COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

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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 Nos. 2016AP2033-CR
2016AP2034-CR

Cir. Ct. Nos. 2013CF1365
2014CF376

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEJANDRO D. SANCHEZ-MORALES,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Racine County: MICHAEL J. PIONTEK, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, 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. In these consolidated matters, Alejandro D. Sanchez-Morales appeals from judgments entered upon his guilty pleas to five counts across two cases and an order denying his postconviction motion for plea withdrawal and sentence modification. Sanchez-Morales argues that the circuit court improperly denied (1) his motions to exclude and suppress evidence seized from his cell phone, (2) his postconviction motion for plea withdrawal based on the ineffective assistance of counsel, and (3) his postconviction sentence modification motion. We reject his arguments and affirm.

¶2 Police discovered Sanchez-Morales, his co-defendant, and an unconscious, underage female at the co-defendant's residence. The female (hereafter, the victim) was taken to the hospital and underwent a sexual assault examination. Sanchez-Morales and the co-defendant were arrested and Sanchez-Morales, who was on probation, remained in jail. Investigator Jody Spiegelhoff seized Sanchez-Morales's cell phone from the jail and obtained a warrant to search the phone's contents. Investigators then extracted video and images depicting the repeated sexual assault of the victim by Sanchez-Morales and his co-defendant.

¶3 The State filed a sixteen-count information charging Sanchez-Morales with six counts of possessing child pornography as a person under the age of eighteen, seven counts of second-degree sexual assault, one count of first-degree recklessly endangering safety, one count of possessing a firearm as a felon, and one count of sexual exploitation of a child by a person under the age of eighteen.

¶4 In March 2014, the State filed a new complaint charging Sanchez-Morales with four counts of solicitation of perjury before a court and two counts of felony intimidation of a witness.[1] The complaint alleged that Sanchez-Morales had written several letters asking his co-defendant, the victim, and other potential witnesses in his pending sexual assault case to lie in court or change their stories.

¶5 Sanchez-Morales filed a motion challenging the admissibility of the cell phone evidence based on the chain of custody leading up to the search warrant. He also sought to suppress the cell phone evidence on constitutional grounds, alleging that police searched the phone before obtaining a warrant and failed to preserve potentially exculpatory evidence, a due process violation. Following a hearing, the circuit court determined that the chain of custody was sufficient to admit the evidence seized from the cell phone. It further found that police did not search the phone before the warrant issued and determined that no due process violation occurred.

¶6 Pursuant to a negotiated agreement, Sanchez-Morales pled guilty to the following five charges, the first four of which were charged in No. 2013CF1365: (1) possessing child pornography as a repeater; (2) second-degree sexual assault as a party to the crime, repeater; (3) first-degree recklessly endangering safety as a party to the crime, repeater; (4) possession of a firearm as a felon; and (5) solicitation to commit perjury as a repeater as alleged in count one of No. 2014CF376. Sanchez-Morales received a global bifurcated sentence

[1] The original sexual assault charges were filed in Racine County case No. 2013CF1365. The new complaint was filed in Racine County case No. 2014CF376. Nearly all counts in both complaints charged Sanchez-Morales as a repeater.

totaling forty-five years, with twenty-five years of initial confinement followed by twenty years of extended supervision.

¶7 Sanchez-Morales moved for postconviction relief on three grounds. First, he asked the circuit court to reconsider its decision to admit evidence seized from his cell phone. Second, he moved to withdraw his pleas on the ground that trial counsel promised he would receive no more than fifteen years of initial confinement. Third, Sanchez-Morales moved to modify his sentence to bring it "more in line" with his co-defendant's sentence. The circuit court denied the postconviction motion in full. Sanchez-Morales appeals.

The circuit court properly denied Sanchez-Morales's motions to exclude and/or suppress evidence seized from his cell phone.

¶8 At the evidentiary hearing on Sanchez-Morales's motions to exclude or suppress evidence, Spiegelhoff testified that she seized the cell phone from the Racine County Jail on September 14, 2013, about one week after Sanchez-Morales's arrest, and placed it in her locked desk drawer in a secure area of the police station. She testified that the phone remained in her drawer until September 23, when she applied for and obtained a warrant to search its contents. She turned the phone on but was unable to access the contents because it had a passcode. She met with Sanchez-Morales that same day to try and get the phone's passcode. He tried but was unable to unlock the phone, stating he could not remember the passcode. Spiegelhoff testified that she turned the phone off after the meeting. The phone was passed on to forensic investigators on September 25, 2013. They were eventually able to find a way into the phone without a passcode.

¶9 Nicholas Schiavo, a defense expert, testified that some activity occurred on the cell phone in the nine days it was in Spiegelhoff's desk and that

simply powering the phone on could cause a loss of data. He testified that turning on its power could cause a phone to connect to a network and that connecting to a network could cause the phone to gain or lose information.

