COURT OF APPEALS DECISION DATED AND FILED

March 28, 2018

Sheila T. Reiff
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 No. 2016AP1284-CR

Cir. Ct. No. 2011CF86

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICARDO L. CONCEPCION,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 REILLY, P.J. Ricardo L. Concepcion pled no contest to ten counts of possession of child pornography under WIS. STAT. § 948.12(1m) (2015-16)[1] and was sentenced to nine years' initial confinement followed by six years' extended supervision. Concepcion argues that he should be allowed to withdraw his no contest plea as the circuit court imposed an unduly harsh sentence, trial counsel was constitutionally ineffective at sentencing, and the court erroneously denied a pretrial suppression motion. We affirm; the search of Concepcion's home was a private-party search rather than a government search, Concepcion's sentence was a proper exercise of discretion, and Concepcion's trial counsel did not perform deficiently at sentencing.

FACTS

¶2 Prior to January 2011, Concepcion had been deputy police chief for the Village of Winthrop Harbor, Illinois, a member of a special forces team in the military, and active in SWAT teams, disaster services units, and mountain bike patrols. Concepcion was a founding member of the Law Enforcement Aviation Coalition ("LEAC"), which is a volunteer search and rescue helicopter organization, and was the lead tactical flight officer for that group. Concepcion provided evidence that "[h]e personally helped save about 1500 lives when his team was one of the first rescue units responding to Hurricane Katrina."

¶3 Dan Bitton was a friend of Concepcion's and also a Winthrop Harbor police officer in Illinois. Concepcion had saved Bitton's life, and Bitton

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. We acknowledge that Concepcion was convicted in 2012 under the statutes in effect at that time; however, the applicable statutes have not changed, so we will refer to the 2015-16 version.

testified that Concepcion was his "best friend" and "the dearest friend that any man … could ever ask for." Bitton too was a pilot for LEAC, which operated out of the Kenosha County airport. Bitton was deputized in Wisconsin as a "police search and rescue helicopter unit commander," but he had no arrest powers in Wisconsin.

¶4 Concepcion owned a mobile home a couple blocks from the Kenosha airport, and gave Bitton permission to use his home. On January 18, 2011, Bitton came to Concepcion's mobile home to sleep before a scheduled, personal flight the following morning. Bitton was off-duty, was not armed, was not in uniform, was not driving a police vehicle, and was accompanied by his girlfriend.

¶5 When Bitton arrived at Concepcion's mobile home, he saw in plain sight a box for a type of helicopter headset. LEAC was missing a number of these headsets. Bitton saw additional signs of headsets and continued looking for them as he intended to take the missing headsets back to LEAC as they had a combined value of nearly $15,000, and "it was an ongoing issue of where these were" and "it was pretty important that [he] did locate them." Bitton found additional headsets in Concepcion's bedroom, and he began looking through containers for more headsets. One container was locked, but a nearby key opened the container, and inside Bitton found DVDs labeled with female names followed by numbers between six and twelve in Concepcion's distinctive calligraphy. Bitton played one DVD and saw pornographic material of children between four and twelve years of age. Bitton called a supervisor at the Winthrop Harbor Police Department and the Kenosha County Sheriff's Department.

¶6 A search warrant was obtained based upon Bitton's information, and the resulting search revealed the presence of child pornography. Concepcion was charged with seventeen counts of possession of child pornography. Concepcion moved to suppress the evidence recovered from his mobile home as the product of an illegal search. The circuit court denied the suppression motion, concluding that Bitton was acting as a private citizen and not a government actor. Concepcion thereafter entered into a plea agreement and pled to ten counts of possession of child pornography.

¶7 After a ***Machner***[2] hearing, the circuit court denied all of Concepcion's postconviction motions for relief. Concepcion argues to us (1) that the search of his home violated his Fourth Amendment rights, (2) that the court erred in its sentencing discretion by imposing an unreasonably harsh sentence, and (3) that his trial counsel was constitutionally deficient at sentencing.

