COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2999-CR **Cir. Ct. No. 2008CM276**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROGER D. GODWIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Roger Godwin appeals pro se a circuit court order denying his motion for postconviction relief and a judgment of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

conviction on two misdemeanor counts of sexual intercourse with a child as a repeat offender.[2] On appeal, Godwin contends that the circuit court judge should have recused himself from the case because of a threat Godwin sent from the county jail to a fellow Grant County judge and other courthouse staff. Godwin also argues that the court should not have accepted his plea because it failed to establish that a sufficient factual basis existed for the crimes charged. Lastly, Godwin claims that his counsel rendered ineffective assistance on multiple grounds. We reject each of these arguments and affirm.

BACKGROUND

¶2 Godwin was charged with three counts of sexual intercourse with a child contrary to WIS. STAT. § 948.09[3] as a repeat offender, WIS. STAT. § 939.62(1)(a). Based on the victim's statement to police, the complaint alleged that Godwin had sexual intercourse four times between May 20 and May 26, 2008, with S.S., who was born on October 1, 1991. The complaint also stated that Godwin had admitted to engaging in consensual sexual intercourse with S.S. on one occasion.

¶3 In a separate case, Godwin was charged with intentionally conveying a threat to destroy property by means of explosives. This charge

[2] Under our rules of procedure, an appellant's brief must include an appendix containing "limited portions of the record essential to an understanding of the issues raised" and a table of contents. WIS. STAT. RULE 809.19(2)(a) (2007-08). Godwin failed to file an appendix in this case. Pro se appellants are not exempt from this rule. Godwin's brief should have included an appendix containing a copy of the judgment of conviction, portions of the plea and sentencing hearing transcript, and the order denying the motion for postconviction relief.

[3] WISCONSIN STAT. § 948.09 provides that "[w]hoever has sexual intercourse with a child who is not the defendant's spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor."

stemmed from an allegation that Godwin sent a letter from the Grant County Jail to Grant County Circuit Court Judge George Curry and other courthouse staff conveying a bomb threat. The plea hearing transcript indicates that Godwin suffers from bipolar disorder, and that he was off of his medications at the time he made the bomb threat.

¶4 Godwin appeared at a plea and sentencing hearing before Grant County Circuit Court Judge Robert VanDeHey at which he entered pleas of no contest to two counts of sexual intercourse with a child in the child sex case, and to one count of intentionally conveying a false threat to destroy property by means of explosives. In accepting Godwin's plea of no contest in the bomb threat case, the court indicated that Godwin was foregoing a defense of not guilty by reason of mental disease or defect (NGI), a defense the court called "pretty legitimate" under the circumstances. Godwin's judgment of conviction in the bomb scare case is not before us in this appeal.

¶5 At the plea and sentencing hearing, the judge raised *sua sponte* the issue of whether the threats Godwin made to other courthouse personnel would affect his ability to be impartial in this case. The judged stated "there is one argument which could be made that because I work in this building … that I would be a potential victim and I shouldn't be handling the case." The judge then offered to recuse himself from the case if Godwin preferred.

¶6 Godwin declined the judge's recusal offer, stating: "I want to keep you as my judge. I will waive anything that would be a conflict." Godwin testified that he had been taking his medications at the time he entered his plea, and that he had been feeling more like himself since being put back on his medications.

¶7 The judge then determined that the information in the complaint was sufficient to find that Godwin committed the offenses to which he pled no contest, and, based on the prosecutor's recommendation, sentenced Godwin to two consecutive sentences of four months each on the charges of sexual intercourse with a child as a repeat offender.

¶8 Godwin moved for postconviction relief, alleging that the court did not have sufficient evidence to prove the two charges of sexual intercourse with a child as a repeat offender and that the judge should have recused himself because he was a victim in this case. The circuit court denied Godwin's motion because the plea and sentencing hearing transcript clearly disproved his arguments. Godwin filed a notice of appeal, challenging the circuit court's dismissal.

