COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2006AP2068-CR
2006AP2069-CR

Cir. Ct. Nos. 2004CF708
2005CF213

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS J. GESKE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Thomas Geske appeals from judgments of conviction and an order denying his postconviction motion. He argues that his sentence is an erroneous exercise of discretion and unduly harsh and that he was

denied the effective assistance of trial counsel by counsel's failure to file a motion to suppress his statement to police. We affirm the judgments and order.

¶2 At fourteen years of age, Geske was charged with four counts arising out an incident in which fourteen-year-old Alyssa D. was lured out of her home and sexually assaulted in a neighbor's backyard. Geske was waived into adult court on November 17, 2004. On April 1, 2005, Geske was charged with three counts for an attempted sexual assault of Julie F. Julie F. was cut with a knife during the attempted assault. The assault of Julie F. preceded the assault of Alyssa D. by about a month.

¶3 Geske ultimately entered a no contest plea under a plea agreement for the consolidated cases. With respect to the Alyssa D. incident he was convicted of party to the crime of attempted first-degree sexual assault, party to the crime of attempted second-degree sexual assault of a child, and child enticement.[1] Regarding the assault of Julie F., Geske was convicted of attempted first-degree sexual assault and second-degree reckless endangerment with use of a dangerous weapon.[2] Consecutive twenty-two year prison terms were imposed for each of the attempted first-degree sexual assault convictions consisting of twelve years, six months' initial confinement and ten years' extended supervision. Three concurrent terms of five years' initial confinement, five years' extended supervision were imposed on the other three convictions.

[1] Under the plea agreement, the sexual assault counts were amended to attempt crimes. A charge of party to the crime of physical abuse of a child was dismissed.

[2] A charge of substantial battery by use of a dangerous weapon was dismissed. The plea agreement also included the district attorney's agreement not to charge Geske under new referrals with misdemeanor property damage and interfering with fire fighting crimes. Those uncharged offenses were read-in at sentencing.

¶4 Geske argues that twenty-five years in an adult prison is too harsh for a fourteen-year-old boy.[3] Sentencing is left to the discretion of the sentencing court and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. ***Id.***, ¶18. "We will find an erroneous exercise of discretion when a sentence is so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable persons concerning what is right and proper under the circumstances." ***State v. Setagord***, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997).

¶5 We first observe that Geske was facing over one hundred years of imprisonment on combination of all five crimes. The maximum sentence for attempted first-degree sexual assault conviction is thirty years. The twenty-two year sentences imposed for Geske's sexual assault convictions are within the maximum. "A sentence well within the limits of the maximum sentence is not 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

[3] The State contends that Geske did not argue in his postconviction motion that his sentence was excessive and constituted cruel and unusual punishment and therefore, Geske has waived the right to raise the issues on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501, (1997). The postconviction motion for resentencing was based on the failure to provide an adequate sentencing rationale as required by ***State v. Gallion***, 2004 WI 42, ¶¶17-19, 270 Wis. 2d 535, 678 N.W.2d 197. However, Geske's contention that the sentencing court failed to impose the minimum amount of confinement consistent with protection of the public, gravity of the offense, and rehabilitative needs was general enough to suggest that the sentence was excessive.

under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983); *see also* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

¶6 Geske contends that what constitutes an excessive and unconscionable sentence must be examined in light of his young age and that his young age is an absolute mitigating factor. For support, he cites ***Roper v. Simmons***, 543 U.S. 551 (2005), which holds that the death penalty violates the prohibition against cruel and unusual punishment when imposed against a defendant who committed murder when just seventeen years old. ***Roper*** recognized that because of a lack of maturity and sense of responsibility, vulnerability to negative influences and outside pressure, and underdeveloped character and personality, the irresponsible conduct of a juvenile offender is not as morally reprehensible as that of an adult and that juveniles cannot be classified among the worst offenders. ***Id.*** at 569-70. This court has already rejected the application of death penalty cases as requiring juvenile age to trump all other sentencing considerations. *See* ***State v. Davis***, 2005 WI App 98, ¶19, 281 Wis. 2d 118, 698 N.W.2d 823 (the Supreme Court's death penalty cases involving juveniles "do not require a trial court to give overriding mitigating significance to the young age of a defendant who has committed a serious crime.").

