COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1267 **Cir. Ct. No. 1996CF138**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE B. SANTIAGO,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Kenosha County: STEPHEN A. SIMANEK and ANTHONY G. MILISAUSKAS, Judges. *Order affirmed; order reversed and cause remanded with directions.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 NEUBAUER, C.J. Eugene B. Santiago appeals from an order denying his motion pursuant to WIS. STAT. 974.06 (2015-16)[1] to withdraw his plea on the ground that he was denied the effective assistance of counsel when trial counsel failed to alert the circuit court to the fact that Santiago had been charged under the law as it existed at that time and not when he committed the offense four years earlier. Santiago further appeals from an order denying his motion to correct the corrected judgment of conviction, which erroneously indicated that he committed the offenses on May 17, 1996. We affirm the first order but reverse the second order and remand with directions for the circuit court to enter the correct date of Santiago's commission of the offenses.

BACKGROUND

¶2 Sometime between July and November 1992, Santiago sodomized an approximately three-year-old boy and, holding a knife to his neck, threatened to kill him if he told anyone.

¶3 In 1996, Santiago was charged with first-degree sexual assault of a child and threat to injure, contrary to WIS. STAT. §§ 948.02(1) and 943.30(1) (1995-96), both as a repeat offender. The amended complaint indicated that for first-degree sexual assault of a child, with the enhancements for use of a dangerous weapon and for habitual criminality, Santiago was facing fifty-five years of imprisonment and, for the threat to injure, he was facing sixteen years of imprisonment.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 Santiago decided to plead no contest to both counts. The parties agreed that the State would drop the weapons enhancer on the count of first-degree sexual assault of a child and recommend probation, while on the threat to injure, the State would be free to argue its position. At sentencing, the court entered two judgments, both indicating that the crimes were committed between July and November 1992. The court withheld sentence on the first-degree sexual assault of a child conviction under WIS. STAT. § 948.02(1) and imposed thirty years of probation. On the threat to injure conviction, the court sentenced Santiago to fifteen years in state prison. The term of probation was to run consecutive to the term of confinement.

¶5 Santiago was informed of his right to pursue postconviction relief, but he did not file a postconviction motion or an appeal.

¶6 On March 14, 2006, Santiago was released from prison. He violated his parole supervision, and it was revoked on March 13, 2008. He was again released from prison on July 1, 2008.

¶7 By decision dated June 24, 2009, an administrative law judge (ALJ) for the Division of Hearing and Appeals ordered Santiago's probation and parole revoked. On the parole revocation, the ALJ ordered that Santiago be reincarcerated for three years, six months, and two days with a custody credit. On the probation revocation, the ALJ ordered that Santiago be returned to court for sentencing.

¶8 The circuit court sentenced Santiago to sixteen years, concurrent to the time he was serving on the parole revocation. The judgment of conviction entered after revocation of probation indicated that Santiago was convicted of WIS. STAT. § 948.02(1)(c).

¶9 On February 22, 2016, the Department of Corrections (DOC) wrote to the circuit court, informing it that WIS. STAT. § 948.02(1)(c) did not exist when Santiago committed the offense. However, the letter said, the amended criminal complaint cited to WIS. STAT. § 948.02(1), "a Class B felony punishable by imprisonment no[t] to exceed 55 years." The DOC asked how it should proceed given that the judgment of conviction did not meet statutory guidelines.

¶10 On April 14, 2016, Santiago filed a motion for postconviction relief pursuant to WIS. STAT. § 974.06, arguing that he was denied due process of law when he was misinformed as to the maximum penalty he was facing on the count charging first-degree sexual assault of a child as well as the minimum penalty on the count charging threat to injure. Santiago argued that he should have been charged under the 1992, not the 1996, law, as that was when he committed the crimes. Under the 1992 law, according to Santiago's calculations, he was facing thirty-five years on the first-degree sexual assault of a child count and nineteen years on the threat to injure count, whereas he was told he was facing fifty-five and sixteen years. Had Santiago been properly informed of the amount of punishment he was facing, he would have opted for a trial. He explained that the additional exposure coupled with family strife would have "trumped the risks and/or benefits of a trial."

¶11 Santiago further argued that the plea colloquy was defective and his attorney was ineffective. Santiago requested, after an evidentiary hearing, that his plea be withdrawn, the complaint be dismissed, and he be immediately released from custody.

