COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1497 **Cir. Ct. No. 2005CF217**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM S. CASS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Adam S. Cass appeals an order denying his WIS. STAT. § 974.06 (2013-14) motion seeking to withdraw his ***Alford*** plea and an

order denying his motion for reconsideration.[1] He alleged that his counsel was ineffective and that there was not a sufficiently strong factual basis for the plea. Cass's motion is procedurally barred by the similar motion he filed pro se the year before. It also fails on the merits. We affirm.

¶2 In 2005, Cass was charged with repeated sexual assault of a child for allegedly assaulting M.B., the daughter of his girlfriend, and exposing a child to harmful materials. The complaint recited a charging period of February 1 through September 30, 2001, the period of time when Cass lived with M.B. and her mother. M.B. reported the assaults in 2005 when she was eleven years old. She told a social worker in a videotaped interview that the offenses occurred while Cass lived with her and her mother at a particular house when she was "around six" years old, after she started kindergarten.

¶3 Cass maintained his innocence. He ultimately entered an ***Alford*** plea to a reduced charge of second-degree sexual assault of a child; the harmful-materials charge was dismissed outright.

¶4 In 2013, Cass filed a pro se motion seeking plea withdrawal.[2] He argued that his counsel ineffectively failed to investigate the timing of M.B.'s

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

[2] Cass contends his 2013 filing "was not a motion or other initiation of a proceeding that could trigger a bar on future claims" because, although it requests an evidentiary hearing and to withdraw his ***Alford*** plea, it is on a preprinted affidavit form, does not use the words "motion" or "petition," does not reference WIS. STAT. § 974.06, and cites no law relevant to his ineffectiveness claim or plea withdrawal.

We are not bound by a pro se defendant's choice of labels. *See* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983). We construe this filing as a WIS. STAT. § 974.06 motion, which is a proper vehicle by which to raise issues of constitutional dimensions. *See* ***State v. Stawicki***, 93 Wis. 2d 63, 67-68, 286 N.W.2d 612 (Ct. App. 1979).

allegations. He pointed out that M.B. was born in November 1993, turned six in 1999, and attended kindergarten in 1999 and 2000. He could not have assaulted her when she was six and in kindergarten, he argued, because he was in prison until after she turned seven. Accordingly, he contended, there was not a strong factual basis for the plea. The court denied the motion as meritless. Cass did not take a direct appeal.

¶5 In 2014, now represented by counsel, Cass filed a second WIS. STAT. § 974.06 motion that raised the same issues, but more developed and better supported. The court denied the motion on the merits without a hearing. The court likewise denied Cass's motion for reconsideration. This appeal followed.

¶6 Cass contends the circuit court improperly denied his ineffective assistance claim without ordering a hearing because he alleged sufficient facts and his claims were not procedurally barred. We cannot agree.

¶7 To the extent Cass is attempting to cloak old claims in new verbiage, we are not bound to address them. "A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶8 Even if not merely repackaged claims, they are procedurally barred. They could have been raised in his 2013 filing and he fails to establish a sufficient reason for not doing so. *See* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181, 517 N.W.2d 157 (1994) ("[I]f the defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a [WIS. STAT. §] 974.06 motion."); *see also* ***State v. Tolefree***,

209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997) (whether procedural bar applies is question of law we determine de novo).

¶9 Cass's motion could not succeed in any event. "Withdrawal of a plea following sentencing is not allowed unless it is necessary to correct a manifest injustice." ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996). The test is met if the defendant was denied the effective assistance of counsel, ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996), or if the court fails "to establish a sufficient factual basis that the defendant committed the offense to which he or she [pled]," ***Smith***, 202 Wis. 2d at 25.

¶10 To be entitled to an evidentiary hearing, a defendant must allege facts in his or her postconviction motion that "allow the reviewing court to meaningfully assess [the defendant's] claim." ***Bentley***, 201Wis. 2d at 314. The motion must allege what the defendant expects to prove, ***State v. Love***, 2005 WI 116, ¶75, 284 Wis. 2d 111, 700 N.W.2d 62, by alleging who, what, where, when, why, and how, ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433.

