COURT OF APPEALS
DECISION
DATED AND RELEASED

March 20, 1997

No. 96-1839-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH W. PICKENS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

DEININGER, J. Kenneth W. Pickens appeals from a judgment convicting him of six felonies and two misdemeanors, all as a repeater. He also appeals his ninety-four year prison sentence and the denial of postconviction relief. Pickens claims that his trial counsel was ineffective in failing to properly object to the admissibility of two letters of apology he had written to the victims

of his crimes. He also claims the trial court abused its discretion when imposing sentence because the court "took its own religious beliefs into account."

We conclude that the letters of apology were not "statements made ... to the prosecuting attorney in connection with" a guilty plea under § 904.10, STATS.[1] Thus, the performance of Pickens' trial counsel was not deficient for failing to object to their admission under that section. We also conclude that the trial court did not erroneously exercise its discretion in imposing sentence. Accordingly, we affirm the judgment of conviction, the sentence, and the order denying postconviction relief.

BACKGROUND

A jury found Pickens guilty of kidnapping, four counts of second-degree sexual assault, taking and operating a motor vehicle without the owner's consent (OMVWOC), and two counts of battery. According to the testimony at trial, two teenage girls had gotten lost while driving to a party in Beloit. They encountered Pickens walking down a road and asked him for directions. He told them that his van had broken down and that he would show them the way to their destination if they would drop him off at a gas station.

The girls drove Pickens to his van, where Pickens physically assaulted them, pushed one from the car and drove off with the other. After driving a short distance, Pickens sexually assaulted the girl. She ultimately escaped and fled for help.

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[1] Section 904.10, STATS., provides as follows:

> Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

On the day of a scheduled motion hearing in the case, Pickens' first trial counsel visited him at the jail. Pickens informed his attorney that he wished to enter into a plea agreement, and that he had already prepared letters of apology to the victims. Defense counsel then met with an assistant district attorney to discuss a possible plea agreement. He told the prosecutor that Pickens had prepared letters of apology. The prosecutor made an offer, which was communicated to Pickens that same day.

The prosecutor had indicated she wanted to see the apology letters in order to review them for appropriateness, and also so she could forward them to the victims with the understanding that they could refuse to receive them. Pickens entered guilty pleas, after which the letters were turned over to the prosecutor, who reviewed them and forwarded them to the victims. The apology letters were identical, and were read to the jury as follows:

> "Please forgive me for intruding on your privacy. However, I do believe it is appropriate at this particular time to convey to you my deepest apology. I am not writing for forgiveness or sympathy, but with the hope that you and your loved ones accept my apology for all the pain and suffering that you have had to endure on behalf of my stupidity. With all sincerity, I am truly sorry and hope that my apology and prayer help redeem you from this tragic mistake of mine. Sincerely, Kenneth W. Pickens."

Subsequently, Pickens filed a motion to withdraw his pleas, stating that his attorney had coerced him into making them. Defense counsel was granted permission to withdraw from representation, and a second attorney was appointed to represent Pickens. The court granted Pickens' motion to withdraw his guilty pleas.

The first attorney recalls discussing the letters with his successor, but did not recall the exact "tenor of the discussions." He testified at the postconviction hearing that the letters had been prepared prior to any discussions of a plea agreement, apparently at the urging and with the assistance of Pickens' sister. Counsel stated that he told the prosecutor about the letters "as an offer of good faith" in order to "paint Mr. Pickens in the best

light" for purposes of obtaining a favorable agreement and sentence. In response to a question, counsel stated "I wouldn't have provided [the letters] if we would have gone to trial, no."

Pickens' second trial counsel testified at the postconviction hearing that he researched the admissibility of the letters under § 904.10, STATS. He believed "that the Court would deny my objection, so I didn't make the objection." Instead, trial counsel opted to object on other grounds that might keep the letters from being admitted -- lack of foundation -- but was overruled. Trial counsel testified that it was his "understanding" from conversations with his predecessor that the letters had been provided by Pickens' sister, that they were not written as part of any plea agreement, and that Pickens had written them as an expression of remorse.

