COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal Nos. **2017AP1089-CR**
2017AP1090-CR
2017AP1091-CR
2017AP1092-CR

Cir. Ct. Nos. **2016CM683**
2016CM762
2016CF1275
2016CF2007

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKEY L. VOEGELI,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: JANET C. PROTASIEWICZ, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Rickey L. Voegeli appeals from judgments of conviction, following guilty pleas, for stalking, felony bail jumping, and two misdemeanor counts of violating a restraining order. Voegeli also appeals the order denying his postconviction motion to withdraw his guilty pleas, or alternatively, for resentencing. We affirm.

BACKGROUND

The Charges

¶2 Voegeli was charged with ten counts of various criminal activity, in four separate cases, stemming from his refusal to leave his ex-girlfriend alone.

¶3 On February 25, 2016, a temporary restraining order was issued against Voegeli prohibiting contact between Voegeli and his former girlfriend, E.T. Voegeli was subsequently served with a copy of the temporary restraining order. Nonetheless, Voegeli called E.T. repeatedly in violation of the restraining order. As a result, on March 8, 2016, Voegeli was charged with knowingly violating a domestic abuse temporary restraining order, a misdemeanor, in Milwaukee County Circuit Court Case No. 2016CM683. Voegeli was released on cash bail.

¶4 On March 16, 2016, Voegeli was charged with misdemeanor counts of knowingly violating a domestic abuse injunction and violating the terms of his bail in Milwaukee County Circuit Court Case No. 2016CM762. According to the criminal complaint, Voegeli went to E.T.'s home to remove some of his personal

items from her garage and drove past E.T.'s home in violation of the injunction. Voegeli posted bail and was released.

¶5 On March 25, 2016, Voegeli was charged in Milwaukee County Circuit Court Case No. 2016CF1275 with one count of stalking and four misdemeanors—two counts of misdemeanor bail jumping, one count of knowingly violating a temporary restraining order and one count of knowingly violating a domestic abuse injunction. According to the criminal complaint, on March 6, 2016, Voegeli followed E.T.'s vehicle to a restaurant and then drove past the restaurant multiple times while E.T. and her family were inside. The complaint also states that on March 23, 2016, Voegeli followed E.T. to another restaurant and waited for E.T. in the parking lot. E.T.'s friend told Voegeli to leave, but Voegeli approached E.T. telling her he "want[ed] to talk to [her]." The complaint states that E.T. was so scared that she was unable to operate her phone to call 911, but police arrived after E.T.'s friend called the police. Voegeli again posted bail and was released.

¶6 On May 10, 2016, Voegeli was charged with one count of felony bail jumping and one count of misdemeanor bail jumping in Milwaukee County Circuit Court Case No. 2016CF2007. According to the criminal complaint, in early May 2016, E.T. noticed a missed call on her phone from Voegeli's phone number. Voegeli told police that he accidentally dialed E.T.'s phone number. The complaint also alleges that Voegeli smelled of alcohol. Voegeli admitted to drinking a couple of beers, a violation of his bond.

The Plea Hearing

¶7 Pursuant to a plea agreement, Voegeli pled guilty to four charges: two counts of violating a domestic abuse order (case Nos. 2016CM683 and 2016CM762); stalking (case No. 2016CF1275); and felony bail jumping (case No. 2016CF2007). The remaining charges were dismissed and read-in at sentencing.

¶8 At the plea hearing, the circuit court engaged Voegeli in a lengthy colloquy to establish whether his pleas were knowing, voluntary and intelligent. As relevant to this appeal, the court also engaged Voegeli in a discussion about the facts of the felony stalking and felony bail jumping charges.

> THE COURT: What'd you do on March 23rd that was the culmination of this stalking situation? In your own words, what did you do?
>
> [Voegeli]: I was going to the restaurant and I was walking up to the door, and [E.T.'s] friend said, "Get out of here," and I went to my car and left immediately ….
>
> ….
>
> [Voegeli]: I drove to the restaurant.
>
> ….
>
> THE COURT: Did you have any reasonable belief that she might be at the restaurant?
>
> [Voegeli]: Yeah. I saw her car there.
>
> ….
>
> THE COURT: So Mr. Voegeli, do you understand, in fact, that there are incidents outlined in the criminal complaint from [multiple dates], finally culminating on the 23rd, that would have caused [E.T.] to suffer serious emotional distress? Do you agree?
>
> [Voegeli]: Yes.

