COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2014
Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP447-CR
2014AP448-CR

Cir. Ct. Nos. 2011CF2726
2011CF5055

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY HERMAN WILLIAMS,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

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

¶1 FINE, J. Anthony Herman Williams appeals a judgment entered on his guilty pleas to one count of first-degree sexual assault with the use of a dangerous weapon and one count of kidnapping with the use of a dangerous

weapon, *see* WIS. STAT. §§ 940.225(1)(b), 940.31(1)(b) & 939.63(1)(b). He also appeals the circuit court's order denying his motion for postconviction relief. Williams contends that: (1) the circuit court sentenced him on inaccurate information; (2) his trial lawyer gave him constitutionally deficient representation; and (3) a new factor requires resentencing. We affirm.

I.

¶2 The State charged Williams with two separate cases. The first involved victim, S.A., in August of 2010. S.A. told police that a man held a knife to her back as she was walking to her apartment from the parking lot and forced her to take him into her apartment. Once inside, he ordered her to undress, forced her to give him oral sex, forced her to let him do oral sex on her, ordered her to "pee or shit" on him, and, when she began urinating, he put his "head between her legs to catch her urine in his mouth, and forced penis to vagina sex, all the time while holding the knife. Based on these acts, the State charged Williams with three counts of first-degree sexual assault and two counts of kidnapping, all with the use of a dangerous weapon. S.A. identified Williams from a photo array.

¶3 The second incident occurred in June of 2011 with victim, J.G. She told police she was on her patio outside her home when a man surprised her, grabbed her by the neck and held a knife to her and forced her into the home. The man then ordered J.G. to undress and "pee on him." When J.G. could not, the man told her "'Pee on me or else I'm going to hurt you.'" When she could not, he ordered her to defecate on him. When she could not, he forced finger-to-anus sex on her, forced penis-to-vagina sex, fondled her breasts, forced mouth-to-vagina sex, grabbed her neck and forced her into the kitchen so he could rinse his mouth, then forced her into the bathroom to get a towel and then back into the kitchen so

he could wash his penis. After that, he forced her into the bedroom and ordered her to "'stay in here for about 2 minutes. I might be gone, I might not. If you come out and I'm here still, I'm going to hurt you.'"

¶4 When J.G. came out of the bedroom, the man was gone. She phoned her mother, who came over and then called police. When questioned by police, Williams admitted going to J.G.'s home, but claimed they had met in an online chat room, that they had consensual penis to vagina sex, and that all was fine until J.G. could not comply with his request to urinate and defecate on him. At this point, he "snapped," and threatened J.G. with a kitchen knife, but then left because J.G. could not urinate or defecate on him. Williams also told police, when questioned about the incident with S.A., that it too arose from an online chat room meeting, but did not want to make a statement about S.A. As noted, the State charged Williams with three counts of first-degree sexual assault and two counts of kidnapping, all with the use of a dangerous weapon. The State plea bargained the cases.

¶5 At the sentencing, the prosecutor described Williams as "a violent serial rapist" arguing that the "serial behavior" with "two separate, aggravated sexual assault incidents that involve striking and unusual methods of operation" requires prison time. The prosecutor told the circuit court that the victims did not know one another and that "to the extent that the defendant will attempt to mitigate this by describing some of [the] contact or conduct in some manner as consensual, the State finds that to be, quite frankly, given the two separate offenses, the two separate victims, the striking similarities, to be, quite frankly, preposterous."

¶6 Williams's lawyer told the circuit court that:

> I don't agree with much of the version that [the prosecutor] has given, these were women, are people that he arranged to meet. They arranged to meet him, and he -- because he didn't get what he wanted, took out the knife and forced them to do something beyond what they expected he would do or what he expected them to do.

The lawyer also told the circuit court that Williams took the plea deal because it reduced the number of counts against him from ten to two, thereby reducing his prison exposure, and because, even under his version of the facts, he was guilty of one act of sexual assault and one act of kidnapping. His lawyer continued:

> the State is correct that it's violent and there's an aggravated quality to it when you're taking out a knife and forcing people to perform sexual acts, the only difference, again, is Mr. Williams saying how they got to that point.
>
> On the second case, the second in time, [J.G.], if it had gone to trial[,] phone records or things like that may have verified what Mr. Williams was saying, but again, what Mr. Williams was saying is I met this person, we had an agreement, and at some point I pull out the knife and force her to do something. It is a sexual assault.

