

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 17, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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

No. 96-1127-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUANE R. BULL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: LEWIS MURACH, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Duane Bull appeals from a judgment convicting him on five counts of second-degree sexual assault of a child. He also appeals from orders denying his postconviction motions for relief. He contends that the public defender triggered a violation of his due process and Sixth Amendment rights by refusing to substitute trial counsel, that trial counsel provided ineffective

assistance and that the court erroneously exercised its sentencing discretion. We reject his arguments and affirm.

The State charged Bull with eleven counts of second-degree sexual assault of a child in one case, and one count in another, both involving repeated acts with his step-daughter. Bull became dissatisfied with his assigned trial counsel, David Knaapen, and five weeks before his scheduled trial date, wrote the public defender to request substitute counsel. The Deputy First Assistant State Public Defender responded as follows:

This is in response to your letter of August 9, 1994 whereby you requested another attorney to represent you in your Columbia County felony case. At this time I have declined to appoint another attorney because I am afraid that it will cause further delay in your case, which is the very thing that you do not want. I have spoken extensively to Attorney Knaapen who has a good handle on your case. He is in the process of finding the appropriate doctor to do a psychological evaluation on you. If you were to be appointed a different attorney at this time, it would take some time for that attorney to familiarize him or herself with your case and get up to speed on it.

Your attorney cannot keep other counties from charging you. In order to consolidate charges in one county, you must actually be charged in the other counties. Once you are charged, Attorney Knaapen can work with the attorney for the other county to try to get your case consolidated in Portage.

As to the District Attorney ordering an evaluation for you, first *you* and *only you* must enter a "not guilty by reason of mental disease or defect" plea for the court to order an evaluation. The D.A. cannot order an evaluation for you. The D.A. can agree to having you evaluated by the doctor of your choice or the D.A. can ask to have a different doctor (one that you may not be agreeable to) evaluate you. In other words, both sides get a doctor or they can agree on one doctor.

In the unlikely event that you have any further concerns about your representation, please contact me. I

will appoint you another attorney if you feel that it would be in your best interest. Good luck with your case.

Bull did not respond to this letter, and a few weeks later pleaded no contest to five of the charges against him in the first case. In exchange for that plea, the State dropped the remaining charges in both cases. Shortly afterward, Bull again wrote to the public defender requesting substitute counsel and, as promised, received one. With new counsel at his side, Bull received five consecutive ten-year prison terms at his sentencing hearing three months later.

Bull subsequently moved to modify his sentences, contending that they were too harsh, that the court relied on erroneous information in his presentence report, and that new factors justified a reduced sentence. The court denied relief. We then allowed him to file a second postconviction motion. In that motion Bull sought to withdraw his plea, alleging a violation of his due process and Sixth Amendment rights to counsel, and ineffective assistance of trial counsel. The trial court also denied that motion, resulting in this appeal.

Bull has not shown a due process or Sixth Amendment violation from Knaapen's continued representation of him at the plea hearing. His argument is entirely predicated on the premise that the public defender denied him substitute counsel. However, the public defender only conditionally denied a substitution, plainly stating, "[i]n the unlikely event that you have any further concerns about your representation, please contact me. I will appoint you another attorney if you feel that it would be in your best interest." We can only conclude that had Bull renewed his request before the plea hearing, he would have received a substitution, as promptly happened when he requested new counsel after the

hearing. Bull cannot reasonably claim a violation of his constitutional rights from that fact that he delayed his second request.¹

Additionally, Bull failed to show any probability of a different outcome had he received new counsel before rather than after he pleaded. On the day of the plea hearing he endorsed a form stating that he was satisfied with counsel's representation. He further weakened his argument by failing to raise the issue until all other avenues had failed, including his first postconviction motion. Additionally, with benefit of new counsel, Bull subsequently entered into a very similar plea agreement, on similar charges, in a different county. From these facts it appears Bull received the disposition that he desired with Knaapen's assistance, and only sought relief from that disposition when he received longer than anticipated sentences.

Bull has also failed to demonstrate ineffective assistance from Knaapen. To prove a Sixth Amendment violation of the right to effective counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by the objective standard of what a reasonably prudent attorney would do in the circumstances. *Id.* at 636-37, 369 N.W.2d at 716. Prejudice results when there is a reasonable probability that but for counsel's errors the result of the proceeding would have differed. *Id.* at 642, 369 N.W.2d at 718. The alleged ineffectiveness here stems

¹ Because the public defender deferred rather than refused Bull's request, we need not decide whether a refusal to appoint new counsel when requested causes reversible error even if counsel subsequently provided effective assistance.

from the fact that Knaapen did not file a suppression motion before the plea hearing on the charges Bull pleaded to, although a substantial part of the evidence against Bull derived from inculpatory statements he made to police, and evidence that was discovered pursuant to those statements. However, Knaapen testified that he did, in fact, file a suppression motion in the companion case, and would have filed one in this case had Bull not agreed to his plea. Bull failed to introduce any evidence contradicting Knaapen's statements, and failed to show that he would have succeeded on his suppression motion. He therefore failed to show counsel's deficient performance and failed to show any prejudice from his alleged omission.

The trial court did not erroneously exercise its discretion in sentencing Bull to maximum consecutive terms. The trial court properly exercises its sentencing discretion if the sentence is not excessive and the court relies on proper factors. *State v. Krueger*, 119 Wis.2d 327, 336-37, 351 N.W.2d 738, 743 (Ct. App. 1984). We presume that the trial court acted properly in sentencing the defendant, and the burden is on the defendant to prove otherwise. *Id.* at 336, 351 N.W.2d at 743. In sentencing Bull, the court considered the seriousness of the offenses and their impact on the victim. The court also considered, as an aggravating factor, Bull's manipulation of the victim. That manipulation included causing the victim to believe that her mother was dying, and giving her forged physician reports instructing her to have sexual contact with Bull. The court also considered the fact that Bull was a pedophile, that his chances of rehabilitation were poor, and that the primary consideration was to protect the public from future offenses. These were proper factors for the court to consider and the court fully explained its reliance on them at the sentencing hearing. Although Bull contends that the court gave inadequate consideration to the rehabilitative goals of sentencing, the court's decision to discount that factor was particularly within its

discretion. *State v. Curbello-Rodriguez*, 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984).

The trial court properly refused to modify Bull's sentence based on new factors. A new factor is a fact or set of facts highly relevant to the sentence, but not known to the trial court at the time of sentencing, either because it was not then in existence or because it was overlooked by the parties. *Rosado v. State*, 70 Wis.2d 280, 288, 234 N.W.2d 69, 73 (1975). Whether a fact or set of facts qualifies as a new factor is a question of law we decide de novo. *State v. Ralph*, 156 Wis.2d 433, 436, 456 N.W.2d 657, 659 (Ct. App. 1990).

Bull presented as new factors the unavailability of effective treatment within the Wisconsin prison system without a lesser sentence, the fact that he subsequently received a consecutive sixty-year prison term on the pending charges in another county, and various errors in his presentence investigation report. However, testimony at the original sentencing hearing established that Bull would need a shorter sentence to qualify for the best treatment program. The trial court was also aware of the pending charges and the likelihood of additional consecutive prison terms. Therefore, neither the eligibility for treatment nor the subsequent sentence are new factors. As for the alleged errors in the presentence report, Bull identifies several in his brief, but failed to make a factual record that these were, in fact, errors. None appear significant in any event, and there is no indication that the trial court relied on them in sentencing Bull. Therefore, we need not consider whether Bull lacked a fair opportunity to correct them at his sentencing hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

