COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2726-CR **Cir. Ct. No. 2008CF423**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN L. HENRY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. John L. Henry appeals from judgments convicting him of seven counts of repeated sexual assault of the same child who had not yet attained the age of sixteen. He also appeals from an order denying his

postconviction motion seeking plea withdrawal based on ineffective assistance of counsel or resentencing based on the circuit court's alleged failure to consider sentencing guidelines. None of his arguments are persuasive. We affirm.

¶2 Henry was charged with twenty-nine counts of repeatedly sexually a child, contrary to WIS. STAT. § 948.025(1).[1] The child was the daughter of the woman with whom he lived. The assaults began when the girl was seven and continued into her teens. Henry pled guilty to seven charges; the other twenty-two were dismissed and read in for sentencing. The negotiated plea reduced Henry's prison exposure from 1,420 years to 240 years.

¶3 Four of the charges of which he was convicted were pre-Truth-in-Sentencing (TIS); three were TIS. The court sentenced Henry to indeterminate sentences of not more than twenty years on each of the four pre-TIS counts. On the TIS counts, it sentenced him to an aggregate 110 years' initial confinement followed by thirty-five years' extended supervision. The court ordered all of the sentences to be served consecutively.

¶4 Henry moved for postconviction relief on two grounds. First, he sought to withdraw his guilty pleas on the basis that trial counsel rendered ineffective assistance. Second, Henry claimed that he should be resentenced because the circuit court did not consider sentencing guidelines. *See* ***State v. Grady***, 2007 WI 81, ¶¶2-4, 302 Wis. 2d 80, 734 N.W.2d 364, *clarified on reconsideration*, 2007 WI 125, 305 Wis. 2d 65, 739 N.W.2d 488. The court denied both claims. Henry appeals, raising the same arguments.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 To withdraw a guilty plea after sentencing, a defendant must demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, such as ineffective assistance of counsel. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To prove ineffective assistance, a defendant must show that "counsel's actions or inaction constituted deficient performance and that the deficiency caused him [or her] prejudice." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Counsel's performance is deficient only if counsel's actions fall outside the "wide range of reasonable professional assistance." ***Strickland v. Washington***, 466 U.S. 668, 689 (1984). On appeal, we will uphold the circuit court's findings of historical fact unless clearly erroneous. ***State v. Wright***, 2003 WI App 252, ¶30, 268 Wis. 2d 694, 673 N.W.2d 386. Whether those facts amount to ineffective assistance is a question of law reviewed without deference to the circuit court. ***Id.***

¶6 Henry's motion alleged that he pled guilty only because his lawyer promised he would be sentenced to no more than ten or twenty years. Inaccurate legal information may render a plea unknowing and involuntary. *See* ***State v. Woods***, 173 Wis. 2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992). A knowing, voluntary and intelligent plea is constitutionally required. ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998). We independently review as a matter of constitutional fact whether a plea was knowing and voluntary. *See* ***State v. Trochinski***, 2002 WI 56, ¶16, 253 Wis. 2d 38, 644 N.W.2d 891.

¶7 In response to Henry's claim, the circuit court held a ***Machner***[2] hearing. Both trial counsel and Henry testified. The court made an express

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

finding that trial counsel was more credible than Henry. This court "must be sensitive" to the circuit court's assessment of credibility, and we will uphold that factual determination unless clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305.

¶8 Trial counsel testified that she told Henry she would do her best for him in recommending a sentence but made him no promises and, in fact, "never" promises a defendant what a judge will do. Henry acknowledged telling the court at his plea hearing that he understood it was not bound by any recommendation and could sentence him to the maximum but that he thought everything was "worked out." He testified that he pled guilty only because his lawyer "promised" that if he cooperated and behaved himself he would get ten to twenty years.

¶9 The circuit court found that counsel, a twenty-year veteran of the public defender's office, was the more credible and made no promise of any kind to Henry. It flatly rejected Henry's claim that he had no reason to lie, noting Henry's admitted involvement in crimes exposing him to centuries in prison. The court termed "nonsense" Henry's alleged misunderstanding that it was not bound by any recommendations and "wishful thinking" that Henry's guilty pleas to such "despicable" conduct would net him only ten or twenty years. The circuit court's assessments are supported by the record and we will not disturb them. We agree with the court's conclusion that Henry established neither deficient performance nor prejudice, and conclude that his plea was knowing and voluntary.

¶10 We also reject Henry's claim that he merits resentencing due to an asserted ***Grady*** violation. A circuit court's obligation to consider sentencing guidelines and to indicate on the record that it had done so would not even apply. WISCONSIN STAT. § 973.017(2)(a) (2005-06) provided:

> **(2)** GENERAL REQUIREMENT. When a court makes a sentencing decision concerning a person convicted of a criminal offense committed on or after February 1, 2003, the court shall consider all of the following:
>
> (a) If the offense is a felony, the sentencing guidelines adopted by the sentencing commission under s. 973.30 or, if the sentencing commission has not adopted a guideline for the offense, any applicable temporary sentencing guideline adopted by the criminal penalties study committee created under 1997 Wisconsin Act 283.

The offenses in all of the seven counts to which Henry pled occurred before February 1, 2003. Further, Henry's offenses were violations of WIS. STAT. § 948.025(1), which was not a guideline offense.

¶11 Even if Henry were able to convince this court that WIS. STAT. § 948.025(1), repeated sexual assault of a child, embraces WIS. STAT. § 948.02(2), sexual assault of a child, it would be to no practical legal effect. There no longer are any sentencing guidelines. The legislature has repealed WIS. STAT. § 973.017(2)(a), *see* 2009 WIS. ACT 28, § 3386m (eff. July 1, 2009), and its repeal applies retroactively. ***State v. Barfell***, 2010 WI App 61, ¶9, 324 Wis. 2d 374, 782 N.W.2d 437. It thus is impossible to order Henry to be resentenced pursuant to a consideration of sentencing guidelines. *See* ***id.*** Error, if any, was harmless because it did not affect Henry's substantial rights. *See* ***State v. Sherman***, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500.

By the Court.—Judgments and order affirmed.

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