¶7 In imposing sentence, the circuit court addressed the "gravity of the offenses, the defendant's character, and the need to protect the public along with things like punishment and deterrence." The sentencing court found that the sentence "needs to be a long period of punishment and deterrence, as Mr. Williams needs to be taken out of the community to protect the citizens of this community and to protect people like the two individuals, the two women that he victimized on these two separate cases." The trial court then discussed the positive aspects of Williams's character--"that he had been working," "pled guilty" to save the victim's the pain of going through a trial, "got his GED while

in custody," and "apologized to the victims, [and] the State." Next, the sentencing court talked about the gravity of the crimes:

- "[T]hese are very, very serious offenses."
- "Mr. Williams faces today slightly over 100 years in the Wisconsin State Prison System."
- Williams's conduct "was aggravated, it was violent, it involved a weapon."
- Williams "engaged in behavior that is serially violent and arguably that of a violent serial rapist."
- "Both of these cases are effectively the kind of scary, violent, heinous events that you see on TV and see in movies."
- "Mr. Williams used weapons, he used threats of force, he engaged in various degrees of humiliation and sex with these victims. … Mr. Williams, based on his plea, certainly admitted to the behavior of having the one victim urinate or defecate on him and admitted to the kidnapping on the second case, I also believe that he clearly engaged in more than that. The behavior that he engaged in was degrading to women, it was violent, and it is likely to if not ruin the lives of these victims, go a long way towards that."
- "Mr. Williams, what you did in these cases is exceedingly aggravated. As I said, you used force. You, in [the case involving J.G.], used a knife, you forced the victim to remove her clothes. I believe that beyond the urination and defecation that you attempted

to have the victim perform for purposes of degrading her or humiliating her, I believe you certainly did more than that. This was basically a forcible rape."

- "[S]exual assault is a polite term for rape, and that's what you did in both of these cases. You did this to humiliate these women, to degrade them, to make their lives awful, to treat them in a way that borders on less than human and in a way that's less than humane."

¶8 The sentencing court also found that "Williams is a serious danger to the community. He's in serious need of rehabilitation. His rehabilitation will take many, many years of treatment." The court sentenced Williams to twelve years of initial confinement and five years of extended supervision on the sexual assault count and twelve years of initial confinement and five years of extended supervision on the kidnapping count, to be served consecutively. The sentencing court found this length of sentence necessary for "punishment and deterrence" and to "give him a lengthy period of time to work on his litany of needs and to protect the community." It also noted that:

- it "considered sentences potentially longer than these sentences, and Mr. Williams is getting credit for the mitigating factors of education, employment, and the fact that he apologized."

- The sentence is "roughly a quarter or slightly more than a quarter of what the defendant is eligible for in total in these cases."

- "[The Court is] also recognizing that Mr. Williams has a limited prior record. Had he had a more extensive record, not pled, not

> show[ed] remorse -- which he did -- the sentences would have been much longer."

¶9 Williams filed a postconviction motion claiming the circuit court: (1) relied on inaccurate information during sentencing; (2) his lawyer gave him constitutionally defective representation at sentencing; and (3) a new factor warrants resentencing. All three of these claims stemmed from his cell phone records that he submitted with his motion, showing that he had called both J.G. and S.A. repeatedly on the day of the assaults. Specifically, on the day of the S.A. assault, Williams dialed S.A.'s cell phone number thirty-three times between 8:36 a.m. and 10:42 a.m., with call length ranging from one second to one hundred and seventeen seconds long. On the day of J.G.'s assault, Williams called J.G.'s cell phone four times between 10:36 a.m. and 11:54 a.m. The length of these calls are not listed.

