COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1867-CR **Cir. Ct. No. 2014CF1704**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON M. AMATO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: WILLIAM E. HANRAHAN, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Brandon Amato appeals a judgment convicting him of one felony count of exposing genitals to a child and two misdemeanor counts of lewd and lascivious behavior. He also appeals an order denying his

postconviction motion for plea withdrawal. For the reasons discussed below, we reject the plea withdrawal and sentencing issues that Amato raises, and affirm.

BACKGROUND

¶2 The State initially charged Amato with two Class I felony counts of exposing genitals to a child based upon allegations that, after having made successful Facebook and Snapchat friend requests to two teenaged girls who had attended the school where Amato had taught the prior year, Amato on separate occasions sent each of the girls pictures of his penis and himself masturbating, with accompanying inappropriate messages soliciting sexual contact.

¶3 The State and Amato presented the court with a proposed plea agreement in which the State would move to dismiss and have read in one of the felony counts and add two misdemeanor counts of lewd and lascivious behavior; would refer Amato to a deferred prosecution program for first offenders and ask the court to withhold sentencing on the counts to which Amato pled; and, if Amato successfully completed the deferred prosecution program, would also move to dismiss the remaining felony count and recommend that the court adjudicate Amato guilty on only the misdemeanor counts, for which the parties would jointly recommend a sentence of time served.

¶4 The circuit court rejected the proposed plea deal. The court first noted that it was taken aback by the offer of deferred prosecution because, if the allegations in the complaint were true, Amato appeared to be a dangerous sex offender who had engaged in a series of personally invasive crimes. The court asked for additional input on why the proposed plea deal would be in the public interest, citing its discretion under ***State v. Conger***, 2010 WI 56, 325 Wis. 2d 664, 797 N.W.2d 341, to decide whether or not to accept a plea deal. After hearing

from the mother of one of the victims, as well as the State and Amato, the court concluded that the plea deal was not in the public interest. The court explained:

> All right. The part that I'm struggling with is the fact that working in the schools is his dream. That's what separates this from the drunkard on the street that exposes himself to a passerby. It's the manipulation that's involved here. It's the planning. It's the cognitive distortions that are involved that separate this from, if there is such a thing, the run-of-the-mill flasher, and against this backdrop, I can't—I can't find that this plea agreement is in the public interest.
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> If the defendant has committed these acts, he deserves to be convicted of crimes, and indeed the crimes that are charged seem to accurately reflect what he's involved himself in, and frankly, in terms of the time-served situation, I don't know how someone who engages in this thought process, that has this mindset to suspend all reality, if these allegations are to be believed, and somehow believes that teenage girls that he's worked with want to actually see pictures of his penis, it's that kind of mindset that crosses a great many social boundaries that I, based upon what's represented in the Criminal Complaint, I have no faith that a simple period of time, a short period of time in the First Offender's Program is going to reach deep enough to provide the framework necessary for the defendant to rehabilitate himself.
>
> Now as to the plea structure itself, I find that the pleas and convictions for the lewd and lascivious conduct I think are consistent with what's called for here. The holding in abeyance of the felony charge pending completion of the First Offender's Program you can do, you know, without having this case held open.…
>
> … [T]o be clear on the record as to what I'm doing is I'm finding that the present arrangement that you've entered into here is not in the public interest.…
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> ….
>
> ... What I'm saying is I would accept pleas to charges and convictions and proceed to sentencing [on the misdemeanors], and [allow the State to proceed as] the State believes is in the public interest, in terms of providing structure for the defendant to rehabilitate himself [on the felony count] ….

¶5 The parties then went off the record and had a conference with the circuit court in chambers. Following the conference, the court made additional comments in support of its decision. It stated:

> I look also to [WIS. STAT. § 972.13, which] talks about what the court shall do upon the acceptance of a plea.… [T]he statute says the court shall enter [a] judgment of conviction. Now, I know that we have this First Offender's Program that contemplates a different procedure, and routinely the courts in Dane County accept guilty pleas, and they disregard the "shall" part of that statute, and they allow individuals to engage in programming that's geared towards their rehabilitation. Now, although there is no statutory authority for such a program, … [a footnote in an opinion by the Wisconsin Supreme Court indicates] tacit acceptance of such a manner of handling these first-offender-referral kinds of things.
>
> In evaluating the State's stated reasons for wanting a plea and withholding adjudication on the felony, when I look at the idea of closure, I would be required under this plea agreement to hold open two convictions—that is for the lewd-and-lascivious-conduct behavior, two serious sex crimes—for up to about two years ....
>
> Now, every day that those cases are pending, I don't think it provides closure. I think that every day that these cases are pending provides uncertainty for the victims and their families and for the defendant as well. I know that the victims and their families want to get on with their lives, and I'm certain that the defendant wants to begin the process of rehabilitating himself and earning back the trust of not only the victims here but the families and those who care about him as well. So that's where my rejecting the plea negotiations came in.
>
> That—I believe that if the State wants to enter into some sort of agreement whereby they withhold an adjudication or prosecution of the defendant on the felony charge, I think … that they can do that … by a contractual arrangement with the defendant, and then I would fully expect to proceed to … a plea and sentencing on the lewd-and-lascivious-conduct charges … but I'm not inclined to keep all these charges open during that time period. It is a cloud of uncertainty that hovers over all.