Private v. Police Search

¶8 Private searches are not subject to the Fourth Amendment as the Fourth Amendment applies only to government action. ***State v. Payano-Roman***, 2006 WI 47, ¶17, 290 Wis. 2d 380, 714 N.W.2d 548. Whether a search is a private search or a government search is a mixed question of law and fact. ***Id.***, ¶16. We apply a three-part test to determine when a search constitutes a private-party search: "(1) the police may not initiate, encourage or participate in the private entity's search; (2) the private entity must engage in the activity to further its own ends or purpose; and (3) the private entity must not conduct the search for

[2] ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

the purpose of assisting governmental efforts." ***Id.***, ¶18 (citation omitted). The State has the burden of production in a private versus public challenge. ***Id.***, ¶23. The defendant has the burden of persuasion to prove by a preponderance of the evidence that government involvement in the search brought it within the Fourth Amendment's protections. ***Id.*** We look to the totality of the circumstances to determine if a search was private. ***Id.***, ¶21.

¶9 Concepcion argues that while the evidence was collected pursuant to a search warrant, the search warrant itself was illegal as it relied on information obtained from Bitton's illegal search. Concepcion argues that "when an off-duty cop 'stumbles upon criminal activity' and begins to 'collect evidence,' he acts as a government agent." The State counters that Bitton was acting in a "private capacity" when he searched Concepcion's home and that purely private searches do not implicate the Fourth Amendment. According to the State, the fact that the "searcher" is by occupation a law enforcement officer does not render a search as governmental per se; rather, we are to examine the capacity in which that person acted at the time in question. *See* ***State v. Cole***, 2008 WI App 178, ¶13, 315 Wis. 2d 75, 762 N.W.2d 711.

¶10 In ***Cole***, the deputy received evidence of intimidation of a witness via a letter mistakenly mailed to her residence. ***Id.***, ¶5. The deputy provided that letter to the prosecutor handling the underlying case. ***Id.*** We concluded that the deputy was acting in her private capacity as there was "no evidence she was aware of any pending case or investigation relating to Cole," and her act of turning over the evidence to another officer indicated that she was acting in a private capacity when she discovered the evidence. ***Id.***, ¶¶19-20.

¶11 Likewise, in ***State v. Berggren***, 2009 WI App 82, ¶2, 320 Wis. 2d 209, 769 N.W.2d 110, a twelve-year-old girl viewed evidence of a sexual assault of a child on a camera. The twelve year old gave her mother the memory stick from the camera, and the mother gave it to her brother who was a police lieutenant, although he was off-duty and on a holiday-related vacation when presented with the memory stick. ***Id.***, ¶¶4-5. The lieutenant viewed the contents of the memory stick and agreed it showed evidence of sexual assault of a child. ***Id.***, ¶5. We determined that police did not instigate the lieutenant's actions (a family member did), the lieutenant was acting in the family's interest when he viewed the photos, and nothing in the record suggested that the lieutenant acted for the purpose of assisting governmental efforts. ***Id.***, ¶17.

¶12 Finally, in ***United States v. Ginglen***, 467 F.3d 1071, 1073 (7th Cir. 2006), an off-duty police officer went to his father's residence with his brothers on the suspicion that their father was involved in a series of armed robberies. Upon entering the house, he saw evidence implicating his father. ***Id.*** He informed police of his observations, and police thereafter obtained a search warrant for the property. ***Id.*** The Seventh Circuit Court of Appeals rejected Ginglen's argument that the son's search was a government search as the son had a nonlaw enforcement purpose for entering his father's home. ***Id.*** at 1075. The son was off-duty, was acting outside of his jurisdiction, was not in uniform, and had a primary purpose to protect the community rather than assist law enforcement. ***Id.***

¶13 We agree with the circuit court's finding that Bitton was acting as a private citizen and not a government actor when he found the child pornography. Bitton, Concepcion's best friend since 1998, had permission to stay overnight at Concepcion's home on January 18, 2011, and had a female companion with him. Bitton was at Concepcion's home as a friend, not as a police officer. Bitton had

no arrest powers while he was in Kenosha County. Bitton was off-duty and in a capacity that the trial court considered to be “a vacation or visiting our state.” Bitton’s act of looking through Concepcion’s home was not for a law enforcement purpose, but to return missing headsets to LEAC. After Bitton played the one DVD and saw what he believed to be child pornography, he stopped looking and reported what he saw to police.

¶14 Wisconsin law enforcement officers did nothing to initiate, encourage, or participate in Bitton’s search of Concepcion’s home. Once Bitton found the child pornography his actions stopped. Like in ***Cole***, Bitton contacted another law enforcement agency with jurisdiction so it could conduct an investigation. The fact that Bitton wanted to return the headsets to LEAC does not transform his actions into government actions. Bitton did not go to Concepcion’s home to look for evidence, he went there to spend the night with his girlfriend before an early morning flight and when he saw the headsets he searched for his own purpose—not the government’s.