¶7 We acknowledge that Geske was a very young offender. However, he was convicted of very serious and aggravated crimes. He lured one victim out of her home for the purpose of committing an assault and she was beaten very badly. The victim was threatened with death. He used a knife in his assault of the other victim and actually wounded the victim. A threat of death was also made. The sentencing court found that the crimes caused serious physical and emotional

harm to the victims. As in ***Davis***, the seriousness of the crimes outweighed the mitigating factor of Geske's young age. *See* ***id.***

¶8 The sentencing court examined Geske's lengthy prior juvenile record involving assaults, thefts, carrying a concealed weapon, stolen property, attempted burglary, and disorderliness. Geske was not successful with other juvenile interventions and had not controlled his behavior. The court recognized mitigating circumstances in his acceptance of responsibility and plea. It identified the need to impose a sentence that would not diminish the seriousness of the offenses and to protect the public. There exists a record explanation for the particular sentence imposed and the sentence is a proper exercise of sentencing discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶40-43, 50.

¶9 We turn to Geske's claim that his trial counsel should have moved to suppress his statement to police and was ineffective for failing to do so. In order to find that trial counsel was ineffective, the defendant must show that counsel's representation was deficient and prejudicial. ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 687-88; ***Thiel***, 264 Wis. 2d 571, ¶19. To prove constitutional prejudice, "the defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Thiel***, ¶20. When a defendant has entered a guilty or no contest plea the prejudice requirement must be satisfied by a showing that there is a reasonable

probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

¶10 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***Theil***, 264 Wis. 2d 571, ¶21. The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.***

¶11 Geske contends that the circumstances of his police interrogation equal those found offensive in ***State v. Jerrell C.J.***, 2005 WI 105, ¶36, 283 Wis. 2d 145, 699 N.W.2d 110. Jerrell's written confession was held to be involuntary where police held the fourteen-year-old for eight hours, left him handcuffed, alone, and chained to a wall for two hours, interrogated him for five and one-half hours, and refused to let him speak with his parents.[4] ***Id.***, ¶¶33-37. Geske testified that he was held for five to six hours in a windowless room, left alone in the room for a majority of that time, was questioned by police for only one and one-half hours, was not handcuffed, didn't ask to call his parents, and was permitted bathroom breaks. He also indicated that he was heavily under the influence of marijuana at that time. The State points out that Geske had more police contact

[4] In ***State v. Jerrell C.J.***, 2005 WI 105, ¶59, 283 Wis. 2d 145, 699 N.W.2d 110, the supreme court mandated that all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention. The recording mandate applies only to interrogations taking place after July 7, 2005, the date of the ***Jerrell C.J.*** decision. Geske's interrogation occurred August 26, 2004.

prior to the interrogation than Jerrell. Yet, we need not decide if a motion to suppress would have been successful.

¶12 Trial counsel testified that she considered the circumstances of Geske's interrogation by police but did not file a motion to suppress because the totality of the circumstances were not offensive or coercive and suppression would not have changed the overwhelming other evidence of his guilt. Although Geske suggests plea bargaining may have been more favorable to him if a successful motion to suppress had been filed, trial counsel indicated that the prosecution may have held it against Geske if he had taken a suppression motion to hearing. Counsel made a thoughtful strategy decision. We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Trial counsel's performance was not deficient.

¶13 Further, Geske was not prejudiced by trial counsel's failure to file a motion to suppress. The direct evidence of Geske's guilt was overwhelming. Geske's younger victim knew him from school and was able to directly identify him. Her pajama pants were found in his possession and his shorts found at the crime scene. Geske's blood was found at the scene of both assaults. There is no reasonable probability that, but for counsel's alleged error, Geske would not have pleaded no contest and would have insisted on going to trial in lieu of a plea agreement reducing the charges which included a promise not to charge other offenses. We conclude that Geske was not denied the effective assistance of trial counsel.

By the Court.—Judgments and order affirmed.

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