COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP1348-CR **Cir. Ct. No. 2004CF3101**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD ALLEN BOYD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Richard A. Boyd pled guilty to having had sexual contact (penis-to-anus) with his twelve-year-old daughter. The circuit court imposed a forty-year prison sentence, composed of thirty years of initial confinement and ten years of extended supervision. Boyd filed a postconviction

motion seeking plea withdrawal, contending that his plea had not been knowing, intelligent, and voluntary because he was not competent at the time he entered the plea. In addition, he alleged that his trial counsel had been ineffective for failing to raise competency as an issue. Finally, he argued that he should be resentenced because the circuit court had not had an opportunity to consider his mental capabilities at sentencing. The circuit court denied the motion without a hearing, and Boyd appeals. We reject each of Boyd's contentions and affirm.

¶2 Boyd was on parole and subject to a domestic abuse restraining order when he went to his wife's home early in May 2004. Boyd stated that he went there despite the restraining order because he thought his wife needed a ride to work. She already had a ride, however, and she left Boyd behind at her home. Three of the four children in the house left for school, leaving only Boyd's twelve-year-old daughter, who was getting ready for school. Boyd was sitting on a bed and asked his daughter to come into the room. She did, and he told her to take off her clothes, which she did. Boyd disrobed and then had sexual contact with his daughter. He told the girl not to tell anyone.

¶3 The girl then went to school, where her teacher observed that she was behaving strangely. Although the girl denied anything was wrong, she continued to behave strangely, and several days later told her teacher and the school nurse what had happened. The girl eventually told authorities about two other incidents during which Boyd had had sexual contact with her. Boyd was arrested, and admitted the May 2004 assault, but he denied having prior sexual contact with his daughter. He also denied having penetrated his daughter's anus or vagina, but admitted having touched the girl's anus with his penis.

¶4 Boyd agreed to plead guilty to the May 2004 sexual assault, and the State, for its part of the bargain, agreed not to charge Boyd with the other two alleged incidents and as an habitual offender. Boyd agreed, however, that the court could consider the other incidents for sentencing purposes. The court accepted Boyd's plea and, after ordering preparation of a presentence investigation report, sentenced Boyd to thirty years of initial confinement and ten years of extended supervision.

¶5 In his postconviction motion, Boyd contended that he had "significant mental disabilities" and, as a result, had not been competent to enter a knowing, intelligent, and voluntary plea. Boyd argued that his trial counsel had been ineffective for failing to raise his competency as an issue, and he also argued that because the circuit court had not had an opportunity to consider his claimed mental disabilities at sentencing, he should be resentenced.

¶6 We first examine Boyd's contention that he should be allowed to withdraw his guilty plea because he was incompetent at the time of the plea. The circuit court denied the motion without a hearing, concluding that Boyd's incompetency claim was insufficiently supported to warrant relief. We agree.

¶7 "[A] postconviction motion for relief requires more than conclusory allegations." ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433. A postconviction motion must include sufficient facts to "allow the reviewing court to meaningfully assess" a defendant's claim. ***State v. Bentley***, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996). A postconviction motion meets this standard when it sets forth "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how" within the four corners of the document. ***Allen***, 274 Wis. 2d 568, ¶23.

¶8 Boyd's postconviction claim of incompetency at the time of the plea hearing was woefully inadequate under the ***Allen*** standard. It stated simply and without support that:

> Boyd has significant mental disabilities. Boyd should have been examined to see if he was competent to stand trial. [Postconviction] counsel's conversations with him show that he does not understand the nature of the court proceedings, a plea agreement, or his rights under the United States and Wisconsin Constitutions.
>
> Specifically, Boyd did not understand what the nature of the plea agreement was nor could he have any meaningful conversations with [trial counsel] … at any … attorney-client meeting….
>
> Boyd's inability to understand what was occurring directly undermines the reliability of his choice to plead guilty.

¶9 Boyd's claim of incompetency at the time of the plea was unsupported by an affidavit from a mental health professional, counsel, or Boyd himself. Instead, Boyd simply claimed mental disability without any description of the disability and how that disability rendered him unable to knowingly, intelligently, and voluntarily enter the plea. In addition, Boyd's postconviction counsel failed to articulate in the motion exactly what led him to question Boyd's competency at the time of the plea.

¶10 The transcript of the plea hearing offers no indication that Boyd was unable to understand the nature of the plea or the consequences of entering his plea. Contrary to Boyd's suggestion, the plea hearing thoroughly met the criteria of WIS. STAT. § 971.08 (2003-04)[1] and ***State v. Bangert***, 131 Wis. 2d 246, 260-62,

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

389 N.W.2d 12 (1986) (to ensure that a plea is knowingly, intelligently, and voluntarily entered, the circuit court is obligated by § 971.08 to ascertain whether a defendant understands the essential elements of the charge to which he or she is pleading, the potential punishment, and the rights being given up), and thereby established that Boyd's plea was knowing, intelligent and voluntary. More specifically, the record shows that the circuit court engaged in a detailed personal colloquy with Boyd during which Boyd affirmed that he understood: the maximum penalties that he faced; the nature and elements of the crime to which he was pleading; the terms of the plea bargain and the rights he was giving up by entering the plea agreement; the plea questionnaire that he signed; and that he was pleading guilty to the crime because he was guilty. The transcript also reveals that, in at least two instances when Boyd indicated that he did not understand something during the colloquy, the circuit court rephrased the question and gave Boyd opportunities to discuss the matter further with counsel.

¶11 Boyd's second contention—that his trial counsel was ineffective for failing to raise the competency issue prior to Boyd entering his guilty plea—fails for essentially the same reasons.

¶12 In evaluating claims of ineffective assistance of counsel, Wisconsin applies the two-part test described in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To prevail on an ineffective-assistance-of-counsel claim, the defendant must prove that his or her counsel's performance was deficient and that the deficiency prejudiced his or her defense. ***Johnson***, 153 Wis. 2d at 127. In this analysis, courts may decide ineffective assistance claims based on prejudice without considering whether the counsel's performance was deficient. ***Id.*** at 128 (quoting ***Strickland***, 466 U.S. at 697). To establish prejudice, the defendant must show

there is a reasonable probability that, but for counsel's error(s), the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305; ***Strickland***, 466 U.S. at 694. "The focus of this inquiry is not on the outcome of the trial, but on the reliability of the proceedings." ***Thiel***, 264 Wis. 2d 571, ¶20 (citation omitted); *see also* ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62.

¶13 In this instance, Boyd demonstrated neither deficient performance nor prejudice. By failing to establish a basis on which counsel could have or should have questioned his competency, Boyd failed to demonstrate deficient performance by trial counsel. Similarly, without a specific factual basis to support an incompetency claim, Boyd could not undercut the validity of his plea or cast doubt on the reliability of the proceedings.

¶14 Finally, Boyd's postconviction request for resentencing based on his claimed mental disability suffers the same flaws. The circuit court was aware at sentencing that Boyd had a "learning disability" and claimed that he was persistently depressed, and it took those claims into account at sentencing. Boyd's claim that the circuit court should have taken into consideration his "significant mental disabilities" is unsupported. Absent a claim of mental disability at sentencing or factual support for the same claim in the postconviction motion, the circuit court cannot be faulted for failing to take such a claim into account.

By the Court.—Judgment and order affirmed.

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