COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP341-CR **Cir. Ct. No. 2008CF4735**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL STEVEN PETERSDORFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN FRANKE and JEFFREY A. CONEN, Judges. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Michael Steven Petersdorff appeals from a judgment of conviction on one count of first-degree sexual assault of a child. Petersdorff also appeals from an order denying his motion for resentencing or, in

the alternative, for a ***Machner*** hearing regarding trial counsel's effectiveness.[1] Petersdorff contends he was sentenced on inaccurate information regarding his acceptance of responsibility and his risk of re-offense, or that trial counsel was ineffective for failing to offer the circuit court sufficient information on those two topics. We reject Petersdorff's contentions and affirm.

BACKGROUND

¶2 Eight-year-old M.A. told police that Petersdorff, who was her mother's boyfriend, would get drunk at a tavern below her home and come upstairs. He would call M.A. into her mother's room and make her stay there. M.A. reported that she would suck on Petersdorff's penis while he had his hands on her head and that Petersdorff would touch and lick "her private area." She reported that these touchings happened more than once. M.A. also told police that Petersdorff had taken naked photographs of her.

¶3 Petersdorff, who by this time was no longer in a relationship with M.A.'s mother, was arrested. When originally interviewed, he was asked to describe his relationship with M.A.'s mother and her children. He denied any sexual relationship with any of the children. He noted that he and M.A. had slept in the same bed or on the couch together on multiple occasions, though he denied there was anything sexual. He also recalled that there was one instance where M.A. came into the bathroom while he was showering and pulled back the shower curtain to tell Petersdorff she needed to use the toilet. Again, he denied any sexual contact with her.

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

¶4 When a detective told Petersdorff that M.A. had been interviewed the previous day, giving a detailed description of his alleged sex acts and telling police there were photos, Petersdorff again denied any sexual contact with M.A. He told police she was likely fabricating the allegations out of anger that he was not around anymore after his break-up with her mother. The detective then asked Petersdorff if he would submit to a "computer voice stress analyzer" test. Petersdorff agreed.

¶5 The test results showed that Petersdorff was being deceptive. When confronted with these results, Petersdorff recalled one event where, passed out drunk, he awoke to find M.A. performing oral sex on him. When he realized what was happening, he pulled away from her, though he did ejaculate. Petersdorff also admitted that he may have taken a picture of M.A. while she was performing the oral sex.

¶6 Consequently, Petersdorff was charged with first-degree sexual assault of a child by sexual intercourse with a child younger than twelve, a Class B felony with a mandatory minimum sentence of twenty-five years' imprisonment. Pursuant to a plea agreement, the State amended the charge to first-degree sexual assault by sexual contact with a child younger than thirteen—still a Class B felony but with no mandatory minimum sentence.

¶7 When the circuit court got to the part of the plea colloquy where it had to satisfy itself that there was a "sufficient factual basis" for the plea, it asked the State what constituted that basis. The State indicated that it was relying on the facts in the complaint. The circuit court responded that the complaint contained "somewhat different versions" of what happened. Specifically, M.A.'s allegations that on multiple occasions, she would suck Petersdorff's penis and he would touch

or lick her vagina were different from Petersdorff's account of a single instance of awakening to find M.A. performing oral sex on him. The circuit court attempted to clarify whether it was true that Petersdorff had contact with her vagina, and she with his penis, on multiple occasions. Petersdorff denied ever touching M.A. and said she had only had contact with his penis during that single incident.

¶8 The circuit court intimated that it did not entirely believe Petersdorff's version as set forth in the criminal complaint, but noted that Petersdorff's "statement" lacked any indication of intent.[2] When the circuit court made this observation, Petersdorff denied any intent. The circuit court went on to explain that it only wanted to know what Petersdorff was admitting, because "I'm not entirely sure whether this admission might technically be a crime." The circuit court adjourned in order for trial counsel to consult with Petersdorff, noting that the plea was coming awfully close to an ***Alford*** plea.[3]

¶9 When the hearing resumed, trial counsel explained that Petersdorff was admitting that the incident where M.A. performed fellatio did happen, that he realized what was happening, and that he did ejaculate, which in counsel's estimation would allow the inference that Petersdorff intended sexual gratification. The circuit court finished the colloquy and noted that Petersdorff was not

[2] "Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony." WIS. STAT. § 948.02(1)(e) (2009-10). The definitions of "sexual contact" require intentional touching. *See* WIS. STAT. § 948.01(5) (2009-10).