¶12 At a hearing on Santiago's motion, he acknowledged that he had not filed an appeal or a prior postconviction motion. Santiago acknowledged that

withdrawing his plea at this point "would present a problem for the State and a trial 20 years later would be a complicated mess." Santiago proposed a solution that would allow the State to file an amended information and Santiago to plead guilty with time served.

¶13 The State argued that there was a "typographical error in the judgment of conviction," that Santiago was not entitled to be released as a result because he had "accepted a plea bargain," that he had not "cooperate[d] with the conditions of probation," and that his sentence after revocation of his probation was based on his failure to "agree to one single condition of his probation."

¶14 Before ruling, the circuit court noted that this case "goes back 20 years," that the sentencing after revocation "goes back about 10 years," and that Santiago "received an initial sentence of 15 years on one count and then when he got out he was on 30 years probation and that probation was revoked and I believe he got an additional 16 years by Judge Wilk. That 16 years is almost run out." Based on those facts, the circuit court found that "[i]t would be very difficult for the Court to determine at this point whether or not what Mr. Santiago alleges actually did take place" because Santiago was "telling the Court what is in his mind," and there was "no way to verify or dispute what is in his mind as to what he would have done 20 years ago on the advice of counsel." The circuit court determined that it was appropriate to dismiss Santiago's motion without an evidentiary hearing and to amend the judgment of conviction to remove the citation to para. (c) of WIS. STAT. § 948.02(1).[2]

[2] The Honorable Stephen A. Simanek denied Santiago's WIS. STAT. § 974.06 motion.

¶15 The corrected judgment of conviction made that amendment and indicated that the offense was committed on May 17, 1996, which was actually the date Santiago pleaded no contest.

¶16 Santiago then moved to correct the corrected judgment, arguing that it should reflect that the offenses were committed sometime between July and November of 1992. The circuit court denied the motion.[3]

¶17 Santiago appeals from both orders.

DISCUSSION

Ineffective Assistance of Counsel

¶18 Santiago argues that both counts as charged in the criminal complaint were fatally defective because he was erroneously charged under the 1996 law. He argues that his counsel's failure to correctly advise him about the sentencing exposure he was facing, which induced him into pleading no contest, constitutes a "manifest injustice" that entitles him to withdraw his plea.[4]

¶19 Initially, Santiago has already completed his sentence on his conviction for threat to injure, making his challenge to that conviction moot. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. None of the exceptions to the mootness doctrine are implicated in

[3] The Honorable Anthony G. Milisauskas denied Santiago's motion to correct the corrected judgment of conviction.

[4] Santiago abandons any claim based on the plea colloquy or under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

this case. ***Id.*** Thus, we will not review Santiago's claim as it relates to his conviction for threat to injure.

¶20 On Santiago's challenge to his conviction for first-degree sexual assault of a child, the State argues that Santiago's challenge is procedurally barred and that he may only challenge the postrevocation sentence. The State is incorrect. WISCONSIN STAT. § 974.06 "provides the primary statutory mechanism for convicted criminal defendants '[a]fter the time for appeal or postconviction remedy provided in [WIS. STAT. §] 974.02 has expired.'" ***State v. Henley***, 2010 WI 97, ¶50, 328 Wis. 2d 544, 787 N.W.2d 350 (first alteration in original) (quoting § 974.06(1)). After a "prisoner in custody" has exhausted his remedies of a motion for a new trial and a direct appeal, a § 974.06 motion may be made "at any time." ***State v. Starks***, 2013 WI 69, ¶41, 349 Wis. 2d 274, 833 N.W.2d 146 (citation omitted). Under § 974.06(1), a defendant may "move to vacate, set aside, or correct his sentence if he contends that: (1) his sentence violates the U.S. or Wisconsin Constitution; (2) the court imposing the sentence lacked jurisdiction; or (3) his sentence exceeded the maximum time set by law or is otherwise subject to collateral attack." ***Starks***, 349 Wis. 2d 274, ¶41.

¶21 Here, Santiago's time for an appeal or postconviction remedy pursuant to WIS. STAT. § 974.02 has long since expired, he is a prisoner in custody, and his claim that trial counsel was ineffective raises a question of constitutional dimension. Thus, his WIS. STAT. § 974.06 motion is not procedurally barred.[5]

[5] "If a defendant did not file a motion for relief under WIS. STAT. § 974.02 or a direct appeal, he is not subject to the 'sufficient reason' requirement of [WIS. STAT.] § 974.06(4)." ***State v. Balliette***, 2011 WI 79, ¶36, 336 Wis. 2d 358, 805 N.W.2d 334.

