 487 N.W.2d 630 (Ct. App 1992). Therefore, the court did not erroneously exercise its discretion when it did not give Fugate's age the overriding and mitigating significance that he would have preferred.

¶24 Based on the foregoing, Fugate's claim that the trial court erroneously exercised its discretion during sentencing is rejected.

By the Court.—Judgment and order affirmed.

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

