**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

March 19, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 96-2936-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DUANE R. BULL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and orders of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Duane R. Bull appeals from a judgment of conviction and sentence entered after his plea of no contest to eight counts of second-degree sexual assault of a child, contrary to § 948.02 (2), STATS., and two counts of sexual exploitation of a child, contrary to § 948.05 (1)(b), STATS. Bull also appeals from orders of the circuit court denying a post-conviction motion to

withdraw his plea. Bull claims that he did not understand certain consequences of the no contest plea, that the representation provided by his trial counsel was inadequate and that the sentence he received was unduly harsh. We disagree and affirm.

The record reveals that Bull sexually assaulted his thirteen-year-old step-daughter on approximately seventy-five occasions over a period of eleven months. He employed a variety of manipulative schemes to convince the victim to engage in sexual acts. Among other things he told the victim that her mother was dying; that she (the daughter) was legally married to Bull; and that the State required her to have sexual relations with Bull.

Bull was prosecuted in both Dane and Columbia counties. He was convicted and received a fifty-year prison sentence for the assaults that occurred in Columbia County. Following his plea of no contest in the present matter (regarding assaults that occurred in Dane County), the circuit court sentenced Bull to an additional sixty years in prison, running consecutively to the Columbia County sentence. The circuit court subsequently denied Bull's post-conviction motion to withdraw his no contest plea, and this appeal ensued.

A post-conviction motion to withdraw a plea may be granted at the trial court's discretion when necessary to correct a manifest injustice. ***State v. Duychak***, 133 Wis.2d 307, 312, 395 N.W.2d 795, 798 (Ct. App. 1986). A plea that is not knowingly, voluntarily or intelligently entered creates a manifest injustice. ***State v. Bangert***, 131 Wis.2d 246, 257, 389 N.W.2d 12, 19 (1986). A trial court's decision regarding withdrawal of a plea will not be upset on review absent an erroneous exercise of discretion, ***State v. Harrell***, 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994), and appellate review is limited to

determining whether the court examined the relevant facts, applied a proper legal standard and used a rational process to reach a reasonable decision. ***State v. Rodgers,*** 203 Wis.2d 83, 91, 552 N.W.2d 123, 126-27 (Ct. App.1996).

Bull alleges he did not understand that a no contest plea constitutes an admission of the facts set forth in the criminal complaint. He states that he assumed he could contest certain facts at sentencing, for purposes of obtaining a more lenient sentence. Bull contends that misunderstanding the consequences of his plea created a manifest injustice warranting its postconviction withdrawal and, consequently, that the circuit court erroneously exercised its discretion by denying such relief. We disagree.

The record is replete with evidence that Bull understood the sentencing consequences of his plea. Bull testified at the postconviction hearing that he knew the court was free to impose the maximum sentence, and that there was no guarantee against that occurring. Bull completed and signed a plea questionnaire stating that he had completed high school, he understood his rights, and he understood that he was subject to a maximum penalty on his plea of $100,000 fine and 100 years in jail. Bull acknowledged again at the plea hearing that he understood the rights he was waiving and the consequences of his plea. In fact, at the plea hearing Bull specifically acknowledged his understanding that for purposes of sentencing the court would consider *not only* the charges to which he pleaded no contest, but also certain charges that had been dismissed and were being "read in."

We note that Bull never attempted to contest the facts of the complaint at sentencing. Bull was afforded an opportunity to speak on his own behalf at the sentencing, he did so at length, and not once during that time did he

or his attorney attempt to contest the complaint's factual allegations. Notwithstanding his alleged misunderstanding, therefore Bull's argument falls short as there is no indication that the plea *actually* precluded him from contesting the facts. In light of the foregoing, we do not find the existence of a manifest injustice and thus we cannot say that the court erroneously exercised its discretion by denying Bull's motion to withdraw his plea.

Next Bull sets forth several arguments regarding the alleged ineffectiveness of his trial counsel. He contends that his counsel failed to properly advise him of the consequences of his plea; that counsel failed to contest certain statements Bull made to the police; and that counsel failed to address a venue issue at the proper time.

Our analysis begins with the test for ineffective assistance of counsel articulated in ***Strickland v. Washington,*** 466 U.S. 668 (1984). *See* ***State v. Sanchez,*** 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (adopting the ***Strickland*** test for claims under the Wisconsin Constitution). Under ***Strickland***, two elements are necessary to establish ineffective assistance of counsel: deficient performance by the attorney and prejudice to the defendant. ***Strickland***, 466 U.S. at 687; *see* ***State v. Robinson***, 177 Wis.2d 46, 55, 501 N.W.2d 831, 835 (Ct. App. 1993). The defendant bears the burden of proving both elements. ***Sanchez***, 201 Wis.2d at 223, 548 N.W.2d at 70. Deficient performance is that falling below an objective standard of reasonableness. ***Robinson***, 177 Wis.2d at 56, 501 N.W.2d at 835. Prejudice to the defendant exists if counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 55, 501 N.W.2d at 835. And because representation is not constitutionally ineffective unless both elements of the test are satisfied, we may dispose of such claims where the defendant fails to establish either element. ***State v. Vinson***, 183 Wis.2d 297,

304, 515 N.W.2d 314, 317 (Ct. App. 1994). Review is a mixed question of law and fact. ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76.

