COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1712-CR **Cir. Ct. No. 2002CF553**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOBBY PRYOR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Bobby Pryor appeals an order denying his motion for postconviction relief from a conviction for incest with a child. We affirm for the reasons discussed below.

BACKGROUND

¶2 Pryor was initially charged with one count of intentionally causing harm to a child, one count of repeated sexual contact with the same child, and one count of incest with a child, each with allegations of habitual criminality. After Pryor waived his preliminary hearing, the State filed an amended information charging Pryor with two counts of intentionally causing harm to a child and two counts of incest with a child, all as a habitual criminal, and also added an allegation that he was a persistent repeater subject to life imprisonment under WIS. STAT. § 939.62(2m)(b)2. and (c) (2001-02).[1] Pryor eventually entered a no contest plea to one count of incest with a child in exchange for a joint recommendation of five years of initial incarceration, with freedom to argue the length of extended supervision, and the dismissal of all of the other charges and repeater allegations, including the persistent repeater allegation. The trial court sentenced Pryor to ten years of initial incarceration followed by ten years of extended supervision.

¶3 Appointed counsel filed a no-merit appeal seeking to withdraw his representation. Pryor objected to having a no-merit report filed, and sought permission to pursue postconviction relief on his own. We granted Pryor's request after ascertaining that it was knowingly and voluntarily made, dismissed the no-merit appeal, and extended the time for him to file a postconviction motion. Pryor then filed a postconviction motion seeking to withdraw his plea and/or modify his sentence for a host of reasons. Following an evidentiary hearing, the trial court denied Pryor's motion. Pryor appeals.

[1] All further references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

STANDARDS OF REVIEW

¶4 In order to withdraw a plea after sentencing, a defendant must ordinarily demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, such as ineffective assistance of counsel, evidence that the plea was involuntary, or failure of the prosecutor to fulfill the plea agreement. ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991).

¶5 The existence of manifest injustice is a determination usually left to the trial court's discretion. ***State v. Sturgeon***, 231 Wis. 2d 487, 495, 605 N.W.2d 589 (Ct. App. 1999). However,

> [w]hen a defendant's assertion of a violation of a constitutional right forms the basis for a plea withdrawal request, he or she may withdraw the plea as a matter of right by demonstrating: (1) that a violation of a constitutional right has occurred; (2) that this violation caused the defendant to plead guilty; and (3) that at the time of the plea, the defendant was unaware of the potential constitutional challenge to the case against him or her because of the violation.

Id. at 496. We review such constitutional questions independently.

¶6 There is an additional mechanism which comes into play for a subset of plea withdrawal motions. A defendant who asserts that the procedures outlined in WIS. STAT. § 971.08 or other court-mandated duties were not followed at the plea colloquy (*i.e.*, a ***Bangert*** violation), and further alleges that he did not understand the omitted information, is entitled to a hearing on his plea withdrawal motion at which the State bears the burden of proof to show that the plea was nonetheless knowing and voluntary. ***State v. Hampton***, 2004 WI 107, ¶¶56-65,

274 Wis. 2d 379, 683 N.W.2d 14; ***State v. Bangert***, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986).

¶7 Sentence determinations are accorded a presumption of reasonableness and will not be set aside unless the trial court has erroneously exercised its discretion. ***State v. Schreiber***, 2002 WI App 75, ¶7, 251 Wis. 2d 690, 642 N.W.2d 621.

DISCUSSION

Plea Issues

¶8 Pryor's primary complaint with respect to his plea is that the trial court did not rule in advance on whether Pryor's prior conviction for first-degree sexual assault was "comparable" to any enumerated "serious child sex offense" within the meaning of the persistent repeater statute. *See* WIS. STAT. § 939.62(2m)(a)1m.b. and 939.62(2m)(b)2. Pryor attempts to frame this issue in several different ways. He asserts that the lack of a ruling constituted a ***Bangert*** violation because the information about the sentence he was facing was a direct consequence of the plea. Alternately, he contends that counsel was ineffective for not obtaining an advance ruling. Finally, he also appears to argue that his plea was unknowing because he could not make an informed decision about whether to enter a plea in order to avoid a life sentence under the persistent repeater statute without first knowing if the persistent repeater statute would in fact apply to him.

