COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2192-CR **Cir. Ct. No. 2014CF115**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG DONALD SPAUDE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: JAMES A. MORRISON, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Craig Spaude appeals a judgment convicting him of two counts of third-degree sexual assault and an order denying postconviction

relief. Spaude argues he is entitled to plea withdrawal because his trial counsel was ineffective for failing to move to suppress his confession. He also argues the circuit court erroneously exercised its sentencing discretion. We affirm.

BACKGROUND

¶2 Spaude was charged with two counts of second-degree sexual assault of a child, stemming from allegations of sexual intercourse on multiple occasions with a fourteen-year-old girl. According to the criminal complaint, Spaude admitted to police that he had sexual intercourse with the victim five times.

¶3 Spaude agreed to plead to reduced charges of third-degree sexual assault. In exchange, the State agreed to recommend five years' initial confinement and five years' extended supervision. The circuit court accepted the pleas after conducting a plea colloquy that included Spaude's admission that the facts alleged in the complaint were true. The court imposed a sentence consisting of ten years' initial confinement and ten years' extended supervision.

¶4 Spaude sought postconviction relief, seeking plea withdrawal based upon the alleged ineffective assistance of his trial counsel. Spaude argued he was in custody when the police questioned him, but the police did not advise him of his ***Miranda*** rights.[1] Spaude asserted his counsel was deficient for not moving to suppress his confession, which occurred during this questioning. Spaude also asserted that his counsel was ineffective because, after Spaude told his lawyer that the victim had made false accusations of sexual abuse, his counsel incorrectly told

[1] Referring to ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Spaude that evidence of those false accusations would be inadmissible at trial.[2] In the alternative, Spaude requested resentencing because the circuit court elevated the rehabilitative needs of the victim to the level of a primary sentencing factor. He also claimed the sentence was unduly harsh and unconscionable.

¶5 During a non-evidentiary postconviction hearing, the circuit court told Spaude's postconviction counsel that it had discussed a variety of sentencing factors at the time it imposed Spaude's sentence, and that it was denying Spaude's sentencing claim "unless you can show me that I was incorrect in the weight that I actually assigned" to the victim's rehabilitative needs. With respect to Spaude's plea withdrawal request, the parties agreed to submit a transcript and DVD recording of Spaude's interview with police for the court to utilize in determining whether an evidentiary hearing was necessary.

¶6 In a written order, the circuit court observed that Spaude had limited his plea withdrawal motion to "the sole issue of whether the defendant's ***Miranda*** rights were complied with." The court concluded Spaude was not in custody when he was interviewed, and it noted the police even told Spaude he was there voluntarily and was free to leave. The court found Spaude's confession voluntary and not coerced. The court denied the postconviction motion, and Spaude now appeals.

DISCUSSION

¶7 A defendant is entitled to withdraw a plea after sentencing only if he or she establishes a manifest injustice by clear and convincing evidence. ***State v.***

[2] Spaude has abandoned this issue on appeal.

Bentley, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1966). Ineffective assistance may demonstrate a manifest injustice. ***Id.*** Ineffective assistance requires a showing of deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If we conclude the defendant has failed to prove one prong of the test, we need not address the other. ***Id.*** at 697.

¶8 Moreover, to establish prejudice in the context of a postconviction motion to withdraw a plea based upon ineffective assistance of counsel, the defendant must allege that but for counsel's errors, he would not have pleaded and would have insisted on going to trial. *See* ***State v. Burton***, 2013 WI 61, ¶50, 349 Wis. 2d 1, 832 N.W.2d 611. A defendant must do more than merely allege that he or she would have pleaded differently; such an allegation must be supported by objective factual assertions. *See* ***Bentley***, 201 Wis. 2d at 313. An allegation unsupported by objective factual assertions that the defendant pleaded because of counsel's missteps is merely a self-serving conclusion that is insufficient to require the circuit court to hold an evidentiary hearing. ***Id.*** at 313-14. The non-conclusory factual allegations should include the "who, what, where, when, why and how." ***State v. Allen***, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433.

¶9 Spaude insists in his reply brief to this court:

> Clearly, if the confession had been suppressed, and had he been able to present evidence that the victim had a history of making false accusations of sexual abuse, the entire trial posture of this case would have been radically altered. It should come as no mystery why he might go to trial if the confession were suppressed.

¶10 Spaude fails to appreciate his burden concerning the postconviction standard in this case. His postconviction motion alleged that Spaude's trial counsel told Spaude that he had viewed the recording of Spaude's interrogation

and "did not see a ***Miranda*** or ***Goodchild*** issue."[3] The postconviction motion further alleged that "[h]ad Mr. Spaude['s] confession been suppressed … there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial." However, the motion failed to include specific facts that explained why Spaude would have insisted on going to trial, particularly in light of the fact that the plea agreement reduced Spaude's punishment from a potential eighty years of imprisonment to twenty years, as well as the State's agreement to recommend five years' initial incarceration and five years' extended supervision.

¶11 Our supreme court's decision in ***Burton*** is instructive. In that case, the defendant initially entered pleas of not guilty and not guilty by reason of mental disease or defect, but he subsequently pleaded guilty. ***Burton***, 349 Wis. 2d 1, ¶2. He then sought postconviction relief, alleging ineffective assistance of trial counsel for failing to inform him of the possibility of a bifurcated plea with the right to a jury trial focused solely on the issue of his mental responsibility. ***Id.*** ¶¶2-3.

¶12 Burton's postconviction motion alleged that had he known about the option of bifurcation on mental responsibility, "there is a reasonable probability that he would not have pled guilty to the crimes." ***Id.***, ¶69. The court characterized that allegation as "speculation, not assertion" and held that Burton "failed to allege sufficient material facts to support a claim of ineffective assistance of counsel." ***Id.*** ¶¶69, 71.

