COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0687-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SHAWN RILEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Shawn Riley appeals from the judgment of conviction, following his ***Alford*** pleas, of one count of kidnapping and four counts of first-degree sexual assault, party to a crime, in violation of WIS. STAT.

§§ 940.31(1)(a), 940.225(1)(b), and 939.05 (1997-98).[1] He also appeals from the trial court's order denying his postconviction motion to withdraw his pleas and for resentencing. Four lawyers represented Riley before the trial court. He claims that he should be permitted to withdraw his pleas. He contends that he received ineffective assistance of counsel because, according to him: (1) the meaning of an ***Alford*** plea was not explained to him by his second and third lawyers; (2) his second lawyer did not discuss or pursue suppression motions that were filed, but not litigated, by his first lawyer; (3) his second lawyer did not challenge the sexual-assault charges as multiplicitous; and (4) his third lawyer did not rely on the second lawyer's alleged ineffectiveness as grounds to withdraw Riley's pleas prior to sentencing. Riley also claims that the trial court erroneously exercised its sentencing discretion. Riley did not receive ineffective assistance of counsel and the trial court properly exercised its sentencing discretion. Accordingly, we affirm.

I. BACKGROUND

¶2 Riley and another person abducted a woman off the street, stripped her, committed multiple sexual assaults on her, and robbed her at gunpoint. Riley's first lawyer filed motions to suppress statements Riley made to the police. Prior to the motion hearing, the lawyer withdrew as Riley's counsel. The case was eventually plea-bargained by Riley's second lawyer. In return for Riley's plea to four counts of first-degree sexual assault and kidnapping, the State agreed to move

[1] ***North Carolina v. Alford***, 400 U.S. 25 (1970) (person may accept conviction even though he or she claims to be innocent).

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

to dismiss and read-in the armed robbery count, a sexual-assault count, and to recommend a total prison time of 120 years. As noted, Riley entered ***Alford*** pleas to the five counts.

¶3 Prior to sentencing, Riley received a new lawyer. This lawyer, Riley's third, moved to withdraw Riley's pleas on the ground that Riley did not know he would have to register as a sex-offender. The trial court denied the motion and then sentenced Riley to 200 years in prison.

¶4 Riley's fourth lawyer brought a postconviction motion claiming that Riley was entitled to withdraw his pleas, alleging that the second and third defense lawyers gave Riley ineffective assistance of counsel. The postconviction motion also sought resentencing. Both the second and third lawyers testified at the postconviction hearing, as did Riley. The postconviction court found that Riley understood the meaning of an ***Alford*** plea and that both lawyers had discussed the issues surrounding the motions to suppress with Riley. The postconviction court held that the lawyers had not given Riley ineffective assistance, concluding: "There's absolutely no reason that the Court could see that any plea should be vacated based upon what's been represented on the record."

II. ANALYSIS

A. Ineffective-Assistance-of-Counsel Claims

¶5 Whether a defendant may withdraw a plea is left to the sound discretion of the trial court. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997). Withdrawal prior to the imposition of sentence is permitted for any fair and just reason, unless the prosecution will be substantially prejudiced. ***State v. Garcia***, 192 Wis. 2d 845, 861, 532 N.W.2d 111, 117 (1995). A fair and

just reason "contemplates 'the mere showing of some adequate reason for defendant's change of heart.'" ***State v. Canedy***, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991) (quoting ***Libke v. State***, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973)). The burden is on the defendant to prove a fair and just reason for withdrawal of the plea by a preponderance of the evidence. ***Garcia***, 192 Wis. 2d at 861–862, 532 N.W.2d at 117. The "fair and just reason" presented by Riley is the alleged ineffective assistance of his lawyers.

¶6 A defendant claiming ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient and, as a result, that he or she suffered prejudice. ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216–217, 395 N.W.2d 176, 181 (1986). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. We "strongly presume" counsel has rendered adequate assistance. ***Id.*** To show prejudice, a defendant must demonstrate that the result of the proceeding was unreliable. ***Id.***, 466 U.S. at 687. If a defendant fails on either aspect—deficient performance or prejudice—the ineffective-assistance-of-counsel claim fails. ***Id.***, 466 U.S. at 697.