¶15 To the extent that Concepcion argues that Bitton’s viewing the DVDs constituted a public purpose, we reject any notion that a person who is motivated to report criminal misconduct converts a private search to a government search. The court properly denied Concepcion’s motion to suppress evidence.

Sentencing Discretion

¶16 Concepcion argues his sentence is unduly harsh and the court erroneously exercised its discretion by giving “short shrift” to his character and gave too much weight to “aggravators that were apparitions with no substance.” We disagree. We review a circuit court’s sentencing decision under the erroneous exercise of discretion standard. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d

535, 678 N.W.2d 197. When a circuit court demonstrates an exercise of discretion, we follow a "consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***Id.***, ¶18.

¶17 Concepcion could have received a term of imprisonment of twenty-five years for each count (fifteen years' initial confinement and ten years' extended supervision). WIS. STAT. § 973.01(2)(b)4.; *see also* WIS. STAT. § 948.12(3)(a). Furthermore, WIS. STAT. § 939.617(1) requires a circuit court to impose a minimum three-year term of initial confinement on each count. This three-year-presumptive minimum can be set aside by a court if it makes statutory findings on the record as to why it declined to impose the presumptive minimum confinement sentence. Although Concepcion faced a maximum sentence of 250 years with a presumptive minimum period of confinement of thirty years, the circuit court, in an explained exercise of discretion, structured Concepcion's sentence to nine years' initial confinement followed by six years' extended supervision.[3] Given the presumptive minimum of thirty years' confinement, Concepcion's sentence was clearly not "unduly harsh or unconscionable." ***State v. Cummings***, 2014 WI 88, ¶71, 357 Wis. 2d 1, 850 N.W.2d 915.

¶18 The circuit court rightfully placed significant weight on the seriousness of the offense, the impact upon the victims and society, and noted Concepcion's pending charges in Illinois for the same type of crime. The court also observed that there were seventy-three charges that could have been litigated but for the plea agreement. The court took Concepcion's character into account,

[3] Concepcion received three years' initial confinement and two years' extended supervision on each count. The circuit court ordered Concepcion's sentences to be served concurrently, with some counts to be served consecutively.

noting all the good he has done through his work, his acceptance of responsibility, his lack of prior record, and his long-term and positive employment history. The court, however, viewed the crime as befitting nine years of confinement.

¶19 The court's sentence was reasoned and reasonable and we find no erroneous exercise of discretion by the circuit court in fashioning the sentence imposed.

Effective Assistance of Counsel

¶20 Concepcion argues that his trial counsel's presentation at sentencing was a "wholly inadequate plain vanilla response to the [S]tate's over-the-top demand for punishment" and that his trial counsel needed to "step it up" and "offer something more forceful than the routine response." Trial counsel is faulted for not explaining to the court what a "hero" Concepcion is and that Concepcion has an "exemplary character and stature who, if character was to mean anything, should receive the leniency she recommended." Concepcion argues trial counsel failed to argue that his collection of child pornography "was small compared to most offenders," and the "relative un-severity of his offense." Concepcion claims that if his trial counsel had provided a "full-throated defense" that his sentence would not have been so "anomalously severe."

¶21 As we found above, Concepcion's sentence was not and is not "unduly harsh," and we disagree with Concepcion's conclusory allegations that he is a "hero," has an "exemplary character," and that any amount of child pornography is "small."

¶22 A defendant alleging ineffective assistance of counsel has the burden of proving both that counsel's performance was deficient and that he suffered

prejudice as a result of that deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We agree with the circuit court that Concepcion's trial counsel did not perform deficiently at his sentencing hearing. Numerous character letters were supplied to the court prior to sentencing; the presentence report was reviewed with Concepcion and the court was advised of corrections to the presentence report by trial counsel; counsel argued the staleness of Concepcion's access to the child pornography, that he has had no improper relations with minors, and that his status as a police officer should not trigger a more serious penalty as he did not use his status as a police officer to commit the crimes. Concepcion's favorable employment history, volunteer work, lack of any prior record, and his low risk to reoffend were all highlighted by trial counsel.

¶23 As the record fully supports that trial counsel was not deficient at sentencing, we need not address the ***Strickland*** prejudice prong.

¶24 The circuit court is affirmed in all respects.

By the Court.—Judgment and order affirmed.

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