COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1475-CR **Cir. Ct. No. 2010CF1866**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL E. SPIESS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Michael Spiess appeals an order of the circuit court denying his postconviction motion for resentencing and his motion alleging ineffective assistance of trial counsel. Spiess contends that he should be resentenced because the circuit court improperly relied on disclosures made by

him that he asserts under terms of his plea agreement with the State could only be used as a mitigating factor, that the presentence investigation report (PSI) process violated his due process rights, and that he received ineffective assistance of counsel. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Spiess was charged with a total of thirty-six counts, including counts of first-degree sexual assault of a child, sexual exploitation involving a child, and the possession of child pornography (images of which numbered in the hundreds of thousands). Pursuant to a plea agreement, Spiess pled guilty to two counts of first-degree sexual assault of a child, three counts of sexual exploitation involving a child, and two counts of possession of child pornography. Under the terms of the plea agreement, Spiess agreed to plead no contest to the seven charges and to "sit down with law enforcement, [and] provide a truthful disclosure of everyone [Spiess] sent child pornography to, and … the events with all of the children that he touched." In exchange, the State agreed that the remaining charges against Spiess would be dismissed, but read-in for sentencing purposes, that the State would recommend a prison sentence of twenty-five years initial confinement and twenty-five years extended supervision, and, provided that Spiess was truthful to law enforcement officers, Spiess would be immune from prosecution for anything he might disclose during his debriefing with law enforcement.[1]

[1] In addition, provided that Spiess received a sentence of not less than twenty-five years imprisonment, the federal government agreed that it would not bring federal charges against Spiess for anything he might disclose during his debriefing with law enforcement.

¶3 Following his plea and conviction, Spiess made his disclosures to law enforcement as required by the plea agreement. A report summarizing the information that Spiess disclosed was prepared by law enforcement.

¶4 A PSI report was prepared at the request of the circuit court. A psychological assessment was prepared at the request of the agent who prepared the PSI report.

¶5 Prior to sentencing, Spiess objected to the PSI report, arguing in part that the report essentially advocated for a breach of the plea agreement, and moved the court for a new PSI report. Relevant to Spiess's objection, the PSI report stated that law enforcement officers had informed the agent who prepared the report that Spiess's "case is the worst [the officer] has seen in the 24 years [the officer] has investigated sensitive crimes," and that the officer did not believe that the sentence recommended under the plea agreement was sufficient. The PSI report also stated that another officer had informed the agent that Spiess's case "is by far the wors[t] pedophilia and molestation case she has seen in her career, investigating sensitive crimes," and that the officer believed that Spiess should be sentenced to life imprisonment.

¶6 Spiess's objection to the PSI and his motion were overseen by Judge Sarah O'Brien. Judge O'Brien stated that the PSI report reflected a belief by detectives that the agreed-upon sentencing recommendation was too lenient, which, possibly constituted a breach of the plea agreement.[2] Judge O'Brien

[2] *See* ***State v. Matson***, 2003 WI App 253, ¶27, 268 Wis. 2d 725, 674 N.W.2d 51 (holding that a letter submitted to the court by the investigating detective recommending a sentence length constituted a breach of a plea agreement that had included a joint sentencing recommendation).

denied Spiess's motion for a new PSI report, but ordered that certain portions of the PSI report, including statements reflecting the detectives' sentencing positions, be redacted from the PSI report. Judge O'Brien also recused herself from sentencing.

¶7 A redacted version of the PSI report was filed with the circuit court and Spiess's case was reassigned to Judge Julie Genovese. Thereafter, Spiess's trial counsel submitted to the court a sentencing memorandum to which counsel attached the summary of Spiess's disclosures to law enforcement. No objection was made at any time to the redacted PSI report or the psychological assessment.