¶22 The State, for support, mistakenly relies on ***State v. Scaccio***, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449. But, ***Scaccio*** had nothing to do with WIS. STAT. § 974.06. Indeed, the defendant in ***Scaccio*** was not challenging the underlying judgment of conviction. Rather, ***Scaccio*** involved a motion for sentence modification following the revocation of his probation, and the interplay between WIS. STAT. § 973.19 and WIS. STAT. RULE 809.30 in attacking a sentence. ***Scaccio***, 240 Wis. 2d 95, ¶¶3-5. Thus, when we wrote that "[a] challenge to a post-revocation sentence does not bring the original judgment of conviction before the court," as the State recites, that was made in the context of discussing RULE 809.30 and § 973.19, not § 974.06. ***Scaccio***, 240 Wis. 2d 95, ¶10. More explicitly, we said, "a defendant cannot use … RULE 809.30 in conjunction with … § 973.19(1)(b) to raise issues that go back to the original judgment." ***Scaccio***, 240 Wis. 2d 95, ¶10 (citing ***State v. Tobey***, 200 Wis. 2d 781, 783-85, 548 N.W.2d 95) (Ct. App. 1996) (holding that defendant's motion for postconviction relief pursuant to RULE 809.30 based on the denial of counsel was untimely when he did not seek that relief until after his probation was revoked, more than a year-and-one-half after he was originally sentenced) and ***State v. Drake***, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994) (where the defendant was sentenced to probation and did not file a direct appeal from the judgment pursuant to RULE 809.30, and his probation was later revoked and he moved to withdraw his plea, his motions for a new trial could only be considered ones for postconviction relief under § 974.06)); *see* ***State ex rel. Marth v. Smith***, 224 Wis. 2d 578, 582 n.5, 592 N.W.2d 307 (Ct. App. 1999) (noting that "[a] defendant may appeal a sentence imposed after revocation of probation although he or she is barred from challenging the underlying judgment of conviction unless relief was timely sought from that conviction"). Again, Santiago has not directly appealed from the judgment, but is using § 974.06 to collaterally attack the

judgment based on an alleged constitutional violation. His appeal from the circuit court's denial of his § 974.06 motion is properly before us.

¶23 On the merits, on the count of first-degree sexual assault of a child, the State clearly erred in charging Santiago. The State does not argue otherwise, and our own examination of the relevant statutes shows that the State erred. The rule is that ordinarily a person will be convicted and sentenced under the law as it existed at the time of the commission of the offense. *See* ***State ex rel. Singh v. Kemper***, 2016 WI 67, ¶36, 371 Wis. 2d 127, 883 N.W.2d 86. Santiago was incorrectly charged under the law as it existed in 1996, and not as it existed in 1992 when he committed this offense. The elements of first-degree sexual assault of a child under WIS. STAT. § 948.02(1) were the same under both statutes, but, as discussed herein the penalties were different.

¶24 Under the 1996 law, as the State charged Santiago, first-degree sexual assault of a child, a Class B felony, was punishable by forty years of imprisonment. WIS. STAT. §§ 939.50(3)(b), 948.02(1) (1995-96). The weapons enhancer must be used first before the repeater enhancer. *See* ***State v. Pernell***, 165 Wis. 2d 651, 659, 478 N.W.2d 297 (Ct. App. 1991) (stating that the weapons enhancer is, unlike the repeater enhancer, not only a penalty enhancer but an element of the crime). The weapons enhancer adds another five years. WIS. STAT. § 939.63(1)(a)2. (1995-96) ("If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years.") The repeater enhancer, because Santiago was previously convicted of a felony, adds another ten years. WIS. STAT. § 939.62(1)(c) (1995-96) ("A maximum term of more than 10 years may be increased by not more than … 10 years if the prior conviction was for a

felony."). Thus, under the 1996 law, Santiago would have been facing a total of fifty-five years.

¶25 Under the 1992 law, as Santiago should have been charged, first-degree sexual assault of a child was a Class B felony, *see* WIS. STAT. § 948.02(1) (1991-92), but, WIS. STAT. § 939.50(3)(b) (1991-92), authorized only up to twenty years of imprisonment. The weapons enhancer added five years. WIS. STAT. § 939.63(1)(a)2. (1991-92) ("If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years."). The repeater or habitual criminality enhancer added another ten years of imprisonment. WIS. STAT. § 939.62(1)(c) (1991-92) ("A maximum term of more than 10 years may be increased by not more than … 10 years if the prior conviction was for a felony."). Thus, as Santiago should have been charged, he was facing thirty-five years of imprisonment.