¶7 Whether a lawyer gives a defendant ineffective assistance is a mixed question of law and fact. ***Johnson***, 133 Wis. 2d at 216, 395 N.W.2d at 181. The trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985). Whether proof satisfies either the deficiency or the prejudice prong is a question of law that this court also reviews *de novo*. ***Pitsch***, 124 Wis. 2d at 634, 369 N.W.2d at 715.

1. ***Alford*** plea explanation.

¶8 Riley contends that he received ineffective assistance of counsel because his second and third lawyers did not explain the meaning of an ***Alford*** plea to him. We disagree. If counsel fails to provide accurate and adequate information to enable a defendant to enter a knowing, voluntary and intelligent plea, such assistance may be ineffective. ***State v. Bentley***, 201 Wis. 2d 303, 311–318, 548 N.W.2d 50, 54–57 (1996). Contrary to Riley's contention, however, the record is clear that the ***Alford*** plea was explained to him. Both attorneys testified that they discussed the meaning of the plea with Riley and that Riley fully understood what it was.[2] Although Riley's testimony contradicted that of his attorneys, the postconviction court was free to believe the attorneys instead of Riley. Because the court's finding is not clearly erroneous, we will not disturb it on appeal. ***State v. Yang***, 201 Wis. 2d 725, 735, 549 N.W.2d 769, 773 (Ct. App. 1996) (due regard given to trial court's opportunity to judge the credibility of the witnesses).

2. Failure to pursue suppression motion.

¶9 Riley argues that he received ineffective assistance of counsel because his second lawyer did not discuss or pursue suppression motions that were filed, but not litigated, by his first lawyer. He further argues that his third lawyer was ineffective for not citing the second lawyer's failure in the presentence plea-

[2] The second lawyer testified that he explained to Riley that, under an ***Alford*** plea, "he would maintain his innocence, but entering a no contest plea, he would be agreeing that the State had more than adequate evidence to convict him." This definition correctly describes an ***Alford*** plea. *See* ***State v. Spears***, 227 Wis. 2d 495, 500 n.2, 596 N.W.2d 375, 377 n.2 (1999) ("With an ***Alford*** plea a defendant accepts conviction but either maintains his or her innocence or declines to admit having committed the crime.").

withdrawal motion. Riley claims that he sought a lawyer several times when he was confessing to the police. Riley's second lawyer testified that he was going to pursue the suppression motions but that he did not go ahead with it because forty-five minutes before the motion hearing Riley entered his pleas. Riley's third lawyer testified that, although he considered the issue after discussing the matter with Riley, he did not believe the motions would be successful. The postconviction court found that the two lawyers were telling the truth and that Riley was not.

¶10 Riley's decision to enter his ***Alford*** pleas was the result of plea-bargained negotiations. Presumably, this encompassed not litigating the suppression motions. *See* ***State v. Wilkens***, 159 Wis. 2d 618, 624, 465 N.W.2d 206, 209 (Ct. App. 1990) (Trial counsel's "deliberate decision not to pursue a previously filed motion to suppress … is a waiver binding on [the defendant]."); *cf.* ***State v. McDonald***, 50 Wis. 2d 534, 537, 184 N.W.2d 886, 887 (1971) (deliberate abandonment of suppression motion prior to trial constitutes waiver).[3] Nevertheless, abandoning valid grounds to suppress could be ineffective assistance of counsel but, significantly, Riley has not demonstrated that the suppression motions would have been successful if they had been litigated. He has, accordingly, not established that the alleged deficient performance in not litigating the motions prejudiced him, which is a prerequisite to a successful assertion of an ineffective-assistance-of-counsel claim. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497, 195 N.W.2d 629, 633 (1972).

[3] Had Riley litigated the motions unsuccessfully, he would have preserved the suppression issue for appeal notwithstanding his pleas. *See* WIS. STAT. § 971.31(10).

3. Failure to challenge charges as multiplicitous.

¶11 Riley next contends that his second lawyer was ineffective for failing to challenge the sexual-assault charges as multiplicitous and that his third lawyer was ineffective for not moving to withdraw Riley's pleas prior to sentencing based on the second lawyer's failure to raise the multiplicity issue. We disagree. Riley was not prejudiced because the sexual-assault charges in this case are not multiplicitous.

