

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP993-CR

Cir. Ct. No. 2013CF136

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HEATHER L. STEINHARDT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County:
SANDY A. WILLIAMS, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Heather Steinhardt appeals the circuit court's order denying her motion for postconviction relief. Steinhardt was convicted of first-degree child sexual assault as party to a crime and failure to protect a child from

sexual assault. She challenges her convictions as multiplicitous in violation of the Double Jeopardy Clause. We affirm.

Background

¶2 The criminal complaint against Steinhardt was based on Steinhardt's involvement in the sexual assault of Steinhardt's minor daughter by the child's stepfather. More specifically, the complaint alleged that:

[T]hroughout the day on April 1, 2013, [the stepfather] had been prodding [Steinhardt] to allow him to have sexual intercourse with [the victim].

[Steinhardt] ... brought [the victim] into the bedroom that [Steinhardt] shared with [the stepfather] and sat with her on the bed.... [The stepfather] was prepared, lying on the bed under the covers.... [The stepfather] then told [the victim] to take off her clothes at which time [Steinhardt] remained on the bed while [the stepfather] engaged in digital penetration of [the victim], [the stepfather] had [the victim] engage in oral sex with him, and ultimately [the stepfather] had sexual intercourse with [the victim] placing his penis inside her vagina. [Steinhardt] stated she remained on the bed the whole time. [The stepfather] finished and [the victim] left the room to take a shower with [Steinhardt] following her into the bathroom.

¶3 As noted, based on these allegations the State charged Steinhardt with one count of first-degree child sexual assault as party to a crime and one count of failure to protect a child from sexual assault, both of which are violations of WIS. STAT. § 948.02.¹ Steinhardt pled no contest to both counts. The circuit

¹ Steinhardt was charged with a third count that is not at issue here. All references to the Wisconsin Statutes are to the 2011-12 version, the version in effect at the time of Steinhardt's crimes, unless otherwise noted.

court sentenced Steinhardt to a total of 22½ years of confinement plus 15 years of extended supervision on the two counts.

¶4 In her postconviction motion, Steinhardt argued that the two charges were multiplicitous and, therefore, that conviction on both counts violated the Double Jeopardy Clause. Steinhardt also argued ineffective assistance of counsel based on the allegation that her attorney failed to advise her of a double jeopardy violation. The State argued that Steinhardt’s plea waived or forfeited her double jeopardy claim and, regardless, the claim failed on its merits. The circuit court denied Steinhardt’s motion without an evidentiary hearing, concluding that Steinhardt’s double jeopardy claim failed on its merits.

Discussion

¶5 We begin with whether Steinhardt’s plea relinquished her right to direct review of her double jeopardy claim, meaning that the only possible route to relief would be ineffective assistance of counsel. “The general rule is that a guilty, no contest, or *Alford* plea ‘waives all nonjurisdictional defects, including constitutional claims[.]’” *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (quoted source omitted; footnote omitted). However, there is an exception in the double jeopardy context. Courts will consider the merits of a double jeopardy claim after a plea if the claim can be resolved “on the record as it existed at the time the defendant pled.” *Id.*, ¶38.

¶6 The parties appear to agree that the only pertinent information in the record at the time of Steinhardt’s plea was the complaint allegations. They dispute whether Steinhardt’s double jeopardy claim can be resolved based on those allegations or whether, instead, further factual development would be required to resolve the claim.

¶7 The parties' dispute is narrowed by a "reluctant[]" concession the State makes, namely, that the same criminal act cannot support more than one charge under WIS. STAT. § 948.02 because WIS. STAT. § 939.66(2p) provides that any violation of § 948.02 is an included offense of any other less or equally serious violation of § 948.02. That is, the State concedes that the same criminal act cannot support both a charge for child sexual assault and a charge for failure to protect under § 948.02.

¶8 Thus, the parties effectively agree that the question for multiplicity purposes is whether Steinhardt's involvement in the sexual assault was one continuous course of conduct or instead was a series of two or more distinct acts that were sufficiently different in time or nature. What this means for purposes of *Kelty* is that we must ask whether this question can be resolved based on the complaint allegations. We agree with the State that it cannot. The complaint is silent, for example, as to how much time passed during and between events. Accordingly, under *Kelty*, Steinhardt relinquished the right to direct review of her double jeopardy claim.

¶9 Steinhardt cites case law supporting the proposition that multiple sexual touchings do not always support multiple charges if there was an insufficient change in activity or insufficient passage of time. See *State v. Hirsch*, 140 Wis. 2d 468, 474-75, 410 N.W.2d 638 (Ct. App. 1987). Courts consider factors such as the passage of time or whether the defendant made a "new volitional departure," thus recommitting to criminal activity. See *State v. Church*, 223 Wis. 2d 641, 658, 589 N.W.2d 638 (Ct. App. 1998); *Hirsch*, 140 Wis. 2d at 473-75. However, those factors at most reinforce our conclusion that Steinhardt's double jeopardy claim cannot be resolved based on the complaint allegations

alone. We disagree with Steinhardt's apparent position that this case law shows that the charges against her were multiplicitous on the face of the complaint.

¶10 What remains is Steinhardt's ineffective assistance of counsel claim. In her briefing, Steinhardt says very little about this claim, but she maintains that she has not abandoned it. We choose to address it.

¶11 We agree with the State that, regardless of deficient performance, Steinhardt's postconviction motion failed to sufficiently allege prejudice to entitle her to a hearing under *State v. Bentley*, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). Steinhardt's only pertinent allegation was that, but for counsel's alleged failure to advise her of a double jeopardy issue, she would not have entered her plea. Such conclusory allegations are insufficient. *See id.* at 316; *see also id. generally* at 314-18.

¶12 Steinhardt's only response to the State's *Bentley* argument is that her conclusory allegations were enough because of the "obvious" nature of her double jeopardy claim. For reasons already stated, we disagree that the claim was obvious. While we do not detail the information here, the State correctly points out that the facts developed for purposes of sentencing support a conclusion that Steinhardt's convictions were *not* multiplicitous. Thus, without further allegations or explanation from Steinhardt, we fail to see how her ineffective assistance of counsel claim could have succeeded.

Conclusion

¶13 For the reasons stated above, we affirm the circuit court's order denying Steinhardt's motion for postconviction relief.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2013-14).