At sentencing, the State recommended the maximum sentence plus the repeater enhancement for each count, all consecutive, for a total of one hundred and three years. Pickens' counsel, while acknowledging that a lengthy prison term would be imposed, urged the court to give Pickens an opportunity to prove himself to the court and society by structuring the sentence as a combination of imprisonment and consecutive probation. In support of this recommendation, defense counsel told the court:

> [G]enerally I'm not one to sort of wear religion on my sleeve, and I'm not making a religious argument to the Court, but I do believe in the redemption of the human being, and if we follow [the State's] sentencing recommendation, we say there is no redemption for Mr. Pickens.

The court then commented extensively on the purposes of sentencing; the aggravated nature of the offenses of which Pickens had been found guilty; his prior record, demeanor, educational background and employment history; Pickens' history of drug abuse; the pre-sentence investigation and its author's recommendations; the sentencing guidelines; and the need to protect the public. The court's comments encompass twenty-three pages of transcript, two paragraphs of which are the following:

> I want to say that, like [defense counsel], I also believe in the redemption of individuals. I want to tell you, Mr. Pickens, that [defense counsel] seemed to be saying that perhaps some of his views about redemption have an origin in a religious genesis, and I guess my views about redemption have that same -- come from that same place, but I want to tell you that while I think that [defense counsel] is right, there is a time when redemption is possible, and I think it comes -- I don't know if you know the story of the prodigal son in the New Testament, but if you do, it has to do with someone who is engaged in a life of some pretty bad things and stupid decisions, and the way that story goes, there came a point where as he was sitting in a pig sty eating food with the pigs, the story goes, he came unto himself and he said, I will arise and I will go unto my father and I will say unto him, Father, I have sinned against heaven and against thee. I am not worthy to be called thy son. Make me as one of thy hired servants. Now that's when I think redemption can occur.
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> I think, Mr. Pickens, that your life can probably be redeemed at the point at which you get to the place where you are willing to say, I have sinned, I'm not worthy, make me a servant, but I don't see that coming from you today.

The court imposed the following sentence: Thirty-five years imprisonment on the kidnapping charge, twelve years on each of the four sexual assault charges, five years on the OMVWOC, and three years on each of the battery convictions. All sentences were ordered to run consecutively for a total of ninety-four years.

Pickens filed a postconviction motion seeking to set aside the convictions and the sentence. The trial court denied the motion.

ANALYSIS

a. Standard of Review

While we defer to a trial court's relevant factual findings, the ultimate question of whether Pickens' trial counsel was ineffective is a question of law which we review de novo. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985). A sentencing decision, however, is committed to the sound discretion of the trial court. ***McCleary v. State***, 49 Wis.2d 263, 281, 182 N.W.2d 512, 521 (1971). A sentencing court is presumed to have acted reasonably, and a sentence will be set aside only if the defendant shows an unreasonable or unjustified basis for the sentence. ***State v. Wickstrom***, 118 Wis.2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984).

b.Admissibility of the Apology Letters Under § 904.10, STATS.

To establish that he was denied effective assistance of trial counsel, Pickens must establish that counsel's performance was deficient and that the deficient performance prejudiced his case. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). Pickens' claim is that trial counsel was deficient because he failed to object to the admissibility of the apology letters on the grounds that they were barred by § 904.10, STATS. Trial counsel testified at the postconviction hearing that he had researched the issue and concluded that the letters could not be kept out on that basis. If counsel's conclusion is correct, his performance cannot be deemed deficient.

The record reflects that the letters were written with the assistance of Pickens' sister prior to any plea discussions. After Pickens had entered guilty pleas, his sister gave the letters to Pickens' attorney, who forwarded them to the prosecutor. The prosecutor wanted to review the letters to ensure they were appropriate and to give the victims an opportunity to refuse them.

Pickens argues that our holding in ***State v. Mason***, 132 Wis.2d 427, 393 N.W.2d 102 (Ct. App. 1986), requires us here to conclude Pickens' trial counsel was deficient for not objecting on the basis of § 904.10, STATS. He claims that an attorney "skilled or versed in the criminal law" should have known of the ***Mason*** holding and its effect of "barring admission of the letters." In ***Mason***, we concluded that § 904.10, STATS., "is clear and unambiguous on its face," ***id.*** at 432, 393 N.W.2d at 104, and that statements made by a defendant during a court hearing to enter a plea, later withdrawn, could not be used to impeach the

defendant's contradictory testimony at trial. We fail to see how our conclusion in ***Mason***, that in-court admissions made during a plea hearing are unambiguously within the bar of § 904.10, STATS., provides much guidance on the issue in this case: whether letters of apology from a defendant to victims, transmitted through a prosecutor, are barred by the statute.

