COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

Nos. 00-2348-CR
00-2349-CR
00-2350-CR
00-2351-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHRISTOPHER BUTLER,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Judgment affirmed; order affirmed in part, reversed in part and cause remanded.*

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

¶1 PER CURIAM. Christopher Butler appeals judgments, entered upon his no contest pleas, convicting him of one count of intentionally causing harm to a child and three counts of second-degree sexual assault of a child. Butler additionally appeals from the order denying his motions for postconviction relief. Butler argues that the circuit court erred by denying, as untimely, his postconviction motion for sentence modification. He also argues that the circuit court erred by denying his claims of ineffective assistance of counsel and selective prosecution without holding an evidentiary hearing.

¶2 Because, as the State concedes, Butler timely filed his motion for sentence modification, we reverse that part of the order denying his motion for sentence modification and remand the matter for further proceedings. However, we reject Butler's arguments regarding ineffective assistance of counsel and selective prosecution and therefore affirm the circuit court's denial of these motions for postconviction relief.

BACKGROUND

¶3 In August 1999, Butler was charged with one count of intentionally causing bodily harm to a child and one count of substantial battery, arising from an incident in which Butler punched a fellow student who had allegedly been teasing him. Butler was also charged in separate complaints with second-degree sexual assault of three children under the age of sixteen. Two of the sexual assaults occurred when Butler was fifteen years old—one involved a thirteen-year-old girl and the other involved a fifteen-year-old girl. The third sexual assault occurred when Butler was sixteen years old and involved a fifteen-year-old girl.

¶4 Butler voluntarily waived juvenile court jurisdiction. In exchange for his no contest pleas, the substantial battery charge was dismissed and read in for sentencing purposes. Butler was ultimately convicted of the remaining charges. The court sentenced him to one year in prison for the intentionally causing bodily harm to a child conviction and eight years in prison for each of the sexual assault convictions, all four sentences to run concurrently. Butler's motion for postconviction relief was denied without a hearing and this appeal followed.

ANALYSIS

A. MOTION FOR SENTENCE MODIFICATION

¶5 Butler argues that the circuit court erred by denying, as untimely, his postconviction motion for sentence modification. We agree. The circuit court denied Butler's motion for sentence modification because it was filed more than ninety days after sentencing, contrary to the time limit imposed by WIS. STAT. § 973.19.[1] Section 973.19, however, presents two alternatives for seeking sentence modification. Pursuant to the statute:

> (1)(a) A person sentenced to imprisonment…*who has not requested the preparation of transcripts under s. 809.30(2)* may, within 90 days after the sentence or order is entered, move the court to modify the sentence or the amount of the fine.
>
> (b) A person who has requested transcripts under s. 809.30(2) may move for modification of a sentence or fine under s. 809.30(2)(h). (Emphasis added.)

[1] All statutory references are to the 1999-2000 version unless otherwise noted.

In turn, WIS. STAT. RULE 809.30(2)(h) provides that a defendant shall file a "motion seeking postconviction relief within sixty days of the service of the transcript."

¶6 Here, it is undisputed that Butler requested transcripts pursuant to WIS. STAT. RULE 809.30(2)(e). The last transcript was filed on July 11, 2000, and Butler's postconviction motion was filed on July 30, 2000, well within the sixty-day time limit imposed by RULE 809.30(2)(h). We therefore reverse that part of the circuit court's order denying as untimely Butler's motion for sentence modification and remand to the circuit court for further proceedings.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

¶7 Butler argues that the circuit court erroneously exercised its discretion when it denied his ineffective assistance of counsel claim without conducting an evidentiary hearing. We are not persuaded.

¶8 A defendant who alleges ineffective assistance of counsel is not automatically entitled to an evidentiary hearing on that claim. To obtain an evidentiary hearing on an ineffective assistance of counsel claim, the defendant's motion must allege, with specificity, both that counsel provided deficient performance and that the deficiency was prejudicial. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313-18, 548 N.W.2d 50 (1996). If the motion alleges facts that entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***Id.*** at 310. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review independently. ***Id.***

¶9 However, if the factual allegations of the motion are insufficient or conclusory, or if the record irrefutably demonstrates that the defendant is not entitled to relief, the circuit court may, in its discretion, deny the motion without a hearing. ***Id.*** at 309-10. When reviewing a court's discretionary act, this court utilizes the deferential erroneous exercise of discretion standard. ***Id.*** at 310-11.

¶10 The analytical framework that must be employed in assessing the merits of a defendant's claim of ineffective assistance of counsel is well known. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that counsel's errors were prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *See* ***id.*** at 697.

¶11 With respect to the "prejudice" component of the test for ineffective assistance of counsel, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *See* ***id.*** at 693. The defendant cannot meet his burden by merely showing that the error had some conceivable effect on the outcome. Rather, the defendant must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶12 Here, the circuit court denied Butler's ineffective assistance of counsel claim without a hearing, concluding that the motion consisted of only conclusory allegations insufficient to allow a meaningful assessment of his claim.

