COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP2318-CR **Cir. Ct. No. 2014CF14**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SRBO M. LAZIC,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Srbo M. Lazic appeals the judgment convicting him of second-degree sexual assault of a child. He contends defense counsel failed to adequately prepare him for the sex-offender presentence process, resulting in an unduly harsh sentence. Lazic also appeals the order denying his postconviction motion for sentence modification or plea withdrawal. We affirm.

¶2 A fifteen-year-old girl told police she and forty-year-old Lazic, a family acquaintance, engaged in sexual activity on twelve or thirteen occasions in late 2013. Lazic was charged with three counts of having sexual contact or intercourse with her. He pled no contest to one count; two others were dismissed and read in at sentencing. Lazic faced twenty-five years' initial confinement (IC) and fifteen years' extended supervision (ES) on the one count.

¶3 The parties jointly agreed to a presentence investigation report (PSI), that there would be no specific sentence recommendation, and that the factual allegations in the complaint would serve as the factual basis for the plea. After balancing Lazic's many positive attributes and his expression of remorse against the gravity of the offense and considering Lazic's psychosexual evaluation, his allocution, and the PSI generated from two interviews, the court sentenced him to eight years' IC and four years' ES. Lazic's postconviction motion to either modify his sentence or withdraw his plea was denied after a hearing. He appeals.

¶4 Lazic argues that he received an overly harsh sentence as a result of defense counsel's failure to adequately prepare him for the sex-offender PSI process. To prevail on an ineffective-assistance claim, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The measure of attorney performance is reasonableness, considering all of the circumstances.

Id. at 688. We measure prejudice by asking whether the defendant has shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶5 Lazic contends defense counsel, Mark Pecora, gave him advice that showed him in a poor light to the PSI writer and that Pecora did not: review either the general or more detailed "highly intrusive and sometimes self-accusatory" sex-offender questionnaire he would have to complete for the PSI; offer to accompany him to the PSI interview; or provide the PSI writer a copy of a psychologist's psychosexual evaluation and risk assessment finding him to be a low risk to reoffend within five years and that his needs could be treated in the community.

¶6 Pecora testified at the postconviction motion hearing. Pecora testified that he told Lazic that he would have to meet with a probation agent who would review the charges in the complaint, the victim's statement, and Lazic's background information. Because Lazic insisted the two read-in counts were untrue, Pecora said he advised Lazic to tell the PSI writer that, on advice of counsel, he declined to answer questions about the read ins, as Pecora believed that not accepting responsibility would hurt Lazic in the PSI.

¶7 Pecora also testified that Lazic called him after the interview "in a panic," saying the PSI writer grew upset when he would not discuss the read ins. Pecora said he "[a]bsolutely" told Lazic to cooperate with the investigation and to tell the truth, the "truth," according to Lazic, being that the read-in offenses did not occur. When Lazic told the PSI writer at the second interview that the read-in charges were untrue, the PSI writer opined that Lazic was presenting a "façade" so as to make himself look good.

¶8 It is unclear to this court just what more Lazic thinks Pecora could have done to alter the PSI's author's impression of him. We disagree with his characterization that Pecora left him to "fend for himself." Pecora described what would be covered: the allegations in the complaint; the victim's account; his educational, employment, and criminal history; his personal and family background; alcohol and drug usage, if any; and his sexual proclivities. Pecora urged Lazic to cooperate, to be truthful, and to decline on advice of counsel to discuss what he wanted to avoid. The right to consult with counsel before a PSI does not include a right to be apprised of all lines of questioning before the interview occurs. ***State v. Thexton***, 2007 WI App 11, ¶10, 298 Wis. 2d 263, 727 N.W.2d 560 (2006).

¶9 We also think Lazic overstates the "recognized" "importance" of counsel being present at the PSI. Lazic had no constitutional right to have counsel present at the interview, nor was Pecora entitled to be there. ***State v. Knapp***, 111 Wis. 2d 380, 381, 385, 330 N.W.2d 242 (Ct. App. 1983). Indeed, "[t]he presence of counsel could jeopardize the neutral objectivity of the PSI author," and advocate counsel's "active involvement … could cause a serious degradation in the reliability and impartiality of the sentencing court's information base." ***State v. Perez***, 170 Wis. 2d 130, 141, 487 N.W.2d 630 (Ct. App. 1992).

¶10 In short, we see no deficient performance by Lazic's attorney, and his ineffective assistance of counsel claim fails.

¶11 Lazic also challenges his sentencing as an improper decision based on the "inaccurate information" in the PSI. He argues that the court heavily relied on the PSI when it sentenced him to a "long" prison term and, by that time, it was too late to correct the PSI writer's wrong impressions of him. Lazic also suggests

the court relied on the prosecutor's "unfounded" sentencing arguments that, through his girlfriend and an anonymous Facebook post, he was involved in pressuring the victim to recant.

¶12 On a challenge to a circuit court's sentencing decision, we "afford a strong presumption of reasonability," as that court "is best suited to consider the relevant factors and demeanor of the convicted defendant." ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76. The sentencing court "clearly has discretion in determining the length of a sentence within the permissible range set by statute." ***State v. Taylor***, 2006 WI 22, ¶19, 289 Wis. 2d 34, 710 N.W.2d 466 (citation omitted). A sentence is unduly harsh only if the length of the sentence imposed is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). If the court properly exercised its discretion, we do not substitute our preference for another sentence even if we would have meted out a different one. ***Taylor***, 289 Wis. 2d 34, ¶18. The defendant bears the burden of proving an unreasonable or unjustifiable basis on the record for the sentence imposed. ***State v. Davis***, 2005 WI App 98, ¶12, 281 Wis. 2d 118, 698 N.W.2d 823.

¶13 The court noted that the offense clearly is a serious one, as the legislature has deemed it punishable by forty years' imprisonment. The court also took into account Lazic's generally positive attributes, but said it could not ignore other aspects of his character, including the age difference between him and the victim, his "grooming" behavior, and his breach of trust, and thus had to consider a sentence that would adequately protect the public. All are proper sentencing concerns. *See* ***State v. Harris***, 2010 WI 79, ¶28, 326 Wis. 2d 685, 786 N.W.2d

409. The court gave greatest weight to the gravity of the offense and its impact on the victim. *See* ***id.*** (court has considerable discretion in deciding weight to give each factor). And despite Lazic's contention to the contrary, the record does not bear out that the court considered the anonymous Facebook post in sentencing him. The sentence was well within what was the court's discretion to impose and was bolstered by sound reasoning. We do not find it to be unduly harsh.

¶14 Based upon the foregoing, we see no reason that the circuit court should have granted Lazic's postconviction motion to either modify his sentence or allow him to withdraw his plea based on his claim that counsel was ineffective.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2017-18).