We take each of Bull's contentions in turn. First, he argues ineffectiveness arising from counsel's alleged failure to advise regarding the consequences of the no-contest plea. In light of our previous discussion on this same issue, we find neither deficient performance by the trial counsel nor prejudice to Bull.

Bull's second argument addresses his counsel's alleged failure to move for the suppression of statements Bull made to the police. Bull has not clearly identified the statements in question, nor has he articulated any legal basis upon which the statements should have been suppressed. Because this allegation is insufficiently developed and unsupported by the record, we decline to review it. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995).

Finally, Bull contends that counsel was ineffective because he waited until sentencing to address an alleged issue of venue. The issue in question involved the location of a motel at which certain of the sexual assaults took place. The victim recalled the name of a motel in Sauk County, while Bull stated the incidents occurred at a motel in Dane County. Challenging this discrepancy would have required the testimony of the victim—something Bull would not permit. Throughout the proceedings Bull strictly instructed his counsel not to pursue any course of action requiring the victim's testimony. In light of Bull's position, we cannot conclude that the trial counsel's actions were unreasonable. *See* ***Strickland,*** 466 U.S. at 691.

Bull argues next that his sentence should be modified because it is unduly harsh and because new factors justify a modification. We reject both arguments.

Bull contends that his sixty-year sentence, running consecutively to the fifty-year sentence in Columbia County, is grossly disproportionate to his crime, and therefore cruel and unusual in violation of the Eighth Amendment to the United States Constitution.[1] He asks this court to review the sentence using the tests set forth in ***Solem v. Helm***, 463 U.S. 277 (1983), and ***State v. Pratt,*** 36 Wis.2d 312, 153 N.W.2d 18 (1967). We need not address ***Solem***, as the Wisconsin Supreme Court has limited its application in this State to sentences of life imprisonment without parole. ***State v. Paske***, 163 Wis.2d 52, 70-71, 471 N.W.2d 55, 62-63 (1991). Under ***Pratt***, a sentence is constitutionally offensive only if it is so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people. ***Pratt***, 36 Wis.2d at 322, 153 N.W.2d at 22.

The sixty-year sentence Bull received in Dane County was far less than the potential maximum, which could have exceeded 100 years. Contrary to Bull's assertion, the circuit court did refer to sentencing guidelines, noting, "Mr. Bull literally goes off the sheet." The circuit court also observed, "this is probably one of the most aggravated examples of second degree sexual assault as could be portrayed." Addressing the issue of Bull's prior conviction and sentence in Columbia County, the court stated:

[1] The Eight Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

> I'm not satisfied that Dane County should in any way view the offenses in this county as a free ride ... he did it on at least twelve occasions in Dane County.... I can't permit that as a member of this community, and I can't permit that as someone who has been elected in this community to perform this task....

Sentencing is left to the trial court's discretion. ***Paske***, 163 Wis.2d at 70, 471 N.W.2d at 62. On review, we respect the strong presumption that the sentencing court acted reasonably. ***State v. Mosley***, 201 Wis.2d 36, 43, 547 N.W.2d 806, 809 (Ct. App. 1996). The sentencing court must consider the gravity of the offense, the character and rehabilitative needs of the defendant and the need to protect the public. ***Paske***, 163 Wis.2d at 62, 471 N.W.2d at 59. In this matter the circuit court discussed the horrifying effects Bull's behavior had on his young victim and the extent to which emotional scars will remain with her forever. The court also considered evidence that Bull was a repeat offender and a very poor candidate for rehabilitation. On this record we cannot conclude that the circuit court erroneously exercised its discretion, and we reject Bull's constitutional attack.

Bull also argues for sentence modification based upon the existence of a new factor, *i.e.,* his participation in a certain therapy program for sex offenders. For purposes of sentence modification, a "new factor" is something highly relevant to the imposition of sentence but not known to the trial judge at the time of sentencing. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). It is clear from the record that Bull's participation in therapy played no part whatever in the circuit court's sentencing determination. It is well established, moreover, that rehabilitation in prison does not constitute a new factor for purposes of sentence modification. ***State v. Wuensch***, 69 Wis.2d 467, 478, 230 N.W.2d 665, 671 (1975). We therefore reject this argument.

Bull also sets forth a "new factor" argument based upon his view that the circuit court departed impermissibly from the sentencing guidelines. This, too, must fail in light of our earlier discussion regarding the circuit court's appropriate exercise of discretion in sentencing.

*By the Court.*—Judgment and orders affirmed.

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