¶10 These phone records show, although not mentioned in the circuit court, that Williams dialed "67" before every single one of these calls. This code is the universal command to deactivate caller ID. *See* http://cellphones.about.com/od/frequentlyaskedquestions/qt/blockcellphonenumber.htm (last visited Sept. 15, 2014). *See also* WIS. STAT. § 902.01 (judicial notice).[1] Williams, without

[1] WISCONSIN STAT. § 902.01 provides:

> **Judicial notice of adjudicative facts. (1)** SCOPE. This section governs only judicial notice of adjudicative facts.
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> **(2)** KINDS OF FACTS. A judicially noticed fact must be one not subject to reasonable dispute in that it is any of the following:
>
> (a) A fact generally known within the territorial jurisdiction of the trial court.

(continued)

mentioning that he blocked his number when he phoned the victims, argued that these calls prove his version of events and show that the State's characterization of his action as a stranger-rapist caused the sentencing court to use inaccurate information during sentencing. He further argued that if his lawyer had submitted the cell phone records before sentencing, the circuit court would not have used inaccurate information, the phone records would have further mitigated the length of his sentence, and that the cell phone records create a new factor warranting resentencing. The circuit court denied the motion, ruling, as material:

> [T]he defendant has not shown that the court was presented with inaccurate information. The record shows that defense counsel specifically informed the court about the existence of phone records that may have supported the defendant's version of events at trial. Although counsel did not present the court with the actual phone records, the court considered the *existence* of those records in the totality of all the statements that were made. While the

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> (b) A fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
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> **(3)** WHEN DISCRETIONARY. A judge or court may take judicial notice, whether requested or not.
>
> **(4)** WHEN MANDATORY. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.
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> **(5)** OPPORTUNITY TO BE HEARD. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
>
> **(6)** TIME OF TAKING NOTICE. Judicial notice may be taken at any stage of the proceeding.
>
> **(7)** INSTRUCTING JURY. The judge shall instruct the jury to accept as established any facts judicially noticed.

> defendant only admitted to certain acts alleged in the complaints, the court believed that he "engaged in much more than that," which was a legitimate inference for the court to make under the circumstances of these cases. A claim that the court made an inaccurate inference based upon insufficient evidence is not inaccurate information that requires resentencing, and therefore, the court denies the motion for resentencing on this basis.

[Emphasis in original.] The circuit court ruled, as a result, that there could not be ineffective assistance for not submitting the phone records. In denying Williams's claim that the phone records created a new factor, the circuit court held:

> In this instance, the phone records do very little to corroborate the defendant's version of the events. While the records show that the defendant had a number of telephone contacts with the victims on the offense dates, they show no more than that. The records do not establish that the defendant and the victims actually knew each other. Nor do they establish that either victim agreed to meet the defendant at their home or consented to engaging in any sex acts with him. Under the circumstances, the defendant has not demonstrated by clear and convincing evidence that the phone records qualify as a new factor.

II.

A. *Inaccurate information*.

¶11 "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 185, 717 N.W.2d 1, 3. "A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing 'must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.'" ***Id.***, 2006 WI 66, ¶26, 291 Wis. 2d at 192–193, 717 N.W.2d at 7 (one set of internal quotation marks and quoted

source omitted). Our review is *de novo*. *See* ***id.***, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

¶12 Williams argues that because the circuit court believed the State's version of events and because the complaint and the preliminary examination testimony referred to the assailant as a stranger or unknown person, the circuit court relied on inaccurate information. As a part of this argument, he contends that the cell phone records prove otherwise. The Record belies Williams's claims.

¶13 At the sentencing, there is no reference to Williams as a stranger, either by the State or the circuit court. Further, there is nothing in the sentencing-hearing transcript to show that the circuit court relied on Williams's status as a stranger or non-stranger. These crimes were heinous regardless of whether Williams was a stranger or an online-chat-room hook-up gone bad. The circuit court relied on the seriousness of the crimes and the need for punishment and rehabilitation. Those same factors would have applied even if Williams's victims knew him.

