COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP454 **Cir. Ct. No. 2012CF002209**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES E. BISHOP,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Charles E. Bishop, *pro se*, appeals an order denying his motion for postconviction relief. Because the circuit court properly rejected Bishop's claims of ineffective assistance of counsel, we affirm.

BACKGROUND

¶2 In its decision denying Bishop's postconviction motion, the circuit court set forth the facts of the case as follows:

> The defendant was originally charged with one count of aggravated battery, one count of misdemeanor battery, two counts of false imprisonment, and two counts of first[-]degree sexual assault (use of a dangerous weapon) stemming from an incident which occurred at 4155 N. 36th Street in the city of Milwaukee. The 64[-]year[-]old victim [R.G.] lived at that address, and on the evening of May 1, 2012, her niece, [L.W.], was at home with her. The defendant, whom [R.G.] once dated for a significant period of time, knocked on the door and demanded entry. Fearing he would kick the door down, the two women let him in, at which time he punched [L.W.] in the face and body with his fists. He then picked up a metal cane and used it to beat both of the women. He then announced he was going to "fuck one of you bitches" and made [R.G.] wash up in the bathroom and strip naked. He then took his clothes off and made [L.W.] watch him have sex with her aunt. During the interrogation process, he admitted all of the above as true.

In setting forth these facts, the circuit court relied on the details in the criminal complaint, which Bishop acknowledged were substantially true and correct during his plea colloquy.

¶3 Pursuant to plea negotiations, Bishop pled guilty to an amended charge of second-degree sexual assault, one count of misdemeanor battery, and one count of false imprisonment. In exchange for Bishop's pleas, the remaining charges against him would be dismissed and read in at sentencing. The State further agreed to recommend a total sentence of five to seven years of initial confinement and five years of extended supervision.

¶4 Prior to sentencing, Bishop moved to withdraw his pleas. Following a hearing, the circuit court denied Bishop's motion. The circuit court subsequently

sentenced Bishop to eleven years of initial confinement followed by four years of extended supervision on the charge of second-degree sexual assault. It imposed a concurrent nine-month sentence on the battery conviction and a concurrent four-year sentence on the false imprisonment conviction.

¶5 Bishop subsequently filed the underlying postconviction motion, which the circuit court denied without a hearing.

DISCUSSION

¶6 On appeal, Bishop renews two claims of ineffective assistance of trial counsel that were set forth in his postconviction motion.[1] He argues trial counsel provided ineffective assistance: (1) by not objecting when the prosecutor violated the terms of the plea agreement; and (2) in making Bishop look like a liar and an unreliable person while attempting to withdraw Bishop's plea, which prompted the circuit court to deviate from the sentence recommended by the State.

¶7 A defendant is not automatically entitled to an evidentiary hearing on postconviction claims. ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996). A circuit court is required to conduct a hearing only when the defendant alleges sufficient material facts that, if true, entitle the defendant to relief. ***Id.*** at 309-10. If the defendant does not raise sufficient facts, if the allegations are merely conclusory, or if the record conclusively shows the defendant is not entitled to relief, the circuit court has the discretion to deny a request for an evidentiary hearing. ***Id.*** Whether a postconviction motion alleges

[1] Bishop has abandoned his postconviction claim that his trial counsel was ineffective for failing to object to an incorrect calculation of sentence credit.

sufficient facts to warrant an evidentiary hearing is a legal issue that we review independently. ***Id.*** at 310.

¶8 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must identify specific acts or omissions of counsel that "were outside the wide range of professionally competent assistance." ***Id.*** at 690. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

1. The prosecutor did not violate the terms of the plea agreement.

¶9 According to Bishop, his trial counsel was ineffective for failing to object when the prosecutor adopted the position of the victim and cast doubt on the terms of the plea agreement. He argues that this was an "end run" around the plea agreement by the prosecutor. *See* ***State v. Matson***, 2003 WI App 253, ¶17, 268 Wis. 2d 725, 674 N.W.2d 51 ("'End runs' around a plea agreement are prohibited.").

¶10 Bishop specifically directs our attention to the following statement, which was made by the prosecutor during his sentencing hearing:

> The State's configuration here puts him into his 60s. *Hopefully that would be a sufficient amount of time to change his behavior and change his attitude* and give him time to figure out why he became this person that doesn't really seem to—his whole history wouldn't make you think that he would do something like this. *But he has to figure out why he did this, otherwise, he's going to stay dangerous*

> *in the community.* And I think there needs to be a sufficient amount of time to make [R.G.] feel like she doesn't have to constantly keep looking over her shoulder. Like if she goes out of her house, there's going to be Mr. Bishop standing there, waiting to kill her, because that's what she thinks right now.

(Italics added.) Bishop highlights the italicized language in his brief.

¶11 Contrary to Bishop's assertions, the State did not breach the plea agreement. As part of the agreement, the State agreed to amend count three from first-degree sexual assault to second-degree sexual assault and to move to dismiss and read in three other counts. Additionally, the State was to recommend a total of five to seven years of initial confinement and five years of extended supervision. This is what the State did.