DISCUSSION

Recusal

¶9 We begin with Godwin's contention that the judge should have recused himself from the case. There is "a presumption that [a] judge is free of bias and prejudice and the burden is on the party asserting judicial bias to show by a preponderance of the evidence that the judge is biased or prejudiced." ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298. Under WIS. STAT. § 757.19(2)(f), a trial judge must recuse himself or herself from a proceeding "[w]hen a judge has a significant financial or personal interest in the out come of the matter." Under § 757.19(2)(g), recusal is required "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." "Any disqualification that may occur under sub. (2) may be waived by agreement of all parties and the judge after full and

complete disclosure on the record of the factors creating such disqualification." Section 757.19(3).

¶10 Godwin argues that Judge VanDeHey should have recused himself from the case because one of the judge's colleagues, Judge Curry, and other courthouse staff were Godwin's victims in the bomb threat case. The State argues that the judge was not required to recuse under WIS. STAT. § 757.19(2), and, regardless, Godwin waived his right to allege a potential conflict.

¶11 We agree with the State that Godwin waived his right to raise this objection at the plea and sentencing hearing. To the extent Judge VanDeHey may have had a conflict requiring recusal under WIS. STAT. § 757.19(2), he made a full and complete disclosure on the record of the potential conflict as required by § 757.19(3) and offered to recuse himself from the case. In response, Godwin affirmatively stated that he wanted Judge VanDeHey to stay on the case, and that he was waiving any potential conflict. Moreover, Godwin indicated that he had been taking his medication at the time of the plea hearing, and he does not now argue that his bipolar disorder affected the knowingness and voluntariness of his waiver. Accordingly, we conclude that Godwin explicitly waived any potential conflict consistent with § 757.19(3).

Lack of Sufficient Factual Basis

¶12 We turn next to Godwin's argument that there was not a sufficient factual basis to convict him of two counts of sexual intercourse with a child.[4] The

[4] The most common context within which an argument that the complaint lacks a sufficient factual basis to support a conviction following a plea is in support of a motion to withdraw a plea. Godwin did not file such a motion with the circuit court. Moreover, part of the relief he seeks, release from confinement based on time served, cannot be provided even if we (continued)

circuit court must determine that a sufficient factual basis exists before accepting a guilty plea. ***State v. Payette***, 2008 WI App 106, ¶7, 313 Wis. 2d 39, 756 N.W.2d 423. A sufficient factual basis exists when "the conduct which the defendant admits [to] constitutes the offense charged." ***Id***. (citing ***State v. Lackershire***, 2007 WI 74, ¶33, 301 Wis. 2d 418, 734 N.W.2d 23). The inference of guilt need not be established beyond a reasonable doubt and may conflict with other inferences drawn from the facts in the complaint. *See* ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. We review a trial court's determination of whether a sufficient factual basis exists for a charged offense under the clearly erroneous standard. ***State v. Harvey***, 2006 WI App 26, ¶10, 289 Wis. 2d 222, 710 N.W.2d 482.

¶13 Godwin argues that the court failed to establish that a sufficient factual basis existed to prove the charges of sexual intercourse with a child because the court relied on hearsay evidence in making its determination. Godwin also appears to argue that the court improperly relied on Godwin's prior convictions in ascertaining the factual basis for the charges. We reject these arguments and conclude that the trial court's determination that a factual basis existed to prove the charged offenses was not clearly erroneous.

¶14 Godwin appears to misunderstand the nature of a plea hearing and the purpose of requiring the trial court to find a sufficient factual basis for the charged offense in arguing that the court improperly relied on hearsay evidence in ascertaining the factual basis for the charged offenses. A trial court "may consider

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agreed with his argument that the complaint fails to provide a sufficient factual basis for his plea. We nonetheless address his argument.

hearsay evidence, such as testimony of police officers, the preliminary examination record and other records in the case" when determining whether a factual basis exists for the offense charged. ***Little v. State***, 85 Wis. 2d 558, 561, 271 N.W.2d 105 (1978). The purpose of the requirement is not to establish the defendant's guilt beyond a reasonable doubt, but "to protect the defendant who pleads guilty voluntarily and understanding the charge brought but not realizing that his conduct does not actually fall within the statutory definition of the charge." ***Id.*** at 560-61. Here, the court could rely on the complaint and other portions of the record in satisfying itself that a sufficient basis existed for the charged offenses.

