COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2480-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD KALTENBACH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Donald Kaltenbach appeals from a judgment of conviction, following a guilty plea, for first-degree reckless homicide, while armed, and from the circuit court order denying his postconviction motion. He

argues that counsel was ineffective and that the court erroneously exercised sentencing discretion. We affirm.

¶2 The pertinent facts are undisputed. On August 31, 1999, Kaltenbach confessed to killing his live-in girlfriend, Erin Findlay. According to Kaltenbach, during an argument in the early hours of August 29, he stabbed Erin in the chest and left her to die in their apartment. Erin's body was discovered days later by police. Kaltenbach pled guilty and was sentenced to forty-five years' imprisonment. After sentencing, he moved to withdraw his guilty plea, claiming that counsel was ineffective. In the alternative, he requested resentencing. The trial court denied his motion without a hearing.

¶3 Kaltenbach first argues that counsel was ineffective for failing to pursue a motion to suppress his statement to police. Prior to entering his guilty plea, Kaltenbach had moved to suppress his statement and derivative evidence based on his assertion that he confessed to police at the hospital, while he was in leg and arm restraints, while he was medicated, and after repeatedly asking for an attorney. The motion was not pursued because Kaltenbach decided to plead guilty. He argues that counsel's failure to pursue the motion amounted to a manifest injustice warranting plea withdrawal. He also argues that the trial court erred in denying his postconviction motion without a hearing. We disagree

¶4 To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance produced prejudice. ***State v. Sanchez***, 201 Wis. 2d 219, 232-36, 548 N.W.2d 69 (1996). To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶5 Ineffective assistance of counsel claims present mixed questions of law and fact. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant present questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test, and a reviewing court need not address both prongs if the defendant fails to make a sufficient showing on one. ***Strickland***, 466 U.S. at 687, 697.

¶6 A defendant is not automatically entitled to a hearing on a postconviction motion. ***State v. Bentley***, 210 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). If a defendant presents only conclusory allegations, which fail to raise a question of fact, or if the record conclusively demonstrates that the defendant is not entitled to relief, then the court may deny the motion on its face. ***Id.*** Whether a motion alleges facts warranting relief and thus entitling a defendant to a hearing presents a question of law, which we review *de novo*. ***Id.*** at 310. If the motion and affidavits fail to allege sufficient facts, the trial court has the discretion to deny the postconviction motion without a hearing, ***id.*** 310-11, and this court reviews that denial solely to determine whether the court erroneously exercised discretion, ***id.*** at 311.

¶7 Kaltenbach argues that his postconviction motion to withdraw his plea merited a ***Machner*** hearing.[1] We disagree. The record establishes that during the plea hearing, defense counsel advised the court that he had gone over the applicable defenses with Kaltenbach and that Kaltenbach had decided it was in his best interests to plead guilty. Consequently, by entering his plea, Kaltenbach knowingly waived his right to pursue his suppression motion. In addition, Kaltenbach's postconviction motion does not even allege that, but for counsel's failure to pursue the suppression motion, there was a reasonable probability that he would not have pled guilty. Further, Kaltenbach offered nothing to support a conclusion that any such motion would have been successful. Accordingly, the court correctly denied the motion without a hearing.

¶8 Kaltenbach next argues that counsel was ineffective for failing, at sentencing, to object to certain victim-impact statements or to present evidence to rebut allegations in those statements. He maintains that the allegations that he previously had been violent with the victim were critical at the sentencing and that "little, if anything was done to counteract the assertion of a previous history of domestic violence outside of [his] denials." The State counters, however, that "trial counsel also argued that the defendant had no history of violence." In addition, "trial counsel . . . presented three witnesses who told the court that defendant was not violent but rather a peacemaker who was kind and compassionate." Denying the postconviction motion, the court commented:

> The defendant was specifically asked at sentencing whether he had a chance to review the report and all the various submissions prior to sentencing, and he stated that he had. He was then asked if he had any additions or corrections to make, and he did not. The court was

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> apprised by trial counsel at sentencing that there were no police reports in existence regarding domestic violence between the defendant and the victim. The defendant and his family contended that there was no truth to physical violence between Findlay and Kaltenbach; the victim's family and friends claimed in their submissions that there was. Trial counsel informed the court that the defendant had no history of violence whatsoever. Although the defendant now claims he told his attorney to comment more forcefully on his lack of violence toward the victim, he himself said nothing during his allocution.
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> Nevertheless, the court finds it was sufficiently apprised of the defendant's position on this issue, and even if the defendant or trial counsel had more vehemently denied any allegations of physical violence with the victim, the court still had the authority and the discretion to place whatever weight it believed such a denial warranted…. Had the defendant stomped his feet and shouted at the top of his lungs that he never engaged in physical violence toward the victim, the court would not have placed any greater weight on his submission.