¶11 Cass had to adequately allege that his counsel's performance was deficient and that this performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "Counsel's conduct is constitutionally deficient if it falls below an objective standard of reasonableness." ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305. To establish prejudice in the context of a postconviction motion to withdraw a guilty plea, a defendant must allege that "but for the counsel's errors, he [or she] would not have pleaded guilty but would have insisted on going to trial," an allegation that must be supported by objective factual assertions. ***Bentley***, 201 Wis. 2d at 312-13. "[A] defendant who

alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

¶12 Cass contended his counsel failed to properly investigate the timing of M.B.'s allegations. She told authorities he assaulted her when she was "about six" and after she started kindergarten, which would have been in 1999 and 2000. Cass was incarcerated until 2001, when she was seven. Cass asserted that a proper investigation would have revealed the availability of an alibi defense, and he would not have pled.

¶13 We agree with the circuit court that Cass's allegation of ineffective assistance did not warrant an evidentiary hearing. Cass viewed M.B.'s videotaped interview and thus was aware of when she said the sexual improprieties occurred. His motion does not articulate that he did not know, or why he could not have learned on his own, how old M.B. was and what grade she was in when he lived in the home. Nor does the motion explain why discovering the information was solely in the purview of his counsel or that the defense he advances would not be apparent to a lay person. No one besides Cass himself would have been more motivated to sort out a time discrepancy. At best, an investigation might have shown that when M.B. disclosed the assaults years later she misremembered or miscalculated how old she was when the abuse occurred.

¶14 Cass also complains that the factual basis supporting the ***Alford*** plea was insufficient because M.B. told authorities Cass lived with them when she was six and in kindergarten, but he still was in prison then. A circuit court may accept an ***Alford*** plea if it determines that the prosecutor's summary of the evidence the

State would offer at trial is "strong proof of guilt." ***Smith***, 202 Wis. 2d at 27 (citation omitted). A higher level of proof is necessary because the evidence must be "strong enough to overcome a defendant's 'protestations' of innocence." ***Id.***

¶15 The circuit court concluded at the plea hearing that the State had "strong evidence of guilt" based on the allegations in the complaint and its earlier viewing of M.B.'s forensic interview. The complaint and interview contained allegations that M.B. claimed that Cass sexually assaulted her while he lived with her and her mother at the residence described in the complaint. Cass did not dispute that he lived with them between those dates.

¶16 The court found that M.B. reported the assaults when she was eleven and that she was seven, not six, when the assaults occurred was of no consequence in the context of the full picture. Time is not an essential element of second-degree sexual assault of a child. *See* WIS. STAT. § 948.02(2); *see also* ***State v. Annina***, 2006 WI App 202, ¶9, 296 Wis. 2d 599, 723 N.W.2d 708 (factual basis requirement satisfied only when strong proof of guilt as to each element of crime).

¶17 '"Strong proof of guilt' is not the equivalent of proof beyond a reasonable doubt." ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 645, 579 N.W.2d 698 (1998). A jury reasonably could be convinced that M.B. could not recall precisely when the incidents occurred several years earlier, especially when they happened repeatedly over a period of time. "Young children cannot be held to an adult's ability to comprehend and recall dates and other specifics." ***State v. Hurley***, 2015 WI 35, ¶33, ___ Wis. 2d ___, 861 N.W.2d 174 (citation omitted). When young children report sexual abuse that began or occurred earlier, they are "likely rendered incapable of reporting the incidents or recalling back to the exact date or time period when the assaults began." ***Id.***, ¶42. In such cases, "[t]he

vagaries of a child's memory more properly go to the credibility of the witness and the weight of the testimony ...." ***State v. Fawcett***, 145 Wis. 2d 244, 254, 426 N.W.2d 91 (Ct. App. 1988).

¶18 The court's findings are not clearly erroneous. *See* ***State ex rel. Warren***, 219 Wis. 2d at 645. Strong evidence of guilt existed to negate Cass's claim of innocence.

By the Court.—Orders affirmed.

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