¶10 We conclude that the circuit court properly exercised its discretion in determining that the cell phone evidence was admissible. ***State v. Warbelton***, 2009 WI 6, ¶17, 315 Wis. 2d 253, 759 N.W.2d 557 (the decision to admit or exclude evidence resists within the circuit court's sound discretion).[2] WISCONSIN STAT. § 909.01 requires that a party seeking to introduce evidence must, as a condition precedent to its admissibility, demonstrate that the evidence in question is "what [the] proponent claims." "The law with respect to chain of custody issues requires proof sufficient to render it improbable that the original item has been exchanged, contaminated or tampered with." ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54 (2006) (internal quotation omitted). "A perfect chain of custody is not required." ***Id.*** Alleged gaps in the chain go to the weight of the evidence, not its admissibility. ***Id.***

[2] We agree with the State's brief that Sanchez-Morales's pleas forfeited his right to appellate review of the chain of custody issue. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (a guilty plea waives all nonjurisdictional defects). Whereas the guilty plea waiver rule does not apply to a circuit court's decision on a suppression motion grounded in constitutional violations, *see* WIS. STAT. § 971.31(10) (2015-16), a chain of custody challenge is based on the application of the rules of evidence, *see* ***State v. Disch***, 119 Wis. 2d 461, 471, 351 N.W.2d 492 (1984) (the chain of custody is a matter of authentication under WIS. STAT. § 909.01). Recognizing that forfeiture is a rule of judicial administration and that the circuit court's decision on this issue overlaps its decision denying Sanchez-Morales's requests to suppress the evidence on constitutional grounds, we choose to reach the merits of the circuit court's discretionary ruling admitting the cell phone evidence.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶11 In determining that the chain of custody was sufficient for purposes of admitting evidence seized from Sanchez-Morales's cell phone, the court credited Spiegelhoff's testimony that she took the phone from the jail and kept it in her locked desk drawer in a secure area of the police department and that she did not tamper with or damage the phone. Based on the phone's secure location and its passcode protection, the court found that nobody else tampered with the phone or its contents. These findings are not clearly erroneous and sufficiently support the circuit court's discretionary decision.

¶12 Relying on the testimony of Schiavo, Sanchez-Morales suggests that the chain of custody was disrupted at the point Spiegelhoff turned on the phone so that Sanchez-Morales could attempt to retrieve his passcode. His contention is that because the phone connected with a network, its contents could have been altered. We are not persuaded.

¶13 The files extracted from the cell phone documented the repeated sexual assaults of the victim by Sanchez-Morales and his co-defendant. At no point does Sanchez-Morales allege that these video files are anything other than what they purport to be—an accurate recording of his criminal conduct. The State's expert testified she did not find any evidence the video files had been contaminated or tampered with. Schiavo testified only that it was possible that data was overridden or lost and he never identified what data could have been affected. As the circuit court observed, Schiavo could not testify to a probability that anything happened to the cell phone, but instead talked in terms of possibilities. The court stated: "[A]nything's possible but that is not a standard that I consider to be meaningful when I do this kind of analysis." Sanchez-Morales has not demonstrated either that the circuit court's findings were clearly erroneous or that its decision to admit the cell phone evidence was unsound. At

best, Sanchez-Morales's chain of custody argument goes to its weight and not its admissibility.

¶14 For these same reasons, we conclude the circuit court properly rejected Sanchez-Morales's due process claim. A defendant's due process rights may be violated if the police (1) failed to preserve evidence that is apparently exculpatory or (2) acted in bad faith by failing to preserve potentially exculpatory evidence. ***State v. Luedtke***, 2015 WI 42, ¶53, 362 Wis. 2d 1, 863 N.W.2d 592. Again relying on Schiavo's testimony, Sanchez-Morales contends there was evidence that his cell phone was accessed while in police custody before the warrant issued, that powering the phone on caused the phone to connect to a network, that connecting the cell phone to a network could cause the phone to gain or lose information, and that the cell phone "could have lost information" when it was powered on. He asserts that Spiegelhoff's failure to prevent the phone from accessing the network should be considered tampering or the failure to preserve exculpatory evidence. We disagree. The circuit court found there was nothing apparently or potentially exculpatory about the evidence Sanchez-Morales claims was altered and, further, that officers did not alter or destroy the cell phone's contents.

¶15 Finally, we conclude that the circuit court properly declined to suppress the cell phone evidence as the alleged fruits of an unlawful warrantless search. The circuit court's finding that there was no search of the cell phone prior to the issuance of the search warrant is not clearly erroneous and is amply supported by the evidence of record. Because there was no warrantless search, there was no constitutional violation.

The circuit court properly denied Sanchez-Morales's ineffective assistance of counsel plea-withdrawal claim without an evidentiary hearing.

¶16 Postconviction, Sanchez-Morales sought plea withdrawal on the ground that trial counsel provided ineffective assistance by promising that he would receive no more than fifteen years of initial confinement at sentencing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (the ineffective assistance of counsel may constitute a manifest injustice warranting plea withdrawal). He contends that the circuit court erred by denying his postconviction motion without an evidentiary ***Machner***[3] hearing.