¶8 At sentencing, the State and Spiess's counsel made a joint recommendation of twenty-five years' initial confinement and twenty-five years' extended supervision, which was consistent with the plea agreement. Judge Genovese determined, however, that the joint recommendation was too lenient and imposed a sentence of forty-five years initial confinement. In rejecting the sentencing recommendation, Judge Genovese stated that "[t]he horror of [Spiess's] crimes cannot be understated" and that Spiess "pose[s] a very, very serious risk." Judge Genovese stated that Spiess had been in possession of 500,000 images of child pornography "depict[ing] bondage, bestiality, object insertion, sexual acts between adults and children, [and] sadomasochistic acts involving children," some of which involved infants and very young children being restrained and sexually assaulted. Judge Genovese also discussed Spiess's victims and the numerous acts perpetrated against them by Spiess, and she detailed the psychological assessment prepared on Spiess, which identified "some serious mental and sexual disorders." Judge Genovese stated that it is her belief that Spiess "pose[s] a very serious risk" and that a period of initial confinement which would result in Spiess being released in his late forties is not sufficient.

¶9 Spiess filed a postconviction motion seeking resentencing. Judge Genovese denied Spiess's motion following an evidentiary hearing. Judge Genovese found that "[t]here is nothing in [the] record that supports that any judge agreed that the [summary of Spiess's disclosures] could only be used in mitigation." Judge Genovese further found that at no point was the court informed that the summary could only be used in mitigation, that Spiess was aware that the court could reject the plea agreement and did not have to follow the joint recommendation, that Spiess's trial counsel did not object to the court's use of the revised PSI report during sentencing, and that Spiess's trial counsel provided the summary to the court.

¶10 Spiess then moved the circuit court to enter findings on whether Spiess's trial counsel's "actions in the plea and sentencing process were effective or ineffective." Judge Genovese stated in her decision and order on Spiess's motion that the issue of ineffective assistance of counsel had not previously been raised by Spiess, that the issue was not raised during the evidentiary hearing on Spiess's postconviction motion for new sentencing, and that the State had not briefed the issue of ineffective assistance of counsel for the court. Judge Genovese stated, however, that Spiess "apparently believes that the record is sufficient to make such a finding since [Spiess's trial counsel] testified at the [evidentiary] hearing." Judge Genovese agreed that the record was sufficient, and found that Spiess's trial counsel was not ineffective. Spiess appeals.

DISCUSSION

¶11 Spiess contends the circuit court erred in denying his postconviction motion for new sentencing and in determining that his trial counsel was not ineffective. We address Spiess's arguments in turn below.[3]

A. Resentencing

¶12 Sentencing decisions are left to the sound discretion of the circuit court and we review a court's sentencing decision to determine whether the court erroneously exercised its discretion. ***State v. Travis***, 2013 WI 38, ¶16, 347 Wis. 2d 142, 832 N.W.2d 491. A court's discretionary sentencing decision will be sustained if the decision is based upon the facts in the record and relies on the appropriate and applicable law. ***Id.***

¶13 Spiess argues that he should be resentenced because the circuit court relied on disclosures made by him to law enforcement officers following his conviction when the court was imposing a sentence. Spiess does not argue that the State breached the terms of the plea agreement. Rather, as best we can tell, Spiess is arguing that the circuit court could not rely on any of Spiess's postconviction disclosures to law enforcement officers to impose a sentence greater than the

[3] On appeal, Spiess also appears to be raising a due process challenge to the procedure used to correct problems with the original PSI report and to be arguing that content in the revised PSI and the psychological assessment that relates to his disclosures during his debriefings should have been redacted. Spiess did not raise these issues below, and has therefore forfeited his right to raise them on appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 825-29, 539 N.W.2d 897 (Ct. App. 1995) (A failure to raise a specific challenge before the circuit court forfeits the right to raise that challenge on appeal.) On appeal, Spiess has also not addressed these issues in terms of ineffective assistance of counsel, and neither do we.

sentence recommended under the plea agreement because the State had agreed that those disclosures "were only to be used in mitigation of [Spiess's] sentence."[4]

¶14 Putting to the side the enforceability of any such agreement, the record does not support Spiess's assertion that there was an agreement that his disclosures could not be relied on by the circuit court to impose a sentence greater than the sentence the parties recommended. In the State's plea offer to Spiess, the State stated:

> [Spiess] is to sit down with law enforcement and provide a truthful disclosure of everyone [Spiess] sent child pornography to and the accounts he used to send the child pornography in addition to a full accounting of his sexual assault victims with complete disclosure as to the acts perpetrated against those victims.