> So I understand that the parties may need more time to consult and to speak about this, and I certainly respect that, and I understand that, and I think that it's appropriate.

¶6 The parties returned to court four days later with a revised plea agreement. Under the new deal, after the court accepted Amato's pleas to three of the charges the State would move to dismiss one of the originally charged felonies; Amato would enter pleas to the other originally charged felony and the two additional misdemeanor counts of lewd and lascivious behavior in the amended complaint; the matter would proceed directly to sentencing on all three charges without a PSI; and the parties would jointly recommend that the court place Amato on concurrent two-year terms of probation for each count, with a number of social media restrictions and conditions related to AODA and sexual offender assessment and potential treatment, but no conditional jail time. The State would further request that the judgment of conviction include a special disposition under WIS. STAT. § 973.015 (2013-14), allowing the felony conviction to be automatically expunged if Amato successfully completed his terms of probation, while Amato agreed to not seek expungement of the two misdemeanor convictions.

¶7 Before accepting Amato's pleas, the circuit court conducted a standard plea colloquy to assure itself that Amato understood the nature of the charges and penalties he was facing, including specifically advising Amato that the court was not required to follow any sentencing recommendations from the parties. The court then heard from the mothers of both victims, as well as the State, defense counsel, and Amato himself, before proceeding to sentencing at the same hearing.

¶8 As to the severity of the offenses, the court emphasized that Amato had abused his position of authority and public trust as a teacher, and also noted that Amato's conduct could have been charged as an even more serious felony of child enticement. Although the court observed that Amato had no prior criminal history and had more "going for [him]" than the typical defendant in terms of education and employment potential, and the court also gave Amato credit for admitting and accepting responsibility for his conduct, the court expressed considerable concern about Amato's "complete lack of self-awareness" that stemmed from more than just his use of alcohol, and the "distortions in [Amato's] brain that somehow gave [him] the go-ahead, somehow told [him] that it was all right, that somehow that [the victims] wanted to see pictures of [Amato] under those circumstances" and led him to take the risk of crossing societal boundaries.

¶9 The court then withheld sentence on each of the three counts, subject to concurrent two-year terms of probation, with the felony count being eligible for expungement, as jointly requested by the parties. However, the court also imposed six months of conditional jail time on one of the misdemeanor counts, a portion of which the court subsequently stayed pending appeal.

¶10 Amato filed a postconviction motion seeking plea withdrawal on the ground that his plea was involuntary because the circuit court had impermissibly injected itself into plea negotiations between the parties. Alternatively, Amato sought resentencing or sentence modification on the grounds that defense counsel had provided ineffective assistance by not requesting a PSI and/or that the circuit court had erroneously exercised its discretion by imposing conditional jail time without ordering a PSI and by denying a postconviction request to modify the sentence to allow the conditional jail time to be served under electronic

monitoring. The circuit court denied the postconviction motion without holding an evidentiary hearing, and Amato now raises the same issues on appeal.

STANDARD OF REVIEW

¶11 In order to obtain a hearing on a postconviction motion raising a claim of an involuntary plea or ineffective assistance of counsel, a defendant must allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶2, 9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required when the defendant presents only conclusory allegations or when the record conclusively demonstrates, as a matter of law, that the defendant is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

¶12 In order to warrant relief on a plea withdrawal claim, the alleged facts, if true, would need to establish the existence of a manifest injustice. *See generally* ***State v. Hunter***, 2005 WI App 5, ¶5, 278 Wis. 2d 419, 692 N.W.2d 256 (WI App 2004). Regarding a claim of ineffective assistance of counsel, the alleged facts would need to establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. *See generally* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

¶13 A claim that the circuit court erroneously exercised its sentencing discretion is based solely upon the record, and can therefore be decided without an evidentiary hearing. We afford discretionary sentencing determinations a strong presumption of reasonableness because the circuit court is in the best position to evaluate the relevant factors and the demeanor of the defendant. ***State v. Klubertanz***, 2006 WI App 71, ¶20, 291 Wis. 2d 751, 713 N.W.2d 116. Therefore, in order to demonstrate a misuse of sentencing discretion, a defendant generally

must show that the record contains an unreasonable or unjustifiable basis for the sentence imposed. ***State v. Schreiber***, 2002 WI App 75, ¶9, 251 Wis. 2d 690, 642 N.W.2d 621.