¶9 We conclude that there was no showing of a ***Bangert*** violation because the trial court had no obligation to discuss the merits of a dismissed claim. Whether or not Pryor's prior conviction actually constituted a comparable serious child sex offense would only have mattered if Pryor went to trial on the original

charges with the persistent repeater allegation and was therefore actually subject to life imprisonment. In other words, potential exposure to the persistent repeater enhancer would have been a consequence of *not* entering a plea, not a consequence of the plea Pryor entered. We further conclude that counsel's failure to request a definitive ruling on the issue before advising Pryor to enter a plea was not ineffective assistance because defense counsel would reasonably have known that the trial court had no obligation to make such an advance ruling. Moreover, counsel informed the court at the plea hearing that he had discussed with both the prosecutor and his client the high likelihood that Pryor's past first-degree sexual assault conviction for sexually assaulting a thirteen-year-old girl at knifepoint would qualify as a comparable serious child sex offense. That was an entirely reasonable assessment and did not constitute deficient performance.[2] Because the record shows that Pryor's plea was entered with full knowledge of the risk that he would face life in prison if he were convicted of the original charges and the State then proved the persistent repeater allegation, Pryor did not demonstrate any manifest injustice in this regard.

¶10 Pryor next complains that neither counsel nor the court explained to him that he could not earn good time and be paroled, as he had been in the past. He again appears to be asserting that his plea was therefore unknowing, as well as asserting a ***Bangert*** violation. However, counsel testified that he explicitly informed Pryor that five years in prison would mean a full five years, minus only a

[2] As the trial court recognized, the issue turned on whether the court was limited to looking at the elements of the prior offense or could also look at the facts underlying that offense when deciding if it were comparable to one of the enumerated serious child sex offenses. Pryor has not cited any authority that would limit the court to the elements. *Cf.* ***State v. Collins***, 2002 WI App 177, ¶23, 256 Wis. 2d 697, 649 N.W.2d 325 (noting "the underlying question is whether the defendant's *conduct* in the other state would be a serious felony if performed in Wisconsin").

few days, because, by statute, prisoners are released the last Wednesday before their sentence expires. The trial court chose to believe counsel's testimony regarding his conversation with Pryor about penalties. We defer to credibility determinations by a trial court acting as the fact finder. *See* ***State v. Oswald***, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238 (Ct. App. 1999). Therefore, Pryor has no factual basis for his claims that counsel did not inform him that he would serve the entire amount of initial incarceration time, or that his plea was unknowing in that regard. Pryor also could not establish a *prima facie* case for a ***Bangert*** violation on this issue because the trial court has no affirmative duty to advise a defendant at the time of the plea that there is no good time or parole eligibility under truth-in-sentencing. *See* ***State v. Plank***, 2005 WI App 109, ¶¶14-17, 282 Wis. 2d 522, 699 N.W.2d 235, *review denied*, 2005 WI 136, 285 Wis. 2d 630, 703 N.W.2d 379 (No. 2004AP2280-CR).

¶11 Pryor next asserts that he should be allowed to withdraw his plea because the State breached the plea agreement and counsel failed to object. However, the trial court determined that the State did not breach the plea agreement, and that factual finding is fully supported by the record. As the court observed, the agreement was for the parties to make a joint recommendation of five years of initial confinement with freedom to argue the appropriate length of the extended supervision, and the State did in fact recommend five years of initial confinement, to be followed by twenty-five years of extended supervision. Pryor's entire argument on this issue appears to be premised on the mistaken notion that there was a difference between being free to argue the length of supervision and being free to argue the "length of the entire sentence," as the prosecutor recited the plea agreement at the sentencing hearing. Since extended

supervision is part of a total sentence, the freedom to argue one necessarily includes the freedom to argue the other.

¶12 Pryor further asserts that he should be allowed to withdraw his plea because the trial court never personally questioned him to ascertain his guilt. Under WIS. STAT. § 971.08(1)(b), the court is to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged." There is no requirement, however, that the inquiry take the form of having the defendant personally answer questions. Here, the court noted that it had sat through a day and a half of trial before the parties reached a plea agreement, and defense counsel agreed there was a factual basis for the plea. The record was more than sufficient to allow the trial court to ascertain that there was a factual basis for Pryor's plea.

