COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP145-CR **Cir. Ct. No. 2014CF5595**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON JOHN MATTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Jason John Matter appeals a judgment of conviction entered upon his guilty pleas to one count of using a computer to facilitate a child sex crime and one count of second-degree sexual assault of a child. He also appeals an order denying his postconviction motion for

resentencing or sentence modification. He claims that his trial counsel was ineffective at sentencing and that the circuit court erroneously exercised its sentencing discretion. We reject his claims and affirm.

BACKGROUND

¶2 In early October 2014, Matter, then thirty-three years old, used a computer to exchange sexually explicit text messages and graphic images with G.S., born October 16, 2001. On October 15, 2014, Matter and G.S. discussed her approaching thirteenth birthday, and Matter suggested taking photographs while they "do this" so he could share them with a friend. A few days later, Matter drove to meet G.S., brought her to an address in Milwaukee County, Wisconsin, and had sexual intercourse with her. Matter thereafter sent more lewd images to G.S., then expressed suspicion that her parents had seized her phone. Satisfied that his suspicions were justified, he sent obscene messages to one of her online accounts describing in graphic terms the sexual behavior of "your daughter."

¶3 Police subsequently arrested Matter. He admitted sending text messages to G.S. about having sex, and he admitted having sexual intercourse with her knowing she was thirteen years old.

¶4 The State charged Matter with using a computer to facilitate a child sex crime and with second-degree sexual assault of a child. *See* WIS. STAT. §§ 948.075(1r), 948.02(2) (2013-14).[1] He decided to accept a plea bargain in which he agreed to plead guilty as charged, and the State agreed to recommend

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

concurrent sentences of seven-to-nine years of initial confinement and seven years of extended supervision. The circuit court accepted Matter's guilty pleas and ordered a presentence investigation report (PSI).

¶5 At sentencing, the State made the promised recommendation. The author of the PSI recommended a total of sixteen years of initial confinement and nine-to-ten years of extended supervision. Matter recommended an aggregate term of approximately five years of initial confinement along with extended supervision of a length that Matter did not specify. The circuit court rejected the recommendations and imposed two consecutive eighteen-year terms of imprisonment, each bifurcated as twelve years of initial confinement and six years of extended supervision.

¶6 Matter moved for resentencing, alleging trial counsel was ineffective for failing to provide the sentencing court with a copy of Matter's psychological assessment. He explained that Dr. Charles Lodl prepared the assessment at the request of a lawyer who represented Matter in Waukesha County proceedings that also arose out of his interaction with G.S. He argued that Lodl's report, which Matter submitted with his motion, constituted mitigating evidence that would have resulted in a shorter period of initial confinement. Matter alternatively sought sentence modification, arguing that the circuit court erroneously exercised its sentencing discretion by imposing an aggregate twenty-four-year term of initial confinement in light of various mitigating factors. The circuit court rejected the claims without a hearing, and this appeal followed.

DISCUSSION

¶7 We begin with Matter's claim of ineffective assistance of counsel. To prevail on such a claim, a defendant must demonstrate that counsel's performance was deficient and the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel's actions or omissions were "professionally unreasonable." *See* ***id.*** at 691. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). A court may start its review by examining either of the two ***Strickland*** prongs and, if a defendant fails to satisfy one component of the analysis, the court need not consider the other. *See* ***id.***, 466 U.S. at 697.

¶8 A defendant who alleges ineffective assistance of counsel must seek to preserve counsel's testimony at a postconviction hearing, *see* ***State v. Curtis***, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998), but a defendant is not automatically entitled to a hearing upon filing a postconviction motion. A circuit court must grant a hearing only if the postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether the allegations necessitate a hearing presents another question of law for our independent review. *See* ***id.*** If the defendant is not entitled to a hearing—either because the defendant does not make sufficient allegations that, if true, entitle him or her to relief, or the allegations are merely conclusory, or the record conclusively

shows that the defendant is not entitled to relief—the circuit court has discretion to deny a postconviction motion without a hearing. *See* ***id.*** We review a circuit court's discretionary decisions with deference. *See* ***id.***

¶9 In this appeal, Matter asserts that his trial counsel was ineffective for failing to submit an allegedly mitigating psychological report to the sentencing court. The claim must fail because Matter's postconviction motion was not sufficient to satisfy either prong of the ***Strickland*** test.

¶10 First, the motion did not demonstrate any deficiency. Although the State does not dispute Matter's implicit contention that trial counsel received the psychological report before the April 2015 sentencing hearing, nothing in the motion would support such a position. Rather, the motion recited:

> [o]n March 30, 2015, Dr. Lodl drafted a report entitled 'Psychological Eva[lu]ation Report' which contained the results of his examination of Mr. Matter and the specific tests administered to him. Dr. Lodl provided the report to [Matter's Waukesha lawyer] who in turn provided the report to trial counsel in this matter.