¶12 An individual has the constitutional right to be free from multiple punishments for the same offense.[4] A two-pronged test is used to determine whether charges are multiplicitous. First, the court inquires into whether the charges are identical in law and fact. ***State v. Lechner***, 217 Wis. 2d 392, 404, 576 N.W.2d 912, 918–919 (1998). Next, the court must inquire into whether the legislature intended that multiple punishments could be imposed. ***Id.***, 217 Wis. 2d at 402–403, 576 N.W.2d at 918. Whether offenses are multiplicitous is a question of law we review *de novo*. ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329, 332 (1998).

¶13 Riley, relying on ***State v. Hirsch***, 140 Wis. 2d 468, 410 N.W.2d 638 (Ct. App. 1987), argues that the sexual-assault charges here are not significantly different in fact, but rather, "were part of the same general transaction." In ***Hirsch***, the defendant "allegedly moved his hand from [the victim's] vagina to her anus and back again." ***Id.***, 140 Wis. 2d at 474, 410 N.W.2d at 641. The court

[4] The Double Jeopardy Clause of the United States Constitution provides, in part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. Article I, § 8 of the Wisconsin Constitution provides: "[N]o person for the same offense may be put twice in jeopardy of punishment."

found the charges multiplicitous, determining, "There was no pausing for contemplation … nor was there a significant change in activity." ***Id.***, 140 Wis. 2d at 475, 410 N.W.2d at 641.

¶14 Contrary to Riley's assertions, however, this case does not resemble ***Hirsch***. Instead, it is more akin to ***State v. Eisch***, 96 Wis. 2d 25, 291 N.W.2d 800 (1980), where the court declined to find sexual-assault charges multiplicitous, holding that "the act of forced fellatio, forced anal intercourse, forced vaginal intercourse, and forced intrusion of [an object into a genital opening] required a new volitional departure in the defendant's course of conduct." ***Id.***, 96 Wis. 2d at 36, 291 N.W.2d at 805. Here, Riley and his co-actor forced the victim to engage in vaginal intercourse, inserted the barrel of a gun into her vagina, and took turns forcing the victim to perform fellatio on them. The record conclusively demonstrates that each of the five counts charged corresponded to a separate act of sexual assault. *See* ***id.***; *see also* ***State v. Kruzycki***, 192 Wis. 2d 509, 523, 531 N.W.2d 429, 434 (Ct. App. 1995) (defendant had sufficient time to reflect between assaults). Therefore, Riley was not prejudiced by counsel's failure to challenge this issue, nor was his third lawyer ineffective for failing to raise the issue in the motion to withdraw Riley's pleas.

B. Sentencing

¶15 Riley also argues that the trial court erred by "overcharacterizing the seriousness of the offense" and by not properly considering mitigating factors. We will not disturb a sentence imposed by a trial court unless the trial court erroneously exercised its discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 183, 233 N.W.2d 457, 460 (1975). We will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the

offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Id.***, 70 Wis. 2d at 185, 233 N.W.2d at 461. To obtain relief on appeal, a defendant "must show some unreasonable or unjustifiable basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992). We presume, however, that the trial court acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984).

¶16 Riley essentially asks this court to reweigh the sentencing factors as applied by the trial court. The weight accorded each factor, however, is within the sentencing court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65, 67 (1977). The three primary factors that a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633, 639 (1984). If the record shows that the trial court properly exercised its discretion, we must affirm that decision. ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194, 199 (Ct. App. 1983).

¶17 Here, the record reflects that the trial court considered the appropriate factors. The trial court noted the gravity of the crimes, describing the offenses as "horrific in nature and every woman's nightmare." It also considered: the results of the presentence report, Riley's criminal record, degree of culpability, age, educational background, employment record, remorse, repentance and cooperativeness, his need for close rehabilitative control, the rights of the public, and "certainly the effect the crime has on the victim." After considering these factors, the trial court determined that the maximum sentence—five consecutive forty-year sentences—was appropriate under the circumstances. *See* ***McCleary v. State***, 49 Wis. 2d 263, 290, 182 N.W.2d 512, 526 (1971) (a trial

judge in an aggravated case and in the exercise of proper discretion may impose a maximum sentence). Given that the trial court considered the proper sentencing factors, we conclude that the trial court did not erroneously exercise its sentencing discretion.[5]

By the Court.—Judgment and order affirmed.

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

[5] Riley also repeats his claim that the four sexual-assault convictions were multiplicitous and, therefore, that the trial court improperly imposed consecutive sentences. We have already concluded, however, that Riley's sexual-assault convictions are not multiplicitous. Consequently, we conclude that the trial court did not err by imposing consecutive sentences.