In his motion, Butler asserted the following with respect to his ineffective assistance of counsel claim:

> 1) THAT on August 23, 1999, Mr. Butler waived juvenile court jurisdiction and was transferred to this court;
>
> 2) THAT said advice was not in his best legal interests and that his trial counsel was ineffective for failing to advise him against it;
>
> …
>
> 6) THAT his trial counsel was ineffective for failing to consolidate these matters with Brown County Circuit Court case no. 00-CF-105 so as to … add to Mr. Butler's bargaining position of being [able] to resolve more matters as a part of an overall plea agreement.

¶13 With respect to Butler's waiver of juvenile court jurisdiction, the motion did not allege what counsel's "said advice" consisted of nor how Butler was prejudiced by that advice. The motion did not indicate how Butler would have benefited by remaining subject to juvenile court jurisdiction. In fact, at the waiver hearing transcript Butler's counsel indicated:

> I've discussed the situation with my client and with his mother, and the mother has reviewed the report to the Court concerning my client's background and history. And we're all in agreement that because he is not fairing well in the secure detention, that for that reason and other reasons on the file, we've agreed to waive the juvenile court jurisdiction and agree to proceed to the adult court.

Additionally, Butler's motion failed to show that he would not have otherwise been sent to adult court had he not voluntarily waived juvenile court jurisdiction.

¶14 Similarly, with respect to his allegations regarding counsel's failure to consolidate these matters with another matter, Butler's motion failed to show that consolidation would have, in fact, been granted and how his bargaining power

would have consequently increased. We therefore conclude that the motion, on its face, does not allege facts that, if true, would entitle Butler to relief. Thus, the circuit court did not err by denying Butler's ineffective assistance of counsel claim without a hearing.

C. SELECTIVE PROSECUTION

¶15 Butler contends that the circuit court erred by denying his selective prosecution claim without granting an evidentiary hearing. A claim of unconstitutional discriminatory prosecution is made when a defendant alleges and proves that he or she is "a member of a class being prosecuted solely because of race, religion, color or other arbitrary classifications, or that he [or she] alone is the only person who has been prosecuted under this statute." ***State v. Barman***, 183 Wis. 2d 180, 189, 515 N.W.2d 493 (Ct. App. 1994).

¶16 To be entitled to a full evidentiary hearing, Butler had to first present a prima facie showing of discriminatory prosecution. *See* ***County of Kenosha v. C & S Mgt.***, 223 Wis. 2d 373, 401, 588 N.W.2d 236 (1999). A prima facie showing of discriminatory prosecution requires the defendant to prove that he or she has been singled out for prosecution while others similarly situated have not, and that the prosecutor's discriminatory selection was based on an impermissible consideration. ***Id.*** Butler's motion failed to present a prima facie case to the trial court and, thus, his selective prosecution claim was properly denied without a hearing.

¶17 A district attorney has great discretion in deciding whether to prosecute. ***Barman***, 183 Wis. 2d at 186. In fact, a district attorney has no duty or obligation to prosecute all complaints. ***Id.*** at 187. Further, a district attorney's

conscious exercise of some selective enforcement is not a constitutional violation. ***Id.*** "Rather, it is the selective, persistent and intentionally discriminatory prosecution in the absence of a valid exercise of prosecutorial discretion that violates a defendant's equal protection rights and constitutes a defense to the charge." ***Id.***

¶18 Here, Butler's motion noted that for two of the sexual assault charges, he, like his partners, was under sixteen years of age. The motion further noted Butler's belief that the two girls had not been prosecuted for having sexual relations with a person under the age of sixteen. Butler's motion ultimately alleged that "the plaintiff's prosecution of him yet failure to prosecute others represents unfair discrimination on the basis of gender and unequal treatment under the law, in violation of basic constitutional [rights]."

¶19 According to one of the criminal complaints, Butler, then fifteen years old, had sexual contact with a thirteen-year-old girl. The other assault involved a girl who was the same age as Butler; however, the complaint indicates that the girl did not acquiesce in the sexual contact and was forcibly restrained during the assault. Because of the age difference between Butler and the thirteen-year-old, and the absence of consent with respect to the fifteen-year-old, we conclude that Butler failed to make a prima facie showing that his "partners" were similarly situated. As the trial court noted, Butler's motion failed "to allege specific facts setting forth the required discriminatory purpose or that … the State chose to forgo prosecution of the girls because of some discriminatory purpose." Because Butler's motion consisted of only conclusory allegations insufficient to establish a prima facie case of selective prosecution, we conclude that the circuit

court properly denied his selective prosecution claim without an evidentiary hearing.

By the Court.—Judgment affirmed; order affirmed in part, reversed in part and cause remanded.

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