¶11 We assume that postconviction counsel carefully crafted Matter's motion "to push his arguments as far as the facts allowed." *See* ***State v. Burton***, 2013 WI 61, ¶63, 349 Wis. 2d 1, 832 N.W.2d 611. Postconviction counsel's careful language here does not state that Matter or his Waukesha County lawyer provided Milwaukee counsel with Lodl's report before sentencing. Accordingly, the postconviction motion failed to demonstrate that counsel performed deficiently by not advising the circuit court about the report. *See* ***State v. Jones***, 2010 WI App 133, ¶33, 329 Wis. 2d 498, 791 N.W.2d 390 (counsel not deficient for failing to make use of information that defendant knew about and failed to disclose).

¶12 Assuming for the sake of argument only that the postconviction motion in some way alleged trial counsel's possession of Lodl's report at the time of sentencing, Matter fails to show he was prejudiced by counsel's failure to present the report to the circuit court. Matter contends he lost the benefit of mitigating evidence because the report states: (1) his "rehabilitative needs are such that he could be treated in the community"; (2) he "does not meet the criteria for any sexual disorder"; and (3) he "present[ed] a low risk to reoffend." We conclude that Matter was not prejudiced by the alleged deficiency because the report is not entirely favorable, and because he does not show any likelihood that the report would have affected the circuit court's sentencing decision.

¶13 Matter emphasizes Lodl's opinion that he could be adequately treated in the community. In Matter's view, this opinion demonstrates that his treatment needs were of "a minimal nature." We disagree. Lodl's opinion reflects a professional conclusion that Matter required treatment, not that his treatment needs were "minimal." Moreover, Lodl's opinion about the availability of community-based treatment has little if any significance here because Matter faced a mandatory minimum of five years of initial confinement upon his conviction for using a computer to facilitate a child sex crime. *See* WIS. STAT. § 939.617(1). Thus, regardless of whether Matter could be treated in the community, the legislature has decreed that he must be confined.

¶14 Turning to Lodl's opinion that Matter did not have a sexual disorder, that opinion would not have aided him because the circuit court never determined that he had a sexual disorder. To be sure, the circuit court concluded that he had significant treatment needs, but the circuit court did not rely, expressly or by implication, on a diagnosis of sexual disorder to reach that conclusion. Rather, as the circuit court explained in its postconviction order, Matter chose a young girl to

satisfy his sexual desires, and, regardless of any professional assessments as to whether Matter "met the criteria for a sexual disorder, such as pedophilia, [his] actions gave the court pause." *Cf.* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (circuit court has an additional opportunity to explain its sentencing rationale in postconviction proceedings).

¶15 As to Lodl's opinion that Matter presented a low risk to reoffend, that opinion was echoed in the PSI. Lodl and the author of the PSI both used the Static-99-R as an instrument to measure Matter's risk of reoffending, and the score reported in the PSI is the same low score as that reported by Lodl. Matter argues that the results of other tests administered by Lodl would have added weight to the favorable risk assessment presented in the PSI and explained why Matter nonetheless committed his crimes. As the circuit court pointed out in its postconviction order, however, "Lodl stated in his report that the defendant's responses to the testing instruments indicated 'he approached this task in a way that may have led him to downplay problems.' [Lodl] also stated that the defendant may have been unwilling 'to disclose other psychological symptoms.'" (Ellipsis omitted.) The circuit court further observed that during the assessment Matter insisted he lacked deviant sexual interests, yet he had courted a twelve-year-old child. Therefore, in the circuit court's view, Lodl's risk assessment was not persuasive, given Matter's behavior and the caveats accompanying Lodl's conclusions. *See* ***State v. Slagoski***, 2001 WI App 112, ¶9, 244 Wis. 2d 49, 629 N.W.2d 50 (circuit court entitled to accept or disregard an expert's opinion as the court deems appropriate).

¶16 In sum, the circuit court determined in postconviction proceedings that Lodl's report would not have benefited Matter, given his criminal actions, the extent to which the report overlapped with other information presented at

sentencing, and the reasons to view Lodl's conclusions with caution. In light of the circuit court's determination, Matter fails to show he was prejudiced by the omission of the report from the sentencing proceedings. *See* ***State v. Giebel***, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995) (no prejudice from alleged deficiency where circuit court found it would not have given a different sentence had trial counsel taken different action). Accordingly, the circuit court properly rejected his ineffective assistance of counsel claim without a hearing.[2] *See* ***Allen***, 274 Wis. 2d 568, ¶9.

¶17 We turn to Matter's contention that the circuit court erroneously exercised its sentencing discretion. The claim lacks merit.