¶26 In the context of an ineffective assistance claim, as Santiago couched it, the questions then are whether counsel's failure to alert the court to this charging error was deficient performance and, if so, whether that deficiency prejudiced him so as to warrant plea withdrawal. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996) (stating that ineffective assistance of counsel may constitute a "manifest injustice" so as to warrant plea withdrawal). Santiago bears the burden of showing deficient performance and prejudice by clear and convincing proof. ***Bentley***, 201 Wis. 2d at 311. A reviewing court may choose to address either the deficiency component or the prejudice component; if a defendant makes an insufficient showing on one component, a reviewing court need not examine the other component. ***Strickland***, 466 U.S. at 697.

¶27 In order to be entitled to an evidentiary hearing on his WIS. STAT. § 974.06 motion alleging ineffective assistance of counsel, Santiago had to allege sufficient material, nonconclusory facts, which, if true, showed that he is entitled to relief. ***State v. Sulla***, 2016 WI 46, ¶26, 369 Wis. 2d 225, 880 N.W.2d 659. This presents a question of law, which is reviewed de novo. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. "[I]f the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***Sulla***, 369 Wis. 2d 225, ¶27 (alteration in original). This question is reviewed for an erroneous exercise of discretion. ***State v. Howell***, 2007 WI 75, ¶¶75, 79, 301 Wis. 2d 350, 734 N.W.2d 48.

¶28 Here, the difficulty for Santiago is that while counsel's performance may have been deficient, he has not sufficiently alleged that he was prejudiced. To prove prejudice, Santiago had to show that "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." ***Strickland***, 466 U.S. at 694. In the context of a plea, a defendant must show that there is a reasonable probability that he would not have pleaded no contest/guilty and would have gone to trial. ***State v. Dillard***, 2014 WI 123, ¶96, 358 Wis. 2d 543, 859 N.W.2d 44. A defendant must do more than merely allege that he would have pleaded differently. ***Bentley***, 201 Wis. 2d at 313. A defendant must support his allegation with "objective factual assertions." ***Id.***

¶29 The only reasons Santiago provided for deciding to plead no contest were that the additional exposure coupled with family strife "trumped the risks and/or benefits of a trial." Santiago does not discuss the relative strengths and weaknesses of the case. He vaguely said that he "has several issues with the case, including ... the accuracy of the time-line and the recitation of the alleged events." He does not allege that he had a viable defense, including to a letter he wrote to the victim that contained implicit admissions of wrongdoing. Santiago does not discuss whether it would have been reasonable to reject a plea deal of fifteen years of imprisonment on the threat to injure and a withheld sentence on the first-degree sexual assault of a child and risk a potential sentence, after trial, of fifty years. *See* ***State v. Burton***, 2013 WI 61, ¶69, 349 Wis. 2d 1, 832 N.W.2d 611. At twenty-nine years of age when he pleaded no contest, Santiago had the potential to be released from prison at the age of forty-four, and even earlier, while the risk of a trial may have resulted in what amounted to a life sentence. Santiago's motion falls short of meeting the pleading requirement for prejudice.

Motion to Correct the Judgment

¶30 A court has the power to correct formal or clerical errors at any time. ***State v. Crochiere***, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828. The corrected judgment of conviction is undisputedly incorrect as to the date Santiago committed the offenses. The State offers no persuasive reason why this error should be left uncorrected. Therefore, we reverse the order denying Santiago's motion to correct the corrected judgment of conviction and remand the matter to the circuit court to correct the corrected judgment of conviction to indicate that the offenses were committed between July and November 1992.

CONCLUSION

¶31 The circuit court correctly denied Santiago's WIS. STAT. § 974.06 motion without an evidentiary hearing as the allegations of prejudice were insufficient. However, the circuit court should have granted Santiago's motion to correct the corrected judgment of conviction to reflect that he committed the offenses between July and November 1992. We, therefore, affirm the first order and reverse the second order and remand with directions to correct the corrected judgment of conviction as indicated.

By the Court.—Order affirmed; order reversed and cause remanded with directions.

Not recommended for publication in the official reports.