COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0785-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GLEN JOYNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dunn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Glen Joyner appeals a judgment convicting him of second-degree sexual assault of a child and an order denying his postconviction motion. He argues that he should be allowed to withdraw his guilty plea because the trial court inaccurately informed him of enhanced penalties he would face for

any future convictions and that his trial counsel was ineffective in three ways: (1) he failed to move to suppress statements Joyner made to his wife and mother in the presence of an officer after he confessed to the officer and invoked his right to counsel; (2) counsel failed to have him execute a new plea questionnaire and instead relied on a questionnaire that was executed five months earlier; and (3) counsel failed to object to information contained in the presentence report. We reject these arguments and affirm the judgment and order.

¶2 Joyner was initially charged with first-degree sexual assault of his daughter. The complaint alleged that Joyner admitted to an investigating officer that he inappropriately touched his daughter in a sexual way. He stated that his daughter told him to stop, he then stopped and told his daughter not to tell her mother what he had done. He then invoked his right to counsel and requested to see his wife and call his mother. During conversations with his wife and mother, Joyner made additional incriminating statements in the officer's presence.

¶3 Pursuant to a plea agreement, the State reduced the charge to second-degree sexual assault of a child and Joyner attempted to enter a guilty or no contest plea. He executed a plea questionnaire and waiver of rights form. Following a plea colloquy at which he continued to maintain his innocence, the court refused to accept his plea. Several months later, he again attempted to plead guilty or no contest and the court refused to accept his plea. Finally, five months after he first attempted to plead guilty, the court accepted his guilty plea. During the plea colloquy, the court informed Joyner of Wisconsin's "three strikes and you're out" law. The court did not inform him of the accelerated penalty for committing a second offense after a conviction for a "serious child sex offense." *See* WIS. STAT. § 939.62(2m) (a) 1m a (1997-98).

¶4 The trial court's failure to inform Joyner of the accelerated penalty he would face for future convictions does not provide a basis for withdrawing the plea. The court is not required to inform a defendant of collateral consequences that require an additional adjudication and do not automatically flow from this conviction. *See* ***State v. Myers***, 199 Wis. 2d 391, 394, 544 N.W.2d 609 (Ct. App. 1996).

¶5 Joyner has not established that his trial counsel's performance was deficient or that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, Joyner must demonstrate that his counsel's performance fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance is highly deferential and strategic choices made after thorough investigation of law and facts are virtually unchallengeable. *See* ***id.*** at 689-90. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. *See* ***id.*** at 691. To establish prejudice, Joyner must show that but for counsel's deficient performance or error, he would have likely succeeded at trial and therefore would not have pleaded guilty. *See* ***Hill v. Lockhart***, 474 U.S. 52, 59-60 (1985).

¶6 Joyner established neither deficient performance nor prejudice from his counsel's failure to move to suppress the statements he made to his wife and mother in the officer's presence. Counsel stated that he intended to make an oral motion in limine if the case went to trial. Nothing in the record suggests that the trial court would not have entertained that motion at that time. In addition, the record discloses no basis for suppressing the statements. It does not appear that the statements were the product of express questioning or its functional equivalent after Joyner requested an attorney. *See* ***Rhode Island v. Innis***, 446 U.S. 291, 300

(1980). Finally, it is highly unlikely that a jury would have acquitted Joyner even if the second and third statements had been suppressed. His first statement is sufficient to support the conviction. While the first statement lacked some of the detail provided by the second and third statements, such as the date of the sexual abuse, those details are not significant because they are not elements of the offense and the nature of the allegation would not lend itself to an alibi defense. *See* ***State v. Fawcett***, 145 Wis. 2d 244, 250-51, 426 N.W.2d 91 (Ct. App. 1988). A reasonable defendant would not forego a plea bargain that reduced his exposure by twenty years based only on the difference between the first confession and his subsequent statements. Counsel's decision to promote a negotiated settlement rather than go to trial facing at least one confession constitutes reasonable strategic decisions that will not be second-guessed on appeal.

¶7 Joyner has not established deficient performance or prejudice from his counsel's reliance on the plea questionnaire and waiver of rights form Joyner executed five months earlier. Joyner does not dispute that counsel went through the form with him before the successful guilty plea. In addition, the trial court went through the form in detail before accepting his plea. Joyner has established neither deficient performance nor prejudice from his attorney's and the court's utilizing the preexisting form rather than requiring that he execute a new, identical form.

¶8 Finally, Joyner has not established deficient performance from his counsel's failure to object to statements in the presentence report that Joyner now claims are erroneous. His attorney testified at the postconviction hearing that he went through the presentence report with Joyner and asked whether there were any facts that needed correction. Joyner reported none. The trial court found counsel's testimony more credible than Joyner's. The credibility of witnesses is a

matter for the trier of fact to determine. *See* ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 775, 28 N.W.2d 446 (Ct. App. 1994). Joyner cannot complain of his counsel's failure to correct misstatements of fact about which Joyner never informed his attorney. *See* ***Strickland***, 466 U.S. at 691.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).