THE COURT: And you intentionally engaged in that course of conduct? Is that correct? You did this all on purpose?

[Voegeli]: No.

THE COURT: What did you do?

[Voegeli]: I just -- being foolish.

THE COURT: So you did commit each act --

[Voegeli]: Yes.

THE COURT: -- intentionally?

[Voegeli]: I did that.

THE COURT: All right. And were you aware that this could cause a reasonable person to suffer serious emotional distress?

[Voegeli]: Yes, I believe so. Yes.

THE COURT: Mr. Voegeli, the final case is [a] felony bail jumping case, and your attorney has again provided me with the jury instructions for felony bail jumping. Did you go over those with her?

[Voegeli]: Yes.

THE COURT: You understand what the State would need to prove in order to convict you of felony bail jumping. Is that correct?

[Voegeli]: Yes.

THE COURT: What did you do on May 7th of this year that was a violation of your bail?

[Voegeli]: I was at my house, and I was going through my contact list and I was dialing my son's number, and I accidentally pushed the wrong number. And I immediately realized what I had done and I hung up and I made no contact.

THE COURT: Did you have alcoholic beverages that day?

[Voegeli]: It was my birthday. I had a couple of beers.

> THE COURT: All right. And so, in fact, you were not supposed to be consuming any alcohol as a condition of your bail as well as leaving [E.T.] alone. Is that correct?
>
> [Voegeli]: Correct.

¶9 The circuit court asked Voegeli if the facts stated in the criminal complaints were true. Both Voegeli and his counsel admitted that the facts in the complaints were true. Counsel also told the court that it could use the allegations in the complaints to establish a factual basis for the pleas. The court found a factual basis for the pleas and accepted Voegeli's pleas as knowing, voluntary and intelligent.

Sentencing

¶10 The circuit court immediately proceeded to sentencing, where the State recounted the pled-to charges and provided the court with additional examples of Voegeli's disturbing behavior towards E.T. for which Voegeli had not been charged. E.T. and a few of her family members also spoke, telling the court about the dramatic and distressing effect Voegeli's actions had on their lives. They also told the court about other instances of Voegeli's troubling behavior that were separate from the charged incidents.

¶11 Voegeli's counsel told the circuit court that she was surprised by the allegations made by E.T. and her family at the sentencing hearing, that counsel was unaware of some of the incidents described, that Voegeli was in need of mental health treatment, and that Voegeli had a solid employment history.

¶12 Voegeli also addressed the court, apologizing to E.T., her family and his own family.

¶13 The circuit court commended Voegeli for his accomplishments, but acknowledged the need to keep E.T. safe, the impact Voegeli's behaviors had on E.T. and her family, and the seriousness of his offenses. The court stated that it was "going to protect [E.T.] for as long as the law will allow [it] to do so." The court imposed a total sentence of six years' confinement and five years of extended supervision broken up as follows: three years of initial confinement and three years of extended supervision on the felony bail jumping conviction; one and one-half years of initial confinement and two years of extended supervision on the stalking conviction; and nine months' confinement in each of the misdemeanor convictions for domestic abuse order violations, all to be served consecutively.

The Postconviction Motion

¶14 Voegeli filed a postconviction motion seeking to withdraw his guilty pleas to the felony charges, arguing that there was no factual basis for the pleas and that his counsel was ineffective for advising him to enter pleas on those counts without a factual basis. Alternatively, Voegeli sought resentencing, arguing that counsel was ineffective for multiple reasons and that the circuit court relied on inaccurate information. In a thorough, well-reasoned written decision, the postconviction court denied Voegeli's motion. This appeal follows.