DISCUSSION

Plea Withdrawal

¶14 Wisconsin has adopted a bright-line rule that judicial participation in plea negotiations before an agreement has been reached is conclusively presumed to render the negotiated plea involuntary. ***State v. (Corey) Williams***, 2003 WI App 116, ¶16, 265 Wis. 2d 229, 666 N.W.2d 58. We have described "participation in plea negotiations" as directing the parties toward a particular outcome or providing input to the parties about what the court would consider to be an appropriate disposition of the charges. *See* ***Hunter***, 278 Wis. 2d 419, ¶¶10-12. However, before permitting a prosecutor to dismiss or reduce charges pursuant to a plea agreement that has been independently reached between a defendant and the State, a circuit court is required to determine that any proposed amendments still fit the crime and are in the public interest. *See generally* ***Conger***, 325 Wis. 2d 664.

¶15 Amato contends that, in the course of explaining its determination that the first proposed plea agreement in this case was contrary to the public interest, the circuit court crossed the line into directing the parties toward a particular disposition of the case. We disagree.

¶16 Of course the rejection of a proposed plea agreement will, by necessity, always have an influence on future plea negotiations because it eliminates, as a potential disposition, the resolution the parties had already agreed

on. However, the circuit court's comments here did not direct the parties toward a particular alternative disposition. Indeed, the court did not make suggestions, much less suggest the ultimate resolution agreed to by the parties.

¶17 Rather, the court concluded that it would not be in the public interest to both defer prosecution on one of the original felonies and delay adjudication on two misdemeanors that the parties were proposing to substitute for the other felony. The court's additional indication that it would accept the proposed deferred prosecution on one of the felonies and dismissal of the other felony if there were immediate adjudication on the proposed misdemeanor charges merely served to clarify what it was about the proposed adjudications that the court found to be against public policy. In other words, we are satisfied that the court's comments were part and parcel of its explanation as to what it found unacceptable in terms of public policy. We therefore conclude that whatever influence the court's public policy determination had upon subsequent plea negotiations did not amount to judicial "participation" in those negotiations.

Ineffective Assistance Of Counsel

¶18 We turn next to Amato's contention that counsel provided ineffective assistance by failing to request a PSI. Although the circuit court did not hold an evidentiary hearing, for the purposes of this appeal we accept as true Amato's allegations that: (1) trial counsel would testify that it is not his practice to request a PSI when there is a joint sentencing recommendation because such recommendations are usually adopted and could be undermined by another opinion, and (2) it is unlikely that a PSI would have recommended conditional jail time because Amato's probation agent would testify that jail time would be unlikely to further Amato's rehabilitative goals.

¶19 First, it is well within professional norms to proceed directly to sentencing without requesting a PSI when the parties plan to make a joint recommendation. That is particularly true when the recommendation is to be for probation, leaving more potential downside than upside to obtaining an additional opinion.

¶20 Second, there is no reasonable probability that a probation agent's opinion about the effect that conditional jail time would have on meeting Amato's rehabilitative needs would have affected the circuit court's decision. The court explicitly stated at the time of sentencing that not incarcerating Amato would "send the wrong message to all that occupy a position of trust," and that "[s]ix months in jail is minimally adequate to provide punishment." The court reiterated at the postconviction hearing that the conditional jail time it had imposed was not strictly about Amato's rehabilitative needs or the need to protect the public, but rather about punishment and creating a sense that justice was actually served. Moreover, Amato has not alleged any mitigating factors about the seriousness of the offense that could have been included in the PSI that would have undermined the circuit court's view that six months of jail time was necessary to punish Amato for his offenses.

Sentencing Discretion

¶21 Finally, we see no erroneous exercise of discretion in the circuit court's failure to order a PSI or its refusal to modify the conditional jail time to home detention. The court plainly addressed the relevant sentencing factors and explained their application to the facts of this case.

By the Court.—Judgment and order affirmed.

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