COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2298-CR **Cir. Ct. No. 2014CF804**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON J. VANCASTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: THOMAS J. WALSH, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Aaron VanCaster appeals a judgment convicting him of nine counts of possession of child pornography and an order denying his postconviction motion to withdraw his no-contest pleas. VanCaster entered the pleas after a psychologist's report concluded there was no basis for pursuing a defense of not guilty by reason of mental disease or defect (NGI). VanCaster contends his trial attorney was ineffective for urging him to abandon the NGI defense and accept the State's plea offer without first seeking a second opinion. We reject that argument and affirm the judgment and order.

BACKGROUND

¶2 The National Center for Missing and Exploited Children CyberTipline reported to local police that nine images of suspected child pornography were uploaded to a computer traced to VanCaster. Police executed a search warrant and recovered hundreds of images VanCaster admitted to possessing. VanCaster initially said he believed his email account had been "hacked." However, as the interview progressed, he admitted to searching, viewing, downloading and saving images of adult and child pornography. He used a peer-to-peer file sharing network to download various child pornography files. VanCaster told police he was going through a rough time in his life due to lawsuits, financial problems and a divorce, and viewing child pornography was a "release."

¶3 At VanCaster's request, the circuit court ordered a psychological evaluation. VanCaster told the psychologist he was depressed because of his deteriorating relationship with his wife, and he began viewing child pornography because adult women looked like his wife. He told the psychologist he was "ready for it" when he was arrested because he "didn't have to work" and could "go into a

hole and be forgot about." He stated he could potentially be incarcerated "forever" for these offenses.

¶4 The psychologist diagnosed VanCaster with a major depressive disorder, but concluded VanCaster did not lack substantial capacity to appreciate the wrongfulness of his conduct or to conform his behavior to the requirements of the law. She based that conclusion on VanCaster's statements that showed a fundamental grasp of the consequences. She also concluded "a rational entry point" for these crimes existed, namely, motivation for sexual gratification. His behaviors did not stem from a psychotic state, hallucinations, or delusions, nor did his assertions constitute gross misperceptions of reality. Rather, VanCaster's behavior was well-organized and suggested his capacity to conform his behavior around his own goals. That behavior included the ability to navigate his web browser to obtain a specific type of pornography, and to save files to his phone which he then transferred to his computer using a flash drive. The psychologist also noted VanCaster's ability to maintain fulltime employment and the absence of any psychiatric intervention.

¶5 Upon receiving the psychological report, VanCaster's trial counsel urged him to accept the State's plea offer to limit its sentence recommendation to ten years' initial confinement and ten years' extended supervision. VanCaster accepted his counsel's advice and entered the no-contest pleas. A presentence investigation report (PSI) was conducted. VanCaster told its author that he believed "the psychologist screwed me." VanCaster claimed that at the time he committed the crimes, he did not know it was wrong, and it never occurred to him that it was illegal. The circuit court imposed concurrent and consecutive sentences totaling eight years' initial confinement and eight years' extended supervision.

¶6 VanCaster filed a postconviction motion to withdraw his no-contest pleas, alleging ineffective assistance of his trial counsel for failing to request a second psychological evaluation. At the postconviction hearing, VanCaster testified that he asked his trial attorney if he could have a second evaluation, but his attorney recommended against it. When asked why he believed a second evaluation would have produced a different outcome, VanCaster replied that he wanted an unbiased opinion, claiming the psychologist exhibited bias based on her demeanor. He offered no details in support of this contention.

¶7 VanCaster's trial attorney testified that he reviewed the psychologist's report with VanCaster, and counsel believed another evaluation would yield the same result because "the problem was with linking that diagnosis to a legal NGI." Counsel concluded the possibility of an additional evaluation supporting an NGI defense was "almost nil." Counsel further testified he believed VanCaster understood what his options were, and he did not force, pressure or coerce VanCaster into accepting the plea agreement. Counsel testified he does not tell his criminal defendants what to do, and "I always stress to my clients that the final decision as to course of action is theirs." He further testified, "I did lay out options for continuing to pursue the NGI, but did in my capacity as his lawyer advise against it as I felt it would be a waste of time and money, frankly."

¶8 No evidence was presented that any psychological expert would have supported a basis for the NGI plea. VanCaster did not support his postconviction motion with any psychological expert opinion.

¶9 The circuit court denied the postconviction motion, finding VanCaster had failed to establish either his counsel's deficient performance or

prejudice to his defense. The court found that VanCaster himself chose to forgo the second NGI evaluation.

DISCUSSION

¶10 A defendant claiming ineffective assistance of counsel has the burden of proving both deficient performance and prejudice to the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, VanCaster must show that counsel's representation fell below an objective standard of reasonableness. *See* ***id.*** at 688. The court must then determine whether, in light of all of the circumstances, the identified acts or omissions were outside of the wide range of professionally competent assistance. ***Id.*** at 690. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. ***Id.*** at 691.

¶11 We need not consider the prejudice prong because VanCaster failed to meet his burden of establishing deficient performance of his trial counsel. *See* ***id.*** at 697. The psychological report was unequivocal and was largely based on VanCaster's own admissions about his motivations. VanCaster provided no specific evidence regarding the psychologist's alleged bias, and he identified nothing about her demeanor that would suggest bias. VanCaster provided no basis for his counsel to believe a second examination would produce a different result, nor did he actually seek a second examination in connection with his postconviction motion. Counsel's failure to pursue a meritless defense does not constitute deficient performance. ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

¶12 The circuit court also properly rejected VanCaster's ineffective assistance of counsel claim because VanCaster, not his trial counsel, made the

ultimate decision to withdraw the NGI plea. *See* ***State v. Byrge***, 225 Wis. 2d 702, 726-27, 594 N.W.2d 388 (Ct. App. 1999), *aff'd on other grounds*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477. The circuit court's finding that VanCaster himself chose to forgo a second NGI evaluation and proceed to the plea hearing is not clearly erroneous. *See* WIS. STAT. § 805.17(2) (2015-16). VanCaster cannot fault his attorney for a decision he made himself.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).