COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2969-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL SAPPINGTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Paul Sappington appeals from a judgment convicting him of first-degree sexual assault of a child and from an order denying his motion for postconviction relief. On appeal, he argues that the circuit court erroneously denied his motion to withdraw his no contest plea, his trial counsel

was ineffective and the circuit court should have permitted postconviction discovery. We reject these arguments and affirm.

¶2 Sappington was charged with having sexual intercourse with a twelve-year-old babysitter. He pled no contest to that charge and was sentenced to twenty-five years in prison. Sappington then moved the court to withdraw his plea on several grounds: (1) newly discovered evidence that it was probable Sappington was not conscious and experiencing a sleep disorder, "confusional arousal," when he sexually assaulted the victim; (2) the real controversy—whether Sappington was conscious and able to control his actions—was not presented to the court; and (3) trial counsel was ineffective for failing to adequately investigate Sappington's claimed sleep disorder and advising him to plead no contest. Sappington also argued that the newly discovered sleep disorder evidence was a new factor relevant to sentencing. The circuit court denied the postconviction motion. Sappington appeals.

¶3 Sappington first argues that the circuit court erroneously denied his postsentencing motion to withdraw his no contest plea. In order to withdraw a plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Krieger***, 163 Wis. 2d 241, 250-51, 471 N.W.2d 599 (Ct. App. 1991). Whether to permit a defendant to withdraw a plea is within the circuit court's discretion. *See* ***State v. Canedy***, 161 Wis. 2d 565, 579, 469 N.W.2d 163 (1991). We will not reverse a circuit court's discretionary act if the record reflects a reasonable basis for the court's determination. *See* ***State v. C.W.***, 142 Wis. 2d 763, 766-67, 419 N.W.2d 327 (Ct. App. 1987).

¶4 Newly discovered evidence satisfies the manifest injustice standard for plea withdrawal if: (1) the evidence was discovered after the entry of the plea; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *See* ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). However, "'newly discovered evidence' does not include a new appreciation of the importance of evidence previously known but not used." ***State v. Bembenek***, 140 Wis. 2d 248, 256, 409 N.W.2d 432 (Ct. App. 1987) (citation omitted).

¶5 We first address whether the sleep disorder evidence was newly discovered. At the postconviction motion hearing, Sappington's trial counsel testified that from their first meeting, Sappington maintained that he did not recall the assault and that this might be attributable to a sleep disorder associated with sleep deprivation. Trial counsel obtained a psychological evaluation focussing on whether Sappington possessed any psychological indicators for child sexual assault. However, counsel did not have Sappington evaluated for the alleged sleep disorder. Counsel decided that he would not present the sleep disorder claim as a defense because he did not believe the theory would be convincing to a jury given the victim's description of Sappington's specific behavior during the assault. In particular, counsel noted that Sappington took off his and the victim's clothing and then replaced part of their clothing after the assault. Counsel determined that Sappington's claim that he was not fully conscious would not be believed by a jury at trial or the judge at sentencing. Counsel formed these opinions before Sappington pled no contest on counsel's advice.

¶6 Sappington concedes that he and trial counsel were aware of the possible defense that a sleep disorder caused Sappington to be unaware that he was having or had had sexual intercourse with the victim. Postconviction,

Sappington obtained an expert opinion that he likely experienced confusional arousal, a sleep disorder, at the time he assaulted the victim. However, because Sappington and his counsel were aware of and considered Sappington's sleep disorder defense before he entered a no contest plea, this expert opinion is a "new appreciation" of evidence previously known, *see* ***Bembenek***, 140 Wis. 2d at 256, not newly discovered evidence for purposes of plea withdrawal. The circuit court did not misuse its discretion when it denied Sappington's plea withdrawal motion.