[3] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). An ***Alford*** plea is a plea wherein a defendant pleads guilty but maintains his or her innocence. *See* ***State v. Garcia***, 192 Wis. 2d 845, 851 n.1, 532 N.W.2d 111 (1995).

admitting any particular factual basis but, nevertheless, the circuit court was satisfied that a sufficient factual basis existed.[4]

¶10 At sentencing, the circuit court imposed a sentence of twenty years' initial confinement and fourteen years' extended supervision out of a total possible sixty years' imprisonment. Petersdorff sought resentencing, contending that trial counsel had not adequately counseled him on the plea process or adequately prepared him for sentencing, resulting in the circuit court misunderstanding "his level of accepting responsibility." He also contended that the circuit court, which made a few comments regarding whether Petersdorff was a pedophile and whether he might re-offend, had sentenced him on erroneous assumptions about either fact.

¶11 Petersdorff alleged ineffective assistance of trial counsel for a purported failure to prepare him to answer the circuit court's questions during the colloquy, or to make appropriate sentencing arguments, sufficient for the circuit court to understand that Petersdorff was accepting responsibility and was at a low risk to re-offend. The circuit court rejected both arguments, adopting the State's response brief in its entirety. Petersdorff appeals.

DISCUSSION

¶12 On appeal, Petersdorff asserts that his sentence is based on inaccurate information. Specifically, he contends that the circuit court "was given an inaccurate account of [his] minimization of his guilt" and the sentence is based

[4] The State advised the circuit court that it had obtained the camera that M.A. said Petersdorff had used, and that there were approximately eight inappropriate photographs of M.A.. As part of the plea agreement, the State was not pursuing child pornography charges; the point was that the photographs tended to corroborate M.A.'s allegations.

on "incomplete" information about whether he is a pedophile and what his risk of re-offense is. He contends that there is no harmless error from either deficiency. In the alternative, Petersdorff asserts that he is entitled to an evidentiary hearing on whether he received ineffective assistance of counsel.

¶13 "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo." ***Id.*** A defendant who seeks resentencing because of the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied upon the inaccurate information in the sentencing. ***Id.***, ¶26.

¶14 The first alleged inaccuracy that Petersdorff complains of is that the circuit court had an inaccurate account of his minimization of his guilt. Specifically, he complains that the circuit court:

> was not told that, within a very short time of those denials, after cooperating with a voice-stress-analyzing test, Mr. Petersdorff retreated from his denials by admitting he had sexual contact resulting in his ejaculating, that he may have photographed the victim performing sexual activity, and that he may have engaged in additional sexual activity that he did not recall.

¶15 Petersdorff vastly overstates the significance of his self-incriminating "admission" to police. When he was told of the reason for his arrest, he denied any sexual activity with M.A. When told of her specific allegations against him, Petersdorff denied them and accused M.A. of making them up out of spite. When told the stress test suggested Petersdorff was being deceptive, he conceded an instance of sexual contact for which he asserted he bore no

responsibility because he woke up to find it happening.[5] Petersdorff did not even fully admit taking photographs, admitting only that he *might* have taken one.