¶15 In any event, the circuit court relied on the factual allegations contained in the complaint in support of its finding that Godwin committed the offenses to which he pleaded no contest after Godwin indicated that the information in the complaint was true and that he understood that the judge would use it as the basis for accepting his pleas and imposing his sentence.

¶16 The record also supports the court's determination that there was a sufficient factual basis to prove the offenses charged. The elements of the offense of sexual intercourse with a child under WIS. STAT. § 948.09 are as follows: (1) the defendant had sexual intercourse with the victim; (2) the victim had not attained the age of eighteen at the time of the alleged offense; and (3) the victim was not the defendant's spouse at the time of the alleged offense. *See* WIS JI—CRIMINAL 2138. The criminal complaint stated that S.S. alleged that she and Godwin engaged in sexual intercourse, that S.S. had attained the age of sixteen at the time of the alleged offense, and that S.S. was not Godwin's spouse**.** The criminal complaint also states that Godwin admitted to engaging in sexual intercourse with S.S. Based on these factual allegations, the circuit court's

determination that a sufficient factual basis existed to prove the offenses charged was not clearly erroneous.

Ineffective Assistance of Counsel

¶17 Finally, we address Godwin's contention that trial counsel rendered ineffective assistance. "Whether a convicted defendant received ineffective assistance of counsel is a two-part inquiry." ***State v. Carter***, 2010 WI 40, ¶21, ___ Wis. 2d ___, 786 N.W.2d 695. "First, the defendant must prove that counsel's performance was deficient. Second, if counsel's performance was deficient, the defendant must prove that the deficiency prejudiced the defense." ***Id.*** (citation omitted). To prove prejudice, the defendant must show that counsel's deficient performance had an adverse effect on the judgment, which occurs when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.***, ¶37 (citation omitted). If we conclude the defendant has not proved one prong, we need not address the other. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1987).

¶18 A claim of ineffective assistance of counsel is a mixed question of fact and law. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. The circuit court's findings of fact will be upheld unless clearly erroneous. ***Id.*** However, whether counsel provided ineffective assistance of counsel is a question of law reviewed de novo. ***Id.***

¶19 Godwin argues that counsel was ineffective on several grounds, many of which are not adequately developed for us to address. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (inadequately developed arguments are usually not addressed). The most developed of his arguments are that counsel erred in permitting him to withdraw his NGI defense in light of his

bipolar disorder, in failing to request court-ordered psychological testing, and in failing to argue for a lighter sentence at the hearing. We reject these arguments.

¶20 Taking Godwin's ineffective assistance arguments in the order presented above, Godwin's NGI defense related to his conviction in the bomb threat case, which is not before us. Any allegedly deficient performance regarding Godwin's withdrawal of the NGI defense would have had no bearing on this case. Even assuming that the NGI defense also related to his convictions for the two counts of sexual assault of a child, Godwin expressly waived this defense following a thorough colloquy on this topic by the circuit court. Godwin has therefore waived his argument that counsel performed deficiently by permitting Godwin to withdraw his NGI defense.

¶21 Next, Godwin does not explain how the failure to request psychological testing prejudiced his defense. Specifically, Godwin does not argue that he did not understand what transpired at the plea and sentencing hearing based on his mental illness, or that his plea was affected because he is bipolar. Moreover, Godwin's counsel made explicitly clear to the circuit court that Godwin suffers from mental health problems. The court acknowledged these problems and understood that they played a role in Godwin's criminal behavior. Godwin does not explain what additional information psychological testing might have revealed that would have been relevant to some portion of his proceeding or how that additional information would have affected his plea.

¶22 Finally, to the extent that failure to request a lighter sentence might provide a basis for an ineffective assistance claim, the record shows that Godwin's counsel in fact argued for a lighter sentence than the eight months' incarceration he received, requesting no jail time and two years' probation. We note that in

arguing in favor of a lesser sentence to the court, counsel noted that the encounters were consensual, the victim was nearly seventeen, and Godwin had admitted to the conduct and stated that he would take responsibility for S.S.'s child. Accordingly, counsel was in no way deficient in this regard.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)(4).