[4] Spiess also argues that his disclosures "were to be *immunized*" and as such, could not be used against him by the circuit court at sentencing. (Emphasis added.) Spiess does not explain to this court what he means by the term "immunized." To the extent that Spiess means that the State agreed not to pursue criminal charges against him for anything he might say during his postconviction disclosures, we agree.

However, immunity has a more specific meaning in criminal law. In situations where a witness's testimony is compelled, the law affords the witness use immunity under the Fifth Amendment and/or transactional immunity. See ***State v. J.H.S., Jr.***, 90 Wis. 2d 613, 617, 280 N.W.2d 356 (1979). Use immunity "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." ***Kastigar v. United States***, 406 U.S. 441, 453 (1972). Under use immunity, the witness may still be prosecuted for crimes related to the compelled testimony "if the prosecuting agency does not offer the immunized testimony and establishes that the evidence offered is not derived from the immunized testimony." ***J.H.S., Jr.***, 90 Wis. 2d at 617. Transactional immunity extends use immunity to prohibit the prosecution for crimes to which the compelled testimony relates. ***Id.*** Spiess makes reference to ***Kastigar's*** immunity protections in his brief on appeal. However, Spiess has not presented this court with a developed argument that his disclosures, which he voluntarily made pursuant to his plea agreement, are entitled to the protections of either use or transactional immunity. Nor has he presented this court with a developed argument that such immunity protections restricted the circuit court's ability to rely, however slightly, on Spiess's disclosures for sentencing purposes. Accordingly, we will not address any arguments that relate directly to the issue of immunity. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 **(**generally, this court does not consider conclusory assertions and undeveloped arguments).

> For full compliance with this agreement and contingent on [Spiess] not receiving less than 25 years in and 25 years out in prison from the circuit court at sentencing, the feds have agreed not to prosecute the defendant for these charges.

At Spiess's plea hearing, the prosecutor stated that the State had agreed, provided Spiess was truthful, that Spiess "won't be prosecuted" for any related offenses that arise from his truthful disclosures to law enforcement. At the evidentiary hearing on Spiess's motion for resentencing, Spiess's trial attorney testified that in terms of Spiess's agreement to provide a truthful disclosure to law enforcement officers:

> [T]he idea [was] that he was going to cooperate and give a truthful statement about everything he did or knew. It was implied there would be no other charges—because there would be no other charges either state or federal, because that was the purpose of the agreement. And that was the purpose of him cooperating was to get his agreement with the state court that he would get the 50-year prison sentence.

Spiess's trial attorney further testified that as he understood the plea agreement, "anything [Spiess] said would not be used against him to charge him with other charges or to enhance his sentence—enhance [the parties'] sentenc[ing] recommendation." There is no indication that the State agreed that the court could use the disclosures only in mitigation of Spiess's sentence.

¶15 Returning to the propriety of such an agreement, even if the State had agreed that the circuit court could not use Spiess's disclosures to impose a harsher sentence, such an agreement would not be enforceable. The law is clear that in sentencing, a circuit court is not bound by or controlled by a plea agreement between the defendant and the State. ***State v. McQuay***, 154 Wis. 2d 116, 128, 452 N.W.2d 377 (1990).

¶16 Spiess argues that in entering into the plea agreement, he believed that his statements "were not to be used against him in any way," and, therefore, he should be allowed to withdraw his plea or should be resentenced without the court's consideration of those disclosures. However, Spiess acknowledged in the plea questionnaire that he understood that the circuit court was not bound by the plea agreement, and Spiess does not argue that he was not aware that the circuit court was free to disregard all or any portion of the agreement he made with the State.