DISCUSSION

¶15 Voegeli raises many arguments on appeal. He contends that his guilty pleas to the two felony counts constituted a manifest injustice because there was no factual basis for the pleas and that trial counsel was ineffective in advising him during the plea process. Alternatively, he argues that he is entitled to resentencing because counsel was ineffective, the court relied on inaccurate

information, and the sentence was unduly harsh or excessive. Voegeli also claims that the postconviction court erroneously denied his postconviction motion without a hearing. We reject all of Voegeli's claims.

I. Voegeli's Pleas

¶16 A defendant seeking to withdraw a guilty plea after conviction and sentencing must establish by clear and convincing evidence that failure to allow a withdrawal would result in a "manifest injustice," *see* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996), that is, the defendant must "show 'a serious flaw in the fundamental integrity of the plea.'" ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). The decision whether to grant or deny a motion to withdraw a guilty plea is addressed to the sound discretion of the postconviction court and will not be reversed by this court unless the postconviction court erroneously exercised its discretion. *See* ***State v. Kosina***, 226 Wis. 2d 482, 485, 595 N.W.2d 464 (Ct. App. 1999). We will sustain a postconviction court's ruling denying a motion to withdraw a guilty plea as long as the court acted within its discretion, which requires an appropriate consideration of the facts of record and the proper application of the relevant legal standards. *See* ***State v. Canedy***, 161 Wis. 2d 565, 579-80, 469 N.W.2d 163 (1991).

¶17 It is well-settled that "if a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred," necessitating plea withdrawal. ***State v. Thomas***, 2000 WI 13, ¶17, 232 Wis. 2d 714, 605 N.W.2d 836. "[E]stablishing a sufficient factual basis requires a showing that 'the conduct which the defendant admits constitutes the offense charged.'" ***State v. Lackershire***, 2007 WI 74, ¶33, 301 Wis. 2d 418,

734 N.W.2d 23 (citation omitted). "[A] judge may establish the factual basis as he or she sees fit, as long as the judge guarantees that the defendant is aware of the elements of the crime, and the defendant's conduct meets those elements." ***Thomas***, 232 Wis. 2d 714, ¶22.

¶18 Here, the record supports the circuit court's finding that a factual basis existed for Voegeli's guilty pleas to the felony charges. The court not only asked Voegeli whether he understood the elements of the charges against him, but the court asked Voegeli to describe the events leading up to those charges in his own words. Voegeli admitted that he intentionally followed E.T. to the restaurant, that he understood her distress, and that he was drinking the night he called her. He also stated that he understood drinking violated the conditions of his bail and acknowledged that the facts set forth in the complaint were true. The court established that Voegeli reviewed the charges with his counsel and asked counsel whether the criminal complaint could be used to establish a factual basis. Counsel responded in the affirmative. The court properly established that Voegeli was aware of the elements of the crime and that his conduct met those elements. *See* ***id.***

¶19 Because a sufficient factual basis for Voegeli's pleas was established, counsel cannot be found ineffective for her role in the plea process.[1]

[1] Voegeli also contends that counsel was ineffective for failing to seek an ***Alford*** plea. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). We agree with the postconviction court that Voegeli's argument assumes the State would have supported an ***Alford*** plea and that circuit court would have accepted one. Such an assertion is completely speculative and will not be addressed further. Voegeli also contends that the postconviction court erroneously denied his postconviction motion without a hearing on the basis that the circuit court's plea colloquy was deficient. Because Voegeli's deficiency argument centers around his claim that the circuit court failed to establish a factual basis for his pleas, we reject this argument and do not address it further.

II. Alleged Sentencing Errors

¶20 Alternatively, Voegeli seeks resentencing on multiple grounds. He alleges that: (1) counsel was ineffective for failing to request a presentence investigation report (PSI); (2) the circuit court relied on inaccurate information; and (3) the circuit court erroneously exercised its sentencing discretion in rendering an excessively harsh punishment.

Ineffective Assistance of Counsel

¶21 Voegeli contends that counsel was ineffective for failing to request a PSI, which Voegeli asserts would have better prepared counsel for the additional accusations E.T. and her family made against Voegeli at sentencing. He also contends counsel should have objected to "the stream of previously undisclosed aggravating conduct."