Preliminary Hearing

¶13 Pryor next raises a series of issues relating to his preliminary hearing. The gist of these complaints is that counsel was ineffective for waiving the time limits for the preliminary hearing without consulting Pryor, and then advising Pryor to waive the preliminary hearing itself without telling him that the State was going to add a persistent repeater allegation in the amended complaint.

¶14 Contrary to Pryor's apparent belief, an untimely preliminary hearing would not have been fatal to the prosecution. Even if defense counsel had not properly waived the time limits and the original action had been dismissed on personal jurisdiction grounds for failure to hold a timely hearing, the State could simply have refiled the charges. Because there would have been no strategic advantage to starting the whole process over from scratch, it was not deficient performance for counsel to waive the time limits on his client's behalf.

¶15 With regard to Pryor's claim that he would have demanded a preliminary hearing had counsel informed him that the State might add a persistent repeater allegation, and then would have gone to trial had the State failed to show probable cause for the persistent repeater allegation at the preliminary hearing, Pryor has failed to show prejudice. As we have already explained, counsel's assessment that Pryor's prior sexual assault conviction would most likely be found to constitute a serious child sex offense comparable to the enumerated offenses in the persistent repeater statute was entirely reasonable. Pryor did not provide any information at the postconviction hearing that would undermine that assessment, and did not show that he would not have been bound over for trial on the very same charges with the same sentence enhancers if he had insisted on having a preliminary hearing.

Sentencing Issues

¶16 Pryor claims counsel performed ineffectively by informing the court that there were a number of inaccuracies in the presentence report but failing to identify them, and that the court then erroneously exercised its discretion by failing to ask about them. However, counsel explained at both the sentencing hearing and the postconviction hearing that he did not deem any of the inaccuracies sufficiently material to warrant the court's attention. Therefore, there was no reason for the court to inquire further. In any event, Pryor does not identify on appeal what the alleged inaccuracies were or explain how they would have affected the trial court's decision. We need not address arguments which are undeveloped, and will not do so here, when it appears that any error was

harmless.[3] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶17 Pryor also complains that the trial court placed undue emphasis on the need to protect Pryor's youngest daughter—whom he had not been charged with molesting—when explaining why it was going to exceed the parties' joint recommendation for five years of initial incarceration. The likelihood that Pryor would reoffend and the need to protect the public, however, were both proper sentencing factors. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & nn.10-12, 270 Wis. 2d 535, 678 N.W.2d 197. The risk that Pryor's youngest daughter might be vulnerable to molestation if she were only seven or eight years old when Pryor was released from prison related to both of those factors, and it was entirely within the trial court's discretion how much weight to give that consideration. ***Schreiber***, 251 Wis. 2d 690, ¶8.

No-Merit Report

¶18 Finally, Pryor claims that appellate counsel performed ineffectively by filing a no-merit report instead of raising a plea withdrawal issue based on Pryor's uncertainty over the application of the persistent repeater statute. Technically, this issue would be more properly presented in a separate petition for writ of habeas corpus. *See* ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). However, for the sake of judicial efficiency, we will briefly address it here.

[3] The trial court explicitly stated at the postconviction hearing that the reason it imposed ten years of initial confinement was to make sure the victims had reached adulthood before Pryor was released. The court also stated that the allegedly inaccurate information did not affect the length of the sentence.

¶19 First of all, counsel is *required* to file a no-merit report when he or she does not believe there are any meritorious issues for appeal but the defendant refuses to close the file. *See* WIS. STAT. RULE 809.32 and ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). If a defendant disagrees with counsel's assessment, he or she may file a response to the report. This court would then resolve the dispute by independently reviewing the record to see whether there were any appealable issues.

¶20 Here, rather than allow this court to evaluate counsel's assessment that there were no meritorious issues for appeal, Pryor chose to discharge counsel and proceed *pro se*. By doing so, Pryor waived any further right to have this court consider whether counsel's no-merit report was properly filed, or should have been rejected. Pryor simply cannot maintain a claim for ineffective assistance of appellate counsel after waiving the right to counsel on appeal.

By the Court.—Order affirmed.

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