Rather, we agree with the State that our more recent holding in ***State v. Pischke***, 198 Wis.2d 257, 542 N.W.2d 202 (Ct. App. 1995), is more closely on point. In ***Pischke***, the defendant, while in jail, had given a letter to a police officer. In the letter, Pischke offered to enter a plea and to provide information about other crimes under investigation. In objecting to the admissibility of the letter, defendant argued that even though it was given to a police officer, it was intended for the district attorney. We stated that "[t]he issue thus narrows to a determination of who this letter was intended for." ***Id.*** at 267, 542 N.W.2d at 207. We concluded the letter was intended for the police, not the prosecutor, given that the prosecutor had nothing to do with the writing of the document and did not know of its existence until later.

Similarly, we here conclude that the apology letters were intended for the victims, not the prosecutor. Although the letters passed through the district attorney's hands, they were prepared without the urging or knowledge of the prosecutor. The letters were not statements "made to" the prosecutor; they were statements made to the victims, for which the prosecutor was merely a conduit.

We therefore conclude that an objection to the admissibility of the letters under § 904.10, STATS., would have been properly overruled by the trial court. Trial counsel's failure to object to the admissibility of the apology letters on the basis of § 904.10 did not therefore constitute deficient performance. *See* ***State v. Davidson***, 166 Wis.2d 35, 42, 479 N.W.2d 181, 184 (Ct. App. 1991). Given this conclusion, we need not consider whether Pickens was prejudiced by the admission of the letters at trial.

c. Trial Court's Comments at Sentencing

We have reviewed the transcript of Pickens' sentencing hearing. We conclude that the court's comments at sentencing, taken as a whole, show that the trial court appropriately considered the purposes of a criminal sentence,

the specific factors present in this case, and the various sentencing recommendations that had been presented to the court. Had the comments Pickens complains of stood alone, or had they constituted a major part of the sentencing court's remarks, we would perhaps have cause to question the court's exercise of proper sentencing discretion. A trial court may not "impose a sentence based upon factors such as church attendance and religious convictions." ***State v. Fuerst***, 181 Wis.2d 903, 914, 512 N.W.2d 243, 246-47 (Ct. App. 1994).

That is not the case here, however. The court's reference to the story of the prodigal son was not central to its sentencing rationale. The court was responding to defense counsel's statement that counsel believed in "the redemption of the human being." Viewed in context, the court's reference to redemption and the story of the prodigal son were comments on Pickens' seeming lack of remorse and his lack of rehabilitation potential, both of which are proper considerations at sentencing. *See* ***State v. Wickstrom***, 118 Wis.2d 339, 356, 348 N.W.2d 183, 192 (Ct. App. 1984). The court made no other comment about his own or the defendant's religious beliefs or practices.

The record thus supports the trial court's explanation at the postconviction hearing:

> And the story of the Prodigal Son, while it does grow out of a religious tradition, it's also a piece of literature within our time, and I don't care, frankly, about Mr. Pickens' religious views one way or another. I don't care whether he's a member of a church or not a member of a church. I don't care about any of his religious beliefs or lack of religious beliefs.
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> But I do believe that the necessity of his coming to grips with the fact that he is the one who has committed rather egregious crimes is something that is appropriate for this Court to take into consideration. And I think, as any parole board will think, that until he comes to grips with the fact that he needs to have some kind of a remorse -- the sort of thing that the Alcoholics Anonymous talk about --

> that he has to come to grips with the fact that it is his choice, that he's the one who has done wrong.

See ***State v. Fuerst***, 181 Wis.2d 903, 915, 512 N.W.2d 243, 247 (Ct. App. 1994) (sentencing court may clarify its statements at postconviction hearing).

Pickens has not shown an unreasonable or unjustified basis for his sentence. We therefore conclude that the court did not erroneously exercise its discretion when imposing the sentence.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.