¶14 Further, as the circuit court pointed out in its order denying Williams's postconviction motion, the existence of the phone calls does not prove that Williams knew the victims, but rather that he only called their cell phone numbers repeatedly on the day of the assaults—and that he did so in such a way as to block his cell number from showing up. In fact, calling someone thirty-three times in a two-hour window sounds more like a stalker than a friend. Moreover, contact by cell phone does not establish that the victims would have known what Williams looked like even though they may have talked to him online or over the phone. According to both victims, Williams snuck up on them and held a knife to

their bodies. Williams did not prove the circuit court relied on inaccurate information when it imposed sentence.

B. *Ineffective assistance*.

¶15 Williams claims his lawyer should have given the actual cell phone records to the sentencing court. He argues the circuit court erred in denying his ineffective assistance claim without having a hearing under ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908–909 (Ct. App. 1979) (normally, the trial court must hold an evidentiary hearing to decide whether a trial lawyer gave his or her client constitutionally ineffective representation). To establish constitutionally ineffective assistance, Williams must show: (1) deficient performance; and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, Williams must identify specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." *See* ***id.***, 466 U.S. at 690. To prove prejudice, Williams must establish that his lawyer's errors were so serious that Williams was deprived of a fair hearing and a reliable outcome. *See* ***id.***, 466 U.S. at 687.

¶16 To get a ***Machner*** hearing, Williams has to show facts that, if true, would entitle him to the relief he seeks. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576–577, 682 N.W.2d 433, 437–438 (The trial court has the discretion to deny a postconviction motion for a ***Machner*** hearing "if 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."). Our review on whether the motion raised sufficient facts to get a hearing is *de novo*. ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996).

¶17 As we have seen, Williams's ineffective-assistance claim is based on the cell phone records that he claims establish a relationship between Williams and the victims from an online chat room. The circuit court denied the motion without a hearing because it found that the actual cell phone records would not have a made a difference in the sentence imposed. The Record supports the circuit court's determination. First, the sentencing court did not discuss the relationship status between Williams and the victims. It was a non-issue. Second, the phone records would not have established that the victims knew Williams by sight. And, he blocked his cell number from showing up on the victims' phone each time he called them the day of the assaults. These phone records, at most, would have shown that Williams called the victims repeatedly the day of each assault. Third, the circuit court based its sentence on the need to punish, deter and rehabilitate. Williams himself admitted that he "snapped" when the victim would not urinate or defecate on him. He grabbed a knife and threatened the victims when he did not get his way. Proving that he called the victims' cell phones before this conduct would not have changed the outcome of the sentencing hearing. Assuming without deciding that Williams's trial lawyer should have introduced the phone records (even thought the trial court was familiar with their general tenor), Williams has not shown even a modicum of prejudice.

C. *New factor*.

¶18 Williams argues the cell phone records are a new factor, warranting sentence modification. The circuit court can modify sentences on the basis of a new factor. *See* ***State v. Vaughn***, 2012 WI App 129, ¶35, 344 Wis. 2d 764, 796, 823 N.W.2d 543, 559. ***Vaughn*** sets out the standards for when a new factor requires resentencing:

> Under established law, a "new factor" may justify a circuit court's exercise of its sentence-modification discretion. A "new factor" is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." The analysis is two-fold: First, "[w]hether a fact or set of facts presented by the defendant constitutes a 'new factor' is a question of law" that we review *de novo*. Second, "whether that new factor justifies sentence modification is committed to the discretion of the circuit court, and we review such decisions for erroneous exercise of discretion." "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor."

Vaughn, 2012 WI App 129, ¶35, 344 Wis. 2d 764, 796–797, 823 N.W.2d 543, 559 (quoted sources omitted). The circuit court clearly knew that some cell phone records existed that showed calls to the victims because Williams's lawyer brought it up at sentencing. Williams argues that the circuit court did not, however, have the *actual* phone records and the actual records would have carried greater weight than the single reference made by his lawyer. As we have already seen, the circuit court's postconviction order clearly found that the actual phone records would not have influenced the sentence imposed. During sentencing, the circuit court focused on the heinousness of the crimes and the need to punish, deter, protect and rehabilitate. The circuit court did not focus on or even mention the relationship or non-relationship between Williams and his victims. Accordingly, we uphold the circuit court's decision that the phone records were not a new factor that justified sentence modification.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.