¶16 Petersdorff also contends that he was "confused and scared" at the plea hearing because he was uncertain whether admitting additional acts would affect the plea agreement, and trial counsel told him only to admit the facts in the complaint. He also contends that if he had been properly counseled prior to the plea hearing, he would have been able to explain to the circuit court that all of the allegations against him fit two categories: the acts he admitted because he remembered them, and those he does not remember but which he admitted because M.A. would not have lied about them. Petersdorff asserts there are no allegations that he was "actively denying."[6]

¶17 However, these contentions do not help Petersdorff. He does not identify where he ever did take direct responsibility for even the single incident he could recall. His idea of taking responsibility was simply to admit that he remembered waking to M.A. and remembered ejaculating, while denying any memory of "putting her down there" or asking her to perform oral sex. There is

[5] At the plea hearing, Petersdorff told the circuit court that he probably ejaculated because he had not "got laid in a while."

[6] At sentencing, Petersdorff addressed the circuit court, stating:

> And I hate to blame this on alcohol because it's not the right thing to do, but I do blame this action on alcohol. Everything I've ever done wrong in my whole life was related to alcohol. I had to quit drinking because this system made me quit drinking with the DUI. I did not personally want to quit drinking. Now it took something like this for me to actually hit rock bottom.

In light of Petersdorff's evident belief that alcohol was the main culprit, it is not clear what Petersdorff believes his trial attorney should have counseled him to say.

no classification of acts for which Petersdorff accepts responsibility because he recognizes that he committed them—only acts he recalls as having happened, and acts he cannot recall because he was drunk.[7] We conclude that the circuit court was not presented with inaccurate information about Petersdorff's acceptance of responsibility.[8]

¶18 The second inaccuracy that Petersdorff complains of relates to the circuit court's risk assessment. The circuit court noted that predicting risk of re-offense was very difficult, and wondered aloud whether Petersdorff was a pedophile. Petersdorff thus contends that "it cannot be doubted that [the circuit court's] expressed concerns about pedophilia and risk to re-offend were also part of its sentencing rationale" and that this information also violated ***Tiepelman***. *See* ***id.***, 291 Wis. 2d 179, ¶14.

¶19 Petersdorff reads too much into the circuit court's sentencing comments. Its first observation was on risk related to alcohol, not pedophilia:

> Predicting risk that you present of re[-]offending is very difficult. To the extent that alcohol is a part of the problem then it will depend on whether you solve that problem or not, and no matter how genuine your desire and belief is that you're going to tackle that problem we see too many people try and fail. I don't have any great confidence that Mr. Petersdorff is going to be able to do it and that it won't lead to any more trouble.

[7] With regard to M.A.'s other allegations that Petersdorff touched or licked her vaginal area, Petersdorff told police that if she said it happened "then it might have happened since he was so intoxicated."

[8] We observe that at sentencing, the circuit court did agree that Petersdorff should get "some" credit for accepting responsibility and sparing M.A. a trial, but noted that such acceptance was "extremely limited and not honest."

¶20 The circuit court then wondered about the possible role of pedophilia, commenting, "Are you a pedophile? I don't know. You say you're not. You've engaged in conduct that certainly raises the specter…. [I]f that is the motivation, you present a significant if not very high risk of re[-]offending[.]"

¶21 But the circuit court was fully aware that it could not fully determine the level of risk that Petersdorff presented, commenting, "I don't have a way of assigning a risk factor here…. I have in mind lesser, medium, or high. I don't know what it is. What I know is there is a risk[.]"

¶22 Petersdorff contends that trial counsel should have introduced expert testimony, which Petersdorff offered with his postconviction motion, to show that he was at a low risk to re-offend. However, the circuit court had presumed a low risk but concluded even that was troubling. It stated, "If there is even a small chance that you would victimize a child like this again, it's worthy of great consideration." We thus discern no inaccuracy relating to risk. Beyond that, Petersdorff appears to concede that the circuit court considered appropriate sentencing factors, determining "that the length of the sentence was properly driven by punishment and the need to deter others."

¶23 Based upon the foregoing, there would be no need for an evidentiary hearing regarding trial counsel's performance: because we discern no error, counsel was not deficient, and there was no prejudice to Petersdorff. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (defendant must show deficient performance and prejudice). The circuit court properly denied the motion for a ***Machner*** hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (circuit court may deny hearing if record conclusively demonstrates no entitlement to relief).

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).