¶18 A circuit court has broad sentencing discretion. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. We will affirm an exercise of sentencing discretion so long as "the facts of record indicate that the [circuit] court 'engaged in a process of reasoning based on legally relevant factors.'" ***Id.*** (citation omitted). That process of reasoning involves choosing the sentencing objectives, which may include "the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the circuit court must consider

[2] Matter argues the circuit court might have reached a different conclusion about the effectiveness of his trial counsel if he had been granted a hearing, because at such a hearing "Lodl would have been able to expand upon his report and answer questions regarding it. His demeanor credibility and v[e]racity as a witness similarly would have breathed life into the words written into his report." Matter fails to explain why Lodl's testimony would have been relevant to the question of whether trial counsel was ineffective for not presenting Lodl's report. We decline to develop an argument for him. *See* ***Estrada v. State***, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999).

the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of factors concerning the defendant, the offense, and the community. *See* ***id.*** We search the record for reasons to sustain the circuit court's exercise of sentencing discretion. *See* ***Odom***, 294 Wis. 2d 844, ¶8.

¶19 Matter complains that the circuit court imposed an aggregate twenty-four years of initial confinement without explaining why an analysis of the sentencing factors required that exact number of years rather than the seven-to-nine years recommended by the State or the sixteen years recommended by the author of the PSI. Matter is not entitled to this degree of specificity.

¶20 A circuit court properly exercises its sentencing discretion when it makes a statement on the record detailing its reasons for "'selecting the particular sentence imposed.'" ***Gallion***, 270 Wis. 2d 535, ¶5 n.1 (citation omitted). The circuit court is not, however:

> require[d] ... to provide an explanation for the precise number of years chosen. ***McCleary*** [***v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971)] mandates that the court's sentencing discretion be exercised on a "rational and explainable basis[,]" and such discretion "must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards."

State v. Taylor, 2006 WI 22, ¶30, 289 Wis. 2d 34, 710 N.W.2d 466 (two set of brackets added). The circuit court's exercise of discretion here satisfied the governing standard.

¶21 The circuit court identified the sentencing objective, stating "the most appropriate goal for this sentence would be punishment." The circuit court

went on to discuss with specificity the relevant factors it considered when choosing an appropriate disposition.

¶22 The circuit court considered the gravity of the offenses, focusing on the effect they had on the victim and her family. The circuit court found that the crimes were "vicious and aggravated" because Matter took advantage of G.S. and robbed her "of her life experiences as an adolescent." Further aggravating Matter's crimes, in the circuit court's view, was the "vile, disgusting, and despicable language he used when he thought he was responding to the victim's parents." The court stated that Matter had "left a legacy of sadness behind for [his] own self-gratification."

¶23 In considering Matter's character, the circuit court noted that, according to the PSI, Matter had "a calm demeanor," and could "adapt to his environment." The circuit court also acknowledged that Matter had only a minimal criminal history and that he was "an educated guy." The circuit court went on to point out that Matter committed his crimes despite his education and apparent sophistication, and the circuit court viewed with profound concern Matter's own characterization of his behavior as "a mistake." The circuit court expounded on this concern in postconviction proceedings, stating that "the court knows of no dictionary definition for 'mistake' that includes acts of intent of this nature. What was the defendant mistaken about?" *Cf.* ***Fuerst***, 181 Wis. 2d at 915.

¶24 The circuit court discussed the need to protect the public. The circuit court explained that the behavior at issue in this case reflected that Matter had "serious serious problems" requiring significant incarceration "to address [his treatment] needs [s]o this little girl can at least not have to look over her shoulder

or any little girls in this community have to look over their shoulders because Mr. Matter is not there. They don't have to be fearful of [this] one predator."

¶25 Matter insists that the circuit court's conclusions about the need to protect the public are undercut by the information that he posed a low risk to reoffend. Matter misunderstands the circuit court's remarks and rationale. The circuit court explained that Matter must be treated in a confined setting to ensure adequate punishment and to grant the public peace of mind flowing from the certainty that, while he receives treatment, children in the community will not be accessible to him.

¶26 Matter further argues that the circuit court placed too much weight on the gravity of the offense and not enough on his "productive status as a student, employee and supportive father and husband." The circuit court has discretion, however, to select the factors it views as significant to the sentencing decision and the weight to attach to those factors. *See* ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. While the circuit court weighed the factors it selected differently from the way that Matter would have preferred, that is not an erroneous exercise of discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 ("[O]ur inquiry is whether discretion was exercised, not whether it could have been exercised differently.").

¶27 The record shows that the circuit court considered the primary sentencing factors and selected the sentences it deemed necessary to meet the goal of adequately punishing Matter. In the circuit court's view, Matter's behavior was "repugnant," the messages he sent were "disgusting," and his sexual acts with the child were "outrageous." The circuit court concluded that Matter's actions were "completely out of order in a civilized society." Indeed, "[i]n our society, sexual

abuse of a child ranks among the most heinous crimes a person can commit." ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶80, 283 Wis. 2d 384, 700 N.W.2d 27 (Prosser, J., concurring). While the circuit court selected sentences that were more onerous than those recommended by the State and the author of the PSI, we cannot say that the circuit court's sentencing decision constituted an erroneous exercise of discretion, given the nature of Matter's crimes. *See* ***Prineas***, 316 Wis. 2d 414, ¶34. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).