¶7 Sappington also claims that his trial counsel was ineffective for not pursuing the sleep disorder theory at trial and sentencing. Counsel renders ineffective assistance if counsel's performance was deficient and the deficient performance prejudiced the defendant. *See* ***State v. Oswald***, 2000 WI App 2, ¶49, 232 Wis. 2d 62, 606 N.W.2d 207, *review denied*, ___ Wis. 2d ___, 609 N.W.2d 473 (Wis. Feb. 22, 2000) (No. 97-1026-CR). Whether counsel's conduct constitutes ineffective assistance is a mixed question of fact and law. *See* ***id.*** at ¶51. We will uphold the circuit court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See* ***id.*** However, the final determinations of deficient performance and prejudice present questions of law which we decide independently of the circuit court. *See* ***id.***

¶8 To consider Sappington's ineffective assistance claim, we have to consider the sleep disorder claim itself. Postconviction, Sappington retained a sleep disorder expert who opined that confusional arousal might account for Sappington's failure to realize that he had sexual contact and sexual intercourse with the victim. The expert defined confusional arousal as a state in which the individual is awake to the extent that he or she is "motorically active," i.e., moving muscles and engaging in seemingly purposeful activities. However, the individual

is not aware of or interacting with the environment. An individual in a state of confusional arousal seems to awaken and engage in various activities, including sexual activities, but is unaware that such activities are occurring. After the episode, the individual fully awakens and orients to the environment but does not recall much or most of what transpired during the episode of confusional arousal. The expert explained that the longer and more complex the activity undertaken during an episode of confusional arousal, the less likely it is that the individual experienced confusional arousal. The expert opined that Sappington did not know he was having sex with the victim.

¶9 In its ruling at the close of the postconviction motion hearing, the circuit court made the following findings. Trial counsel was an experienced criminal defense attorney and made a professional judgment that this defense would be unsuccessful. Counsel referred Sappington for a psychological evaluation and had access to previous mental health evaluations. However, none of these reports suggested that Sappington had a sleep disorder or that counsel should explore the sleep disorder theory (beyond Sappington's contention that this was a potential defense). Furthermore, the sleep disorder expert's opinion was highly speculative. The court noted the complexity of the sexual activity in which Sappington engaged, from undressing himself and the victim, to having sexual contact and intercourse, and partially re-dressing himself and the victim. This activity weighed against a diagnosis of confusional arousal, which is not characterized by the individual performing complex tasks. The court found that Sappington's theory of defense was another example of his attempt to excuse and evade responsibility for his conduct, and to blame others. Therefore, counsel did not act outside the range of professionally competent assistance.

¶10 The circuit court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). We sustain the court's findings regarding counsel's conduct because they are not clearly erroneous based upon the record of the postconviction motion hearing.

¶11 We agree that it was within trial counsel's professional judgment to determine whether to pursue a sleep disorder defense. We consider if trial counsel's decisions were based on the law and the facts as they existed when trial counsel's conduct occurred and upon which an ordinarily prudent lawyer would have then relied. *See* ***State v. Felton***, 110 Wis. 2d 485, 502-03, 329 N.W.2d 161 (1983). As the circuit court noted, other than Sappington's claim, counsel did not have any information from other mental health professionals suggesting that this theory was worth pursuing. Additionally, counsel concluded that the theory was unlikely to persuade a jury. An ordinarily prudent attorney confronted with the facts then available to Sappington's counsel could have reached the same conclusion: the sleep disorder defense should not be pursued.

¶12 Sappington argues that he was prejudiced at sentencing because trial counsel did not offer the sleep disorder as a mitigating factor. Sentencing is within the circuit court's discretion. *See* ***State v. Rodgers***, 203 Wis. 2d 83, 93, 552 N.W.2d 123 (Ct. App. 1996). The same judge presided at sentencing and at the postconviction motion hearing. Postconviction, that judge rejected Sappington's defense theory and deemed it another attempt to evade responsibility for his conduct. We fail to see how the judge would have been swayed by this expert opinion had it been presented at sentencing. Therefore, Sappington was not prejudiced by trial counsel's failure to do so.

¶13 Sappington argues that the circuit court should have permitted him to be tested at a sleep disorder clinic. The court declined to permit additional testing because it found the sleep disorder expert's opinion highly speculative and questionable. The court also expressed a concern that further psychological testing was not appropriate because Sappington was evaluated before sentencing. As the court found, none of the previous mental health evaluators noted a sleep disorder. The court had a reasonable basis for rejecting this defense and declining to permit testing at a clinic. *Cf.* ***State v. O'Brien***, 223 Wis. 2d 303, 322, 588 N.W.2d 8 (1999) (criminal defendant may have postconviction discovery when the sought-after evidence would be consequential to the case and the result of the proceedings would have been different).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).