COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1726-CR **Cir. Ct. No. 2008CF418**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY T. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: EDWARD F. VLACK III, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Anthony Miller appeals a judgment, entered upon his guilty pleas, convicting him of two counts of possessing child pornography. Miller also appeals the order denying his postconviction motion for plea withdrawal. Miller argues he is entitled to withdraw his pleas because (1) the plea

colloquy failed to define an element of the crime; and (2) he was denied the effective assistance of trial counsel. Alternatively, Miller contends the circuit court failed to properly exercise its discretion when it imposed a sentence in excess of the presumptive mandatory minimum. We reject Miller's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Miller with one count of possessing child pornography and one count of sexual exploitation of a child. Miller moved to suppress statements made to the police. Before the motion was decided, Miller entered into a plea agreement. Under that agreement, the State amended the Information to allege two counts of possessing child pornography, and Miller pled guilty to both. Out of a maximum possible fifty-year sentence, the court imposed concurrent sentences resulting in five years' initial confinement and ten years' extended supervision. Miller's postconviction motion for plea withdrawal or resentencing was denied after a hearing. This appeal follows.

DISCUSSION

I. Plea Withdrawal

¶3 A defendant seeking to withdraw a plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. Fosnow***, 2001 WI App 2, ¶7, 240 Wis. 2d 699, 624 N.W.2d 883. When, as here, a defendant seeks to establish manifest injustice based on both a deficiency in the plea colloquy and factors extrinsic to the colloquy, such as the ineffective assistance of counsel, there are two "different

route[s] to plea withdrawal." ***State v. Basley***, 2006 WI App 253, ¶14, 298 Wis. 2d 232, 726 N.W.2d 671. Each will be discussed in turn below.

A. Plea Colloquy

¶4 When taking a plea, the circuit court has a statutory obligation to establish on the record that the defendant understands, among other things, the elements of the crime charged. *See* WIS. STAT. § 971.08(1);[1] ***State v. Bangert***, 131 Wis. 2d 246, 262-72, 389 N.W.2d 12 (1986). When moving for plea withdrawal based on an alleged defect in the plea colloquy, the defendant must (1) make a prima facie showing that the plea was accepted without the trial court's conformance with WIS. STAT. § 971.08 or other mandatory procedures; and (2) allege that he or she did not know or understand the information that should have been provided at the plea hearing. ***State v. Howell***, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48. If the defendant satisfies both prongs, the State has the burden to prove at an evidentiary hearing that the plea was knowing, intelligent, and voluntary, despite the inadequacy of the record at the time of the plea's acceptance. ***Id.***, ¶29; *see also* ***Bangert***, 131 Wis. 2d at 274.

¶5 Here, the circuit court concluded that Miller satisfied both prongs and shifted the burden to the State. The court ultimately determined, however, that the State met its burden of proving that the pleas were knowing, intelligent and voluntary. Although we affirm the circuit court's decision, we conclude the burden never shifted to the State because Miller satisfied only the first of the two necessary prongs. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶2, 318

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Wis. 2d 216, 768 N.W.2d 53 (we may affirm circuit court's decision on other grounds even if we do not agree with its reasoning).

¶6 WISCONSIN STAT. § 948.12(1m) (2007-08) criminalizes the possession of child pornography and provides:

> (1m) Whoever possesses any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct under all of the following circumstances [is guilty of a Class D felony]:
>
> (a) The person knows that he or she possesses the material.
>
> (b) The person knows the character and content of the sexually explicit conduct in the material.
>
> (c) The person knows or reasonably should know that the child engaged in sexually explicit conduct has not attained the age of 18 years.

At the plea hearing, Miller submitted a signed plea questionnaire/waiver of rights form that summarized the elements as "having reached the age of 18, did knowingly possess photographs of child engaging in sexually explicit conduct and knew the child was under 18." The form indicated that Miller understood the elements of the offense, and that his attorney had explained those elements to him.

¶7 "A circuit court has significant discretion in how it conducts a plea hearing and may, within its discretion, incorporate into the plea colloquy the information contained in the plea questionnaire, relying substantially on that questionnaire to establish the defendant's understanding." ***State v. Hoppe***, 2009 WI 40, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794 (internal quotations omitted). The plea colloquy, however, "cannot be reduced to determining whether the defendant has read and filled out the form." ***Id.***, ¶32.

¶8 Relevant to this appeal, the following exchange occurred at the plea hearing:

> [Court]: Okay. Mr. Miller I have a document in front of me it's entitled a plea questionnaire and waiver of rights. Did you have the chance to go over this with your attorney?
>
> [Miller]: Yes sir.
>
> [Court]: Does your signature appear on the second page?
>
> [Miller]: Yes sir.
>
> [Court]: Have you received a copy of the amended information?
>
> [Miller]: Yes sir.
>
> [Court]: Do you understand that this document contains two counts; each count is a charge of possession of child pornography?
>
> [Miller]: Yes sir.