¶17 Accordingly, we conclude that Spiess's arguments are without merit and that the circuit court did not erroneously exercise its discretion in denying Spiess's motion for resentencing.

B. Ineffective Assistance of Counsel

¶18 Spiess asserts that his trial attorney provided ineffective assistance by: (1) providing the summary of his disclosures to law enforcement officers to the circuit court prior to sentencing; (2) failing to inform the circuit court that Spiess's disclosures "were only to be used in mitigation of [his] sentence"; (3) telling Spiess that his disclosures "could only help and not hurt him," and (4) for recommending that Spiess enter into the plea agreement.

¶19 Whether a defendant receives ineffective assistance of counsel presents a mixed question of fact and law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the court's legal conclusions as to whether counsel's performance was deficient and if so, prejudicial, are questions of law that we review de novo. ***Id.*** at 128.

¶20 To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. We give great deference to counsel's performance and, therefore, a defendant must overcome "'a strong presumption that counsel acted reasonably within professional norms.'" ***State v. Trawitzki***, 2001 WI 77, ¶40, 244 Wis. 2d 523, 628 N.W.2d 801 (quoted source omitted). To prove prejudice, a defendant must demonstrate that counsel's errors had some adverse effect on the defense. ***Strickland***, 466 U.S. at 693. The defendant must show the alleged deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.*** at 686. The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. ***Id.*** at 693. Instead, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶21 We conclude that the third and the fourth ineffective assistance of counsel arguments that Spiess makes are conclusory and not fully developed. Because they are undeveloped, we consider those arguments no further. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶22 Turning to the first of Spiess's remaining arguments, we will assume without deciding that it was deficient for counsel to provide the summary prepared by law enforcement of Spiess's postconviction disclosures. We conclude, however, that Spiess has not shown that counsel's error was prejudicial. Spiess

argues that it is "uncontroverted that had these disclosures not been provided to Judge Genovese … and had their contents not been incorporated in the [PSI] report … the sentence would [not] have been as high as it was."

¶23 Spiess's burden on appeal is to show that there is a reasonable probability that the result of his sentencing would have been different had his trial counsel not made the summary available to the court. ***Strickland***, 466 U.S. 694. However, even if Spiess had presented this court with a developed argument, we are not persuaded that the result of his sentencing would have been different. Excluding the information contained in the summary of Spiess's disclosures, the circuit court was aware that Spiess, who was only twenty-three, was in possession of not just a few, but hundreds of thousands of pornographic images of children. These images are both graphic and disturbing in nature. The court was also aware that Spiess had sexually assaulted multiple children under the age of thirteen, and that Spiess had made pornographic images of those children. The maximum sentence that Spiess faced for the charges to which he pled was 310 years' imprisonment. The sentence imposed by the court was less than fifteen-percent of that.

¶24 Furthermore, Spiess's argument amounts to the proposition that his trial counsel performed deficiently by providing accurate information to the circuit court, information that was already not only available to the court, but that the parties could not have legally agreed to keep from the circuit court. The argument implausibly assumes that if Spiess's counsel had not presented the information, the prosecution would not have presented the information. This is to say, Spiess's argument is flawed in many different ways.

¶25 Spiess argues next that counsel was ineffective for "failing to advise the [circuit] court that [his] disclosures were only to be used in mitigation of [his] sentence." As we explained above in paragraph 14, the record before us does not support Spiess's assertion that he and the State agreed that the circuit court could rely on his disclosures only to impose a sentence less than that recommended under the plea agreement. However, even if the parties had agreed to such a restriction on the use of his disclosures, the circuit court would not have been bound by the parties' agreement. Accordingly, we conclude that trial counsel was not deficient in failing to so advise the court.

CONCLUSION

¶26 For the reasons discussed above, we conclude that the circuit court did not err in denying Spiess's motions.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).