¶22 A defendant claiming ineffective assistance of counsel must show both that his counsel performed deficiently and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "To prove deficient performance, a defendant must show specific acts or omissions of counsel that were 'outside the wide range of professionally competent assistance.'" ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted). To demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** If a court concludes that the defendant has not proven one prong of the ***Strickland*** test, it need not address the

other prong. ***Id.*** at 697. Based on the facts found by the circuit court, whether counsel's actions are deficient and whether the defendant was prejudiced by counsel's deficient actions are questions of law. ***Nielsen***, 247 Wis. 2d 466, ¶14.

¶23 Voegeli's claim is unavailing because he cannot show that he was prejudiced. As the postconviction court noted in denying Voegeli's postconviction motion, it would not have sustained an objection at sentencing because the victim "was entitled to speak her mind as to why a longer sentence should be imposed." Indeed, Voegeli addressed the court himself and did not deny any of the victim's claims. Moreover, we agree with the postconviction court that Voegeli's "claim as to what a presentence report would have shown is entirely speculative." The record shows that the circuit court rendered its sentence based upon the facts of the case, the gravity of Voegeli's offenses, his character, and the need to protect the victim. Voegeli was not prejudiced by a lack of a PSI or any failure to object to statements made at sentencing. Accordingly, counsel was not ineffective. *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (counsel's failure to raise meritless objections is not ineffective assistance).

Inaccurate Information

¶24 Related to his ineffective assistance of counsel argument, Voegeli contends that the circuit court relied on inaccurate information when it heard statements made by E.T. and her family at sentencing about "Voegeli's character and culpability for his conduct." Voegeli contends that some of the statements made at sentencing were not only inaccurate, but constituted new information and violated his due process rights.

¶25 A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue that this court reviews independently. *See* ***id.*** A defendant who moves for resentencing on the ground that the circuit court relied on inaccurate information must establish that there was information before the sentencing court that was inaccurate and that the court actually relied on the inaccurate information. ***Id.***, ¶31. "Whether the court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (citation omitted).

¶26 We note first that Voegeli has not established that the statements made by the victim or her family at sentencing were indeed false. Voegeli also testified at the sentencing hearing and did not refute most of the claims made by E.T. or her family. Moreover, as we discuss further, the circuit court considered the appropriate sentencing factors when issuing Voegeli's sentence. We are satisfied that Voegeli's due process rights were not violated.

Harsh and Excessive Sentence

¶27 Finally, Voegeli contends that the circuit court imposed a "harsh and excessive sentence," particularly for his felony bail jumping conviction.

¶28 Voegeli conceded that he was not to consume alcohol as a condition of his bond. Voegeli also conceded that he dialed E.T.'s phone number, a violation of his domestic abuse injunction, after consuming alcohol. He argues

that the court excessively sentenced him for "consum[ing] two beers … on his birthday."

¶29 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). The circuit court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426-28, 415 N.W.2d 535 (Ct. App. 1987). A sentence is unduly harsh and thus an erroneous exercise of discretion when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); *see also* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995) (We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion.).

¶30 The circuit court imposed the maximum sentence on each of Voegeli's convictions. In doing so, the court discussed the sentencing objectives as well as the appropriate sentencing factors outlined by ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The court discussed the trauma caused to the victim and her family, Voegeli's inability to leave the victim alone, Voegeli's repeated injunction violations, the gravity of the offenses, and Voegeli's need for various rehabilitation programs. The court thoroughly articulated its reasons for imposing the maximum sentence. The sentence is therefore presumed to be reasonable and not excessive or shocking to the public sentiment. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

¶31 For the foregoing reasons, we conclude that the postconviction court did not erroneously deny Voegeli's postconviction motion.[2] We affirm.

By the Court.—Judgments and order affirmed.

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

[2] To the extent Voegeli raises issues not addressed by this decision, we conclude that our resolution of the issues addressed is dispositive and that the record supports both the circuit court and the postconviction court.