In light of the decision in ***Hoppe***, we conclude the circuit court's reliance on the plea questionnaire and waiver of rights form substituted for an in-court colloquy regarding the elements of the offense. *See* ***id.***

¶9 Although Miller made a prima facie showing of a defect in the plea colloquy, his postconviction motion failed to allege that he did not know the elements of the crime. Rather, he asserted that at the time of his plea, "he did not know the *legal definition* of 'sexually explicit conduct' contained in the elements of the crime of possession of child pornography." (Emphasis added.) A valid plea, however, "requires only knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements." ***State v. Trochinski***, 2002 WI 56, ¶29, 253 Wis. 2d 38, 644 N.W.2d 891. Because the circuit court was not obligated to ensure Miller's knowledge of the legal definition of "sexually

explicit conduct," his claimed lack of knowledge does not satisfy the second prong necessary to shift the burden to the State. We therefore affirm the circuit court's denial of Miller's request for plea withdrawal on this ground.

B. Ineffective Assistance of Counsel

¶10 Ineffective assistance of counsel can constitute a manifest injustice warranting plea withdrawal. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To establish ineffective assistance of counsel, Miller must prove both "(1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him." *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). To prove prejudice, Miller must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶11 Miller claims that although the court never ruled on his suppression motion, counsel told him the motion had been denied and encouraged him to enter into the plea agreement. Because the motion was never decided, any challenge to the statements was not preserved for appeal. Miller contends he would not have pled guilty had he known he would be waiving his right to challenge the admissibility of his statements to police.

¶12 At the postconviction motion hearing, Miller acknowledged that he discussed his appellate rights with counsel, including the possibility of an interlocutory appeal in the event his suppression motion was denied. He also testified that counsel told him the motion had been denied, but conceded the possibility that he was mistaken or misunderstood what counsel told him.

¶13 Trial counsel testified that she advised Miller he could appeal if the court denied his suppression motion. Counsel, however, specifically refuted Miller's claim that she told him the motion was denied. According to counsel, Miller opted to go forward with the plea because he and his family were concerned about publicity. Counsel's notes did not indicate whether she informed Miller he would be waiving his right to appeal any issues raised in the suppression motion by pleading guilty before the court decided the motion. Counsel nevertheless testified that it would be her usual practice to go over such information with a client.

¶14 The court found counsel's testimony to be more credible. The circuit court, in its capacity as fact finder, is the ultimate arbiter of witness credibility, *see* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345, and Miller has failed to establish that the court's credibility determination is clearly erroneous. *See* WIS. STAT. § 805.17(2). Because the court found that counsel did not give Miller the misinformation forming the basis for his ineffective assistance claim, we reject this challenge to his guilty pleas.

II. Sentencing Discretion

¶15 Miller alternatively argues that the circuit court failed to properly exercise its discretion when it imposed a sentence in excess of the presumptive mandatory three-year minimum for each count. In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). There is a strong public policy against interfering with the trial court's sentencing discretion, and sentences are afforded the presumption that the trial court acted reasonably.

See ***id.*** at 681-82. Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its reasons for the sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted).

¶16 The trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

¶17 Here, Miller asked the court to deviate from the presumptive mandatory minimum by withholding sentence and imposing probation. A sentencing court is permitted to deviate downward "if the court finds that the best interests of the community will be served and the public will not be harmed and if the court places its reasons on the record." WIS. STAT. § 939.617(2). The circuit court found that a sentence less than the presumptive minimum would not be in the best interests of the community.

¶18 The court considered the proper sentencing factors, along with mitigating factors such as Miller's family, his education and employment history, and his progress in treatment. The court, however, concluded there were

aggravating factors that justified a sentence in excess of the mandatory minimum. The court found Miller's compulsion for child pornography particularly problematic given the number of times he returned to it even after he destroyed computer equipment and promised his wife that he would stop. The court also found that Miller's offenses were aggravated because he viewed child pornography while at work and because he had shared images with other users over the internet.

¶19 Miller nevertheless contends the court sentenced him based on a "deeply mistaken view of the science of addictive behavior." According to Miller, the sentencing court was "laboring under a misconception that one's inability to control addictive or compulsive behavior without the assistance of any professional help is an indicator of a likelihood of failure in the future, even after proper treatment is received." The sentencing court, however, was aware that Miller was in treatment, that he was focused on successfully completing the program, and that his treatment provider did not view him as a "threat." The court, in its discretion, properly drew its own conclusions from the information presented.

¶20 Neither Miller's views on the science of addiction nor the prognosis offered by his treatment provider prohibited the court from relying on Miller's personal history and aggravating factors to impose a sentence in excess of the presumptive mandatory minimum. To the extent Miller contends the court failed to consider mitigating factors, the record belies this claim. The court considered those factors, but did not believe they warranted a lesser sentence. Because the circuit court considered relevant factors and imposed a sentence authorized by law, we conclude it properly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

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