(Record references omitted.) For these reasons, the court correctly denied the motion without a hearing.

¶9 Finally, Kaltenbach argues that the maximum forty-five-year sentence was improper insofar as it was based on "the alleged non-reported violent conduct between [him] and Ms. Findlay." He also argues that "the community would be shocked that he received the maximum sentence for his conduct given his personal circumstances and the fact that he did accept responsibility for his conduct." We are not convinced.

¶10 The principles governing appellate review of a court's sentencing decision are well established. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. ***Id.*** We will not remand for resentencing absent an erroneous exercise of discretion. ***State v.***

Thompson, 172 Wis. 2d 257, 263, 493 N.W.2d 729 (Ct. App. 1992). In reviewing whether a court erroneously exercised sentencing discretion, we consider: (1) whether the court considered the appropriate sentencing factors; and (2) whether the court imposed an excessive sentence. *See* ***State v. Glotz***, 122 Wis. 2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). The primary factors a sentencing court must consider are the gravity of the offense, the character of the offender, and the protection of the public. ***Larsen***, 141 Wis. 2d 427. The weight to be given each factor, however, is within the sentencing court's discretion. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977).

¶11 The record reflects the sentencing court's careful consideration of the required sentencing criteria. Considering the severity of the offense, the court noted the "horrific nature of the crime," which involved Kaltenbach "plunging [a knife] in [the victim's] chest . . . [a]nd then . . . lett[ing] her lay [sic] there for approximately three days." Indeed, the court stated that based on these facts, Kaltenbach was fortunate not to have been charged with first-degree intentional homicide.

¶12 The court also gave considerable weight to the impact on the families of both the victim and the defendant, noting the horror and devastation for everyone involved. Addressing the needs of the defendant, the court observed that Kaltenbach's life had been spiraling out of control, resulting in substance abuse and revealing a dark side to his personality.[2] Consequently, the court believed that

[2] Kaltenbach argues that the court erred in considering the allegations of prior abuse between Erin and him, and claims his sentence was based on inaccurate information. We reject his argument.

(continued)

Kaltenbach's rehabilitative needs and the protection of the public were of paramount concern. Accordingly, the court sentenced him to the maximum sentence.

¶13 The record reflects the sentencing court's proper consideration of the appropriate sentencing factors and its detailed explanation of the bases for the sentence. The court's sentencing comments reflect "a process of reasoning based on legally relevant factors." *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984) (appellate court has duty to affirm sentencing decision if trial court "engaged in a process of reasoning based on legally relevant factors").

¶14 Further, we do not conclude that "the sentence imposed is so excessive and unusual and so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Considering Kaltenbach's

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First, information upon which a trial court bases sentencing need not be established beyond a reasonable doubt. *See* ***State v. Marhal***, 172 Wis. 2d 491, 502, 493 N.W.2d 758 (Ct. App. 1992). The rules of evidence do not apply at sentencing. ***Id.*** Consequently, a sentencing court may consider information presented in letters and statements as long as the defendant has an opportunity to rebut the information. *See* ***State v. Damaske***, 212 Wis. 2d 169, 195-96, 567 N.W.2d 905 (Ct. App. 1997). This is precisely what occurred in Kaltenbach's case.

Second, a defendant who requests resentencing based on a claim of alleged inaccuracies at sentencing must show both that the information was inaccurate and that the court actually relied on that information in the sentencing him or her. *See* ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). At sentencing, Kaltenbach had the opportunity to object to and rebut the allegations of prior domestic violence. While Kaltenbach did not directly address the issue at sentencing, he produced witnesses who did so. His lawyer also addressed the issue. His postconviction motion submissions offer nothing more to rebut the information presented at sentencing; consequently, the trial court properly denied his request for resentencing.

rehabilitative needs, the gravity of his offense, and the devastating impact of his crime, the sentence is not unduly harsh or excessive.

By the Court.—Judgment and order affirmed.

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