COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1059-CR **Cir. Ct. No. 2006CF80**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL BRIAN KRAUSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: JOHN A. DAMON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Paul Krauss appeals a judgment of conviction for second-degree sexual assault by use of force, second-degree reckless endangerment, false imprisonment, knowingly violating a domestic abuse injunction, and bail jumping, together with an order denying his postconviction

motion. Krauss argues that he was entitled to a ***Machner***[1] hearing on his postconviction motion, and that the circuit court erroneously exercised its sentencing discretion. We affirm.

BACKGROUND

¶2 Following a jury trial, Krauss argued in a postconviction motion that his trial counsel had provided ineffective assistance. At the first of two scheduled evidentiary hearings, Krause presented the testimony of several witnesses whom he argued should have testified at trial. At the conclusion of the hearing, the State discussed the proffered testimony and argued none of it would have made a difference to the outcome if presented at trial. The court agreed and denied Krauss's motion, stating:

> I don't find anything that's been presented ... would have required any attorney to present any of this evidence that would have made any difference at a trial ... compared to all the other evidence that was presented. ... Even if I accept everything in the brief, I don't find it was prejudicial by anything that was done to make a case that there was ineffective assistance. So I agree with [the prosecutor] for all the reasons he stated ....

Thus, the second hearing, at which trial counsel was scheduled to testify, was not held. Krauss's motion also requested resentencing, but the court did not address that issue. The court later signed a written order, drafted by Krauss's counsel, denying the motion. Krauss now appeals.

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

¶3 Krauss argues the circuit court erroneously denied him a full hearing on his postconviction motion. When a defendant challenges the effectiveness of trial counsel in a postconviction motion, the circuit court must hold an evidentiary hearing if the defendant alleges facts that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If, however, "the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." To deny a hearing, a court is required to form its independent judgment after a review of the record and pleadings and to support its decision with a written opinion. ***Id.***

¶4 Krauss argues his postconviction motion adequately set forth his arguments, supported by sufficient facts, such that they were not mere conclusory allegations. He then summarizes the arguments set forth in his postconviction motion. Based on this, he argues he was entitled to a ***Machner*** hearing and, therefore, requests a remand for that hearing.[2]

¶5 Krauss fails to acknowledge, however, that the court heard his proffered evidence and, applying the prejudice prong of the ineffective assistance of counsel standard, determined the record conclusively demonstrated Krauss was not entitled to relief. Because the court concluded any failure to investigate or present witness testimony was nonprejudicial, there was no need for trial counsel

[2] On appeal, Krauss does not argue the merits of his ineffective assistance claims or request a new trial.

to testify. Counsel's reasons, or lack thereof, for not presenting the proffered evidence would be irrelevant. *See* ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11 (courts need not address both ineffective assistance of counsel prongs if defendant fails to satisfy either).

¶6 Krauss also complains the court's decision was not reduced to writing, contrary to ***Allen***, 274 Wis. 2d 568, ¶9.[3] Again, Krauss's argument misses the mark. He is not entitled to a remand for the circuit court to set forth its reasons in writing. The written order, drafted by Krauss, indicates the motion was denied for the reasons set forth at the hearing. ***Allen*** does not require a written decision when a court orally sets forth its reasoning at the conclusion of an evidentiary hearing. Further, Krauss effectively acknowledges any such error would be subject to the harmless error doctrine, but fails to argue the merits of his claims or explain how the absence of a written decision would be prejudicial in this situation.

¶7 Krauss also argues the court erroneously exercised its sentencing discretion. He contends the court erred because it punished Krauss for going to trial, failed to exercise independent judgment, and ordered an unduly harsh and excessive sentence. We address these contentions in turn.

¶8 The circuit court did not improperly punish Krauss for exercising his constitutional right to a trial. Rather, the court concluded Krauss was motivated to pursue a trial so that he could further persecute his victim. The record amply

[3] Krauss also complains the circuit court did not independently state all of its reasons for concluding the omission of the various witnesses' testimony was not prejudicial. We are aware of no authority, however, and Krauss cites none, holding that a court must parrot back a party's reasoning when adopting it as the court's own.

supports this conclusion, which bears unfavorably on Krauss's character. For example, one of the messages Krauss left on the victim's cell phone was played at trial and sentencing. Krauss stated:

> I can hardly wait for my trial. That's going to be so cool to see you sit up there and say how scared you are of me, and then we whip out those pictures of you [engaging in sexual acts with Krauss] and stuff. How scared you were and blubbering "I'm so scared of you and I need a restraining order for four years." You reap what you sow I guess. So there you go. Have yourself a fine night. Sleep well. Night-night.

The court was also made aware of a letter Krauss wrote to the victim's parents, where he wrote:

> It's not going to look good for her in court and then to have a jury of small town people here know and see all of her antics over the past 3 months, not to mention when they hear of how she's abandoned the house and is living with another man after only a short period of time. ... I invite you to witness for yourselves the fall of [the victim] at the trial. ... She needs to learn about commitment. [Four] marriages by your 30th birthday is obviously a problem. Of course, she isn't to blame as she is the poor victim in all of her failed marriages. I told her I did NOT get married again, just to get divorced and it takes more than "a little paperwork" to get rid of me!!!! Time and LOTS of $$$$.

¶9 We also reject Krauss's claim the circuit court erroneously exercised its sentencing discretion by unduly deferring to the State's analysis or recommendations. We could reject this argument solely on Krauss's failure to develop his argument or support it with any references to the record. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). However, we also observe the court properly set forth its reasons for the sentence, addressing, among other factors, Krauss's character, the gravity of his offense, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984).

¶10 Finally, we reject Krauss's contention that his sentence was unduly harsh and excessive because it exceeded the recommendations of the presentence investigator and Krauss's counsel, and the crimes occurred at a single location on the same day. The circuit court sentenced Krauss to consecutive sentences on five charges, totaling thirty-seven years' imprisonment, twenty-four of which were to be served as initial confinement. The court could, however, have sentenced Krauss to fifty-six years' imprisonment. A sentence that is well within the limits of the maximum sentence is presumptively not unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. Considering the sentencing factors the circuit court discussed and the record as a whole, we are not persuaded Krauss's minimally-developed argument overcomes the presumption.

By the Court.—Judgment and order affirmed.

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