¶17 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel performed deficiently and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To satisfy the prejudice prong in the plea withdrawal context, a defendant must demonstrate that but for counsel's deficient conduct, there is a reasonable probability he or she would not have pled guilty and would have insisted on a trial. ***Bentley***, 201 Wis. 2d at 312. The circuit court is not required to hold an evidentiary hearing if the factual allegations of a defendant's motion are insufficient or conclusory, or if the record conclusively demonstrates that the defendant is not entitled to relief. ***Id.*** at 309-10. Whether a motion is sufficient to require an evidentiary hearing presents a question of law. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (1979). A ***Machner*** hearing is "a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." ***Id.*** at 804.

¶18 We conclude that the circuit court properly denied Sanchez-Morales's postconviction plea withdrawal motion without a hearing because it did not contain "sufficient allegations to raise the issue of whether there is a reasonable probability that [he] would not have pled guilty but for" counsel's alleged sentencing guarantee.[4] *See* ***Bentley***, 201 Wis. 2d at 312-13 (a defendant must do more than merely allege that he or she would not had pled; he or she must support the allegation with "objective factual assertions"). In other words, Sanchez-Morales's postconviction motion failed to sufficiently allege prejudice.

¶19 In assessing the reasonable probability that the defendant would not have pled guilty, a court may look at a number of factors including the case's relative strengths and weaknesses, the reasons that a defendant expressed for pleading guilty, the benefits obtained by the defendant in exchange for the plea, and the thoroughness of the plea colloquy. *See* ***State v. Harris***, 2003 WI App 144, ¶14, 266 Wis. 2d 200, 667 N.W.2d 813.

¶20 Sanchez-Morales did not address any of these factors in his postconviction motion and the record only contradicts his conclusory, unsupported allegation. The plea-taking procedures in this case were thorough. At the plea hearing, the circuit court ascertained that Sanchez-Morales had executed a plea questionnaire stating that he understood "that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty," that he was entering his pleas of his own free will and was not promised anything other

[4] By deciding the issue on prejudice, we in no way imply that trial counsel made the sentencing guarantees asserted in Sanchez-Morales's motion. We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." ***Id.***

than what was reflected in the plea agreement and that the State had agreed to recommend thirty years of initial confinement while the defense remained free to argue. Sanchez-Morales confirmed that all the information provided on the plea form was true and, after discussing the maximum penalties, the circuit court reminded him that it could impose those maximums without regard to any recommendations:

> THE COURT: Do you understand that I will listen to the State's recommendation, I'll listen to your lawyer's recommendation, your recommendation, and the presentence recommendation, but I am free to sentence you to the maximum penalties if that's what I decide I should do at the time of sentencing?
>
> SANCHEZ-MORALES: I do.

¶21 Furthermore, Sanchez-Morales's unsupported allegation that he would not have pled guilty but for counsel's alleged sentencing guarantee rings hollow in light of other factors such as the strength of the State's case—the crime was captured on video—and the plea agreement, which drastically reduced his exposure. The circuit court was not required to hold an evidentiary hearing on Sanchez-Morales's plea withdrawal claim.

Sanchez-Morales is not entitled to a sentence modification.

¶22 Postconviction, Sanchez-Morales requested that the circuit court modify his sentence "to bring it more in line with the sentence given to" his co-defendant in the sexual assault case. The motion stated that the co-defendant pled "to many of the similar counts" but "received a global sentence of 20 years of initial confinement and 10 years of extended supervision." In his sexual assault case, No. 2013CF1365, Sanchez-Morales received an aggregate sentence of twenty-three years of initial confinement followed by eighteen years of extended

supervision. The circuit court denied the motion, stating that it "did not abuse its discretion in sentencing the Defendant."

¶23 It is a well-settled principle of law that sentencing is committed to the circuit court's discretion, and our review is limited to determining whether the court erroneously exercised that discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. To demonstrate an erroneous exercise of discretion, "[t]he defendant must show some unreasonable or unjustifiable basis in the record for the sentence imposed." ***State v. Echols***, 175 Wis. 2d 653, 681-82, 499 N.W.2d 631 (1993).

¶24 Sanchez-Morales has shown neither an improper basis for his sentence nor grounds for a sentence modification.[5] Wisconsin recognizes the importance of "[i]ndividualized sentencing." ***Gallion***, 270 Wis. 2d 535, ¶48. Disparities in sentencing from one case to the next do not show an erroneous exercise of discretion. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 187-88, 233 N.W.2d 457 (1975). A sentence is unduly harsh only if it is so excessive and unusual and so disproportionate to the offense committed as to shock the public sentiment. ***Id.*** at 185. Not only were a number of serious charges dismissed, thus limiting Sanchez-Morales's exposure, the concurrent sentences imposed on his crimes of conviction resulted in a global sentence well within the maximum. The circuit court properly exercised its discretion in imposing sentence.

By the Court.—Judgments and order affirmed.

[5] Sanchez-Morales sets forth in detail the legal standard for a new-factor sentence modification, but never attempts to apply that standard to the facts of his case. The co-defendant's sentence is clearly not a "new factor" because it was known to and considered by the circuit court at sentencing.

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