[3] Referring to ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

¶13 As in ***Burton***, Spaude's postconviction motion identifies alleged deficiencies in his trial counsel's performance, but it makes only a conclusory allegation that "there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial." Spaude's motion fails to support that assertion with any specific factual allegations that explain why he would not have pleaded guilty and would have insisted on going to trial under the circumstances. Spaude fails to show he was prejudiced by his counsel's claimed ineffective assistance and the circuit court therefore properly denied his motion without an evidentiary hearing. *See* ***Bentley***, 201 Wis. 2d at 309.

¶14 The circuit court also properly exercised its sentencing discretion. In his initial brief to this court, Spaude discusses the circuit court's sentencing rationale at length. However, the argument section of Spaude's brief addresses only one aspect of the court's reasoning. He argues that "[b]y elevating a secondary sentencing factor, i.e. 'the rehabilitative needs of the victim,' to the level of a primary sentencing factor, the sentencing court abused it discretion by giving undue weight to this secondary factor."[4]

¶15 In this regard, Spaude inappropriately relies upon a statement in ***State v. Jones***, 151 Wis. 2d 488, 444 N.W.2d 760 (Ct. App. 1989). In that case, we held that the "rehabilitative needs of the victim" is an appropriate factor for a sentencing court to consider because it is a "logical extension of one of the secondary factors, i.e. the rights of the public." ***Id.*** at 496. We noted this consideration was especially true in cases such as this, where a minor child has

[4] We have not used the phrase "abuse of discretion" since 1992, when our supreme court replaced the phrase with "erroneous exercise of discretion." *See, e.g.*, ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

been the victim of a sexual crime, and where the circuit court finds that significant incarceration of the perpetrator of the crime will have a positive influence on the child's recovery from its effects. We stated, "While this factor is not deemed to rise to the level of consideration due a primary sentencing factor, it *may* be considered by a trial court where appropriate." ***Id.*** In other words, "the decision to consider the rehabilitative needs of a victim when sentencing a convicted offender is within the discretion of the trial court." ***Id.***

¶16 Spaude hangs his proverbial hat on the statement in ***Jones*** that the rehabilitative needs of the victim do not "rise to the level of consideration due a primary sentencing factor …." He argues that this statement precludes a circuit court from giving as much weight at sentencing to the victim's rehabilitative needs as it gives to a primary sentencing factor. However, Spaude misunderstands the fundamental difference between primary and secondary sentencing factors.

¶17 A primary sentencing factor is one of the three factors that circuit courts must consider when imposing sentence: the defendant's character; the gravity of the offense; and the need to protect the public. *See* ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d 409. A secondary factor is an additional factor that the court may consider at sentencing. ***Id.***, ¶14.

¶18 Therefore, when we stated in ***Jones*** that the victim's rehabilitative needs is a secondary factor that does not "rise to the level of consideration due a primary sentencing factor," but "*may* be considered by a trial court where appropriate[,]" we simply meant that a sentencing court does not need to consider the victim's rehabilitative needs in every case, as it would if that were a primary factor. *See* ***Jones***, 151 Wis. 2d at 496. However, the court may consider that factor in an appropriate case. The fact that the victim's rehabilitative needs are a

secondary factor does not mean that the circuit court may not give substantial weight to that factor at sentencing. To the contrary, "[s]entencing courts have considerable discretion as to the weight to be assigned to each factor," whether primary or secondary. *See* ***Harris***, 326 Wis. 2d 685, ¶28.

¶19 In explaining the sentence in the present case, the circuit court properly considered Spaude's character, the gravity of the offense, and the need to protect the public. The court found that Spaude's conduct was "beyond outrageous." "This is predation by a 40 some year old man against a 13 year old girl who … besides all the other problems she has in life, is learning disabled," and whom Spaude assaulted after she moved into his home. The court also noted that "[a]ccording to the PSI, some of this was at knife point, or threat of knife point." "There were repeated instances of sexual intercourse and of, quote, blow jobs and hand jobs," and Spaude repeatedly "ejaculated on her stomach" and "[o]ther times apparently in her body," sometimes without a condom. Spaude's conduct exposed the victim to "incalculable psychological damage" and the risk of pregnancy.

¶20 The circuit court noted Spaude repeatedly "tr[ied] to deflect blame" onto the victim, but that "[s]he could not possibly have any blame" because "[s]he's 13 years old when this starts …. She can't consent to this …." The court also added that Spaude's age was "an extremely negative" factor. The court determined that "[s]hort of first degree murder or repeated drunk drivings resulting in a death, I don't know what could be more vicious or aggravated than this." The court concluded that "[t]he public needs to be protected, and there are just no mitigating factors in this case."

¶21 The circuit court imposed the maximum sentence, giving two reasons for its decision. First, "we need to have the maximum possible assurance of protection for as long as possible." The second, "equally important" reason was that the victim "needs to know that the law gave you every second available because of the unmitigated evil of what you did." "She needs to know that for her healing, if nothing else, and she needs to know that she did not cause this." The circuit court's sentence was reasoned and thorough. Although the court gave significant consideration to the victim's rehabilitative needs, it was entitled to do so.

¶22 Furthermore, the sentence was allowable by law and not so disproportionate to the offense as to shock the public sentiment. *See* ***State v. Davis***, 2005 WI App 98, ¶21, 281 Wis. 2d 118, 698 N.W.2d 823. Indeed, the sentence Spaude received was far below the eighty-year potential punishment he faced for the same conduct under the original charges of second-degree sexual assault of a child. The sentence was neither unduly harsh nor excessive. The circuit court properly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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