¶12 The statement with which Bishop takes issue was the prosecutor's explanation for why she thought the recommendation was appropriate in terms of punishment, deterrence, and rehabilitation and why the court should follow her recommendation. *See* ***State v. Ferguson***, 166 Wis. 2d 317, 324, 479 N.W.2d 241 (Ct. App. 1991) ("At sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot 'be immunized by a plea agreement between the defendant and the [S]tate.' A plea agreement which does not allow the sentencing court to be appraised of relevant information is void against public policy.") (citation omitted).

¶13 Insofar as Bishop argues that the prosecutor "adopted the position of the victim" in making her sentencing remarks, we are not convinced. Instead, we again view the prosecutor's comments relating to the victim as a presentation of relevant information. *See* ***State v. Williams***, 2002 WI 1, ¶43, 249 Wis. 2d 492, 637 N.W.2d 733 (A prosecutor may not agree to keep relevant information from

the sentencing court). Relevant information includes the effects of the crime on the victim. *See* ***State v. Walker***, 2006 WI 82, ¶12 n.8, 292 Wis. 2d 326, 716 N.W.2d 498 ("[O]ne factor a court should consider is the gravity and nature of the offense, which includes consideration of the effect upon the victim."); *see also* ***State v. Bokenyi***, 2014 WI 61, ¶64, 355 Wis. 2d 28, 848 N.W.2d 759 ("[C]ommentary regarding the victim's wishes may be relevant and appropriate at the sentencing…. In fact, a victim's wishes may often come to bear in considering the need to protect the public.") (citations omitted).

¶14 There was nothing improper in the prosecutor's remarks and consequently, Bishop's trial counsel was not ineffective for failing to object to or consult with Bishop about the remarks. It is well-established law that counsel could not have been ineffective for failing to make meritless arguments. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

2. The circuit court's deviation from the recommended sentence was not the result of ineffective assistance of trial counsel.

¶15 Bishop also argues that his trial counsel, in an attempt to withdraw his plea, made him "appear as a liar and unreliable person," which prompted the circuit court to exceed the recommendation of the parties during sentencing. He points to the following remarks by trial counsel during the sentencing hearing:

> [Counsel]: Your Honor, first, I want to state on the record that we're participating in this hearing on a protest because we think Mr. Bishop should be allowed to have his plea withdrawn, your Honor, respectfully.

Counsel continued:

> It's one of the reasons why—I don't want to beat a dead horse here, but I was so adamant about trying to get this fellow to withdraw the plea or profer that to the Court because I believe that when you have cases of this

> significant nature, that the defendants should be given something like a grace period on something like this….
>
> But the fact is you're looking at 40 years of stuff like this in a guy with his age. I would think we've got to give these persons a grace period to think this over. If I was his attorney at that time, I'd say if you're going to go with 40 years, you might as well go down swinging. I mean, that's just my philosophy as a defense attorney.[2]

¶16 Bishop seemingly asserts that it was his trial counsel's comments that resulted in the circuit court saying to Bishop during the sentencing hearing: "I don't believe you, Mr. Bishop, and I didn't believe you at your withdrawal hearing, and I don't believe you today."

¶17 The sentencing transcript reveals that in making his own remarks to the circuit court, Bishop stated:

> Your Honor, I have known [R.G.] for 16 years. I got keys to her house. At the time of this incident, I'd known her niece. I have never had any problem with either one of them in the past. I am not guilty of this crime of sexual assault or false imprisonment or battery. I only pleaded guilty because my lawyer said this was best for me. I wish to withdraw my plea of guilty and to have a trial. Thank you.

It was in the context of these denials, that the circuit court said it did not believe Bishop, emphasizing:

> There is a difference of stories about what occurred here. And in sentencing, the very first thing I have to consider is how serious is what occurred. And so I have to make some kind of determination about what I believe happened here. And I don't believe you, Mr. Bishop, and I didn't believe you at your withdrawal hearing, and I don't believe you today.

[2] A new attorney represented Bishop during the plea withdrawal and sentencing hearings.

> And here's why I don't: All of the evidence supports the version of the stories that the women are telling. The bruising is enormous. It's widespread. It's huge. It's deep purple, at least on Ms. [R.G.] This isn't one whack or two whacks with a cane because you're a little ticked off.
>
> Your spontaneous statements to the police shortly after the incident absolutely corroborate what the women have said. There's no incentive for these women to make this story up. In fact, it's such a bizarre story, how would you even think of it?
>
> I agree with [your trial attorney], there's something missing here, and the thing that's missing is understanding how in the heck you committed these crimes, but I believe you committed these crimes, and I'm going to sentence you based on the assumption that the crimes happened as they [were] described.

¶18 In its decision denying Bishop's motion for postconviction relief, the circuit court additionally explained that it "imposed its sentence based on the seriousness and egregiousness of the offenses, the defendant's need for rehabilitation, and the absolute need for community protection." *See generally* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (The court has an additional opportunity to explain its sentence when challenged by postconviction motion.).

¶19 The record belies Bishop's contention that the circuit court penalized him because his trial counsel, in attempting to withdraw Bishop's plea, made him appear as a liar and unreliable person. He has failed to establish either deficient performance or prejudice on the part of his trial counsel.

¶20 Accordingly, we conclude the circuit court properly denied Bishop's postconviction motion.

By the Court.—Order affirmed.

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