COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP337-CR **Cir. Ct. No. 1999CF5970**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. FUERST,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 FINE, J. Michael L. Fuerst appeals a judgment entered on his guilty plea to first-degree sexual assault of a child as an habitual criminal. *See* WIS. STAT. §§ 948.02(1), 939.62 (1999–2000). He also appeals an order denying his postconviction motion for plea withdrawal or, in the alternative, to modify his

sentence. Fuerst claims that: (1) the circuit court erroneously denied his postconviction motion for plea withdrawal without an evidentiary hearing; and (2) the circuit court erroneously exercised its sentencing discretion. We affirm.

I.

¶2 In November of 1999, the State charged Fuerst with first-degree sexual assault of a child. The case was plea bargained. In exchange for Fuerst's guilty plea, the prosecutor agreed to recommend twenty years in prison: "the State has indicated it will be recommending 20 years in the Wisconsin State prison system."

¶3 Before sentencing, Fuerst filed a private presentence investigation report, written by a clinical therapist certified as an alcohol and drug abuse counselor, recommending an imposed and stayed sentence of forty years in prison with one year at the Milwaukee County Huber Correctional Facility. The circuit court sentenced Fuerst to forty years in prison.[1]

¶4 In January of 2006, we reinstated Fuerst's postconviction and appellate rights under WIS. STAT. RULE 809.30. *See* ***State ex rel. Fuerst v. Swenson***, No. 2004AP2192, unpublished slip op. (WI App Jan. 10, 2006). As we have seen, the circuit court denied Fuerst's postconviction motion without an evidentiary hearing.

[1] Fuerst committed the sexual assault before Truth-in-Sentencing, which applies to offenses committed after December 31, 1999. 1997 Wis. Act 283. Thus, the circuit court imposed an indeterminate sentence.

II.

A. *Plea Withdrawal.*

¶5 There are two distinct but overlapping routes to plea withdrawal. *See generally* ***State v. Howell***, 2007 WI 75, 301 Wis. 2d 350, 734 N.W.2d 48. A defendant can allege that a plea is invalid due to: (1) an alleged deficiency in the plea colloquy, *see* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); and (2) a factor extrinsic to the plea colloquy, *see* ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). Fuerst's challenge is the latter. In his postconviction motion, Fuerst conceded that the circuit court complied with the mandated plea-colloquy requirements, but claimed that his plea was not knowingly, intelligently, and voluntarily entered for reasons outside of the Record. *See* ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 53–54, 644 N.W.2d 891, 898 (manifest injustice warranting post-sentencing plea withdrawal where plea not knowingly, intelligently, and voluntarily entered).

¶6 To be entitled to a hearing on his plea-withdrawal motion, Fuerst must allege facts that, if true, would entitle him to relief. ***Nelson***, 54 Wis. 2d at 497, 195 N.W.2d at 633. Whether a motion alleges facts that, if true, would entitle a defendant to relief is a question of law that we review *de novo*. ***Bentley***, 201 Wis. 2d at 310, 548 N.W.2d at 53. If, however,

> the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.

Nelson, 54 Wis. 2d at 497–498, 195 N.W.2d at 633. Fuerst's claims do not pass ***Nelson/Bentley*** muster.

¶7 In his postconviction motion, Fuerst contended that his guilty plea was not knowingly, intelligently, and voluntarily entered because he did not know that the circuit court could sentence him to more than twenty years in prison. *See* ***Bangert***, 131 Wis. 2d at 260–262, 389 N.W.2d at 20–21 (circuit court obligated by WIS. STAT. § 971.08 to ascertain whether defendant understands potential punishment for charge); ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 390, 683 N.W.2d 14, 19 (circuit court must ascertain whether defendant understands court not bound by plea bargain). Fuerst alleged in an affidavit attached to his motion that, during a meeting at the county jail, he asked his trial lawyer "if I could get more than twenty years of prison and he assured me that our agreement was 'capped.'" According to the affidavit, the lawyer also told Fuerst "that this judge always follows the state's prison recommendation from a plea agreement." Fuerst claimed in the affidavit that "[i]f I had known that my sentence was not 'capped' by the plea agreement or my information that the judge always followed the plea agreement was wrong, I never would have waived my right to trial and pleaded guilty."

¶8 In support of these allegations, Fuerst attached to his postconviction motion letters he wrote to his sister and mother before sentencing. Fuerst wrote to his sister: "I know mom thinks I'll get a year, but you and I know better. Well its counting down and I still remember what the lawyer said that it was a long shot. Keep this letter and see how close I come[.] I bet 20 years." (Spelling as in original.) He wrote his mother: "I talked to the lawyer and he told me again its a long shot. He said he thinks it will be caped off at twenty years. Thats a long time." (Spelling as in original.)

¶9 Also attached to Fuerst's motion was an affidavit from Fuerst's postconviction lawyer. According to the affidavit, the postconviction lawyer met with Fuerst to discuss potential claims. During the meeting, Fuerst told the postconviction lawyer that Fuerst "believ[ed] that the court was obligated by the plea agreement to impose no more than a twenty year sentence" based on "information provided by his trial attorney based on the court's sentencing history in following plea agreement sentence recommendations." Fuerst also:

> acknowledged that he read the plea questionnaire and that he was told that [*sic*] by the court that the court could sentence him to a prison term greater than the twenty year term recommended by the State of Wisconsin as a part of the plea agreement. *Mr. Fuerst also said that he believed he was telling the truth when he answered the judge's various questions during the plea colloquy.*

(Emphasis added.) The postconviction lawyer also averred that he spoke to Fuerst's trial lawyer. The trial lawyer claimed that he never told Fuerst that "the judge either could not or would not (or both) exceed a twenty year prison term based upon the plea agreement and the court's sentencing history." Rather, the trial lawyer claimed that he told Fuerst "that the twenty year agreement was the best he could get for Mr. Fuerst and that he hoped that the judge would accept the recommendation." Fuerst claims on appeal that the allegations in his postconviction motion meet the ***Nelson/Bentley*** standard for an evidentiary hearing. We disagree.

¶10 The Record conclusively demonstrates that Fuerst is not entitled to relief. At the plea hearing, the circuit court told Fuerst that Fuerst could be sentenced to the maximum term of imprisonment:

> THE COURT: You understand then as an habitual criminal, the maximum penalty you would be facing for sexual -- first degree sexual assault of a child as habitual criminal is imprisonment for up to 50 years?

> THE DEFENDANT: Yes, sir.

The circuit could also told Fuerst that it was not bound by the plea bargain:

> THE COURT: Do you understand that the judge is not part of any plea agreement and is not required to follow the recommendations of the district attorney, or of your attorney, or of anyone else?
>
> THE DEFENDANT: Yes, sir.

Additionally, Fuerst told the circuit court that he had signed a guilty plea questionnaire and waiver-of-rights form, that he had gone over the form with his lawyer, and that he understood what he had signed. As material, the form Fuerst signed provided: "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: fifty years prison." *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627, 629 (Ct. App. 1987) (circuit court may refer to signed plea questionnaire and waiver-of-rights form).

¶11 This Record shows that Fuerst did, in fact, at the time he entered his guilty plea, know that the circuit court could sentence him to a maximum of fifty years in prison. The information provided at the plea hearing overrides any erroneous assertion Fuerst's trial lawyer may have made or any misunderstanding Fuerst may have had. *See* ***Bentley***, 201 Wis. 2d at 319, 548 N.W.2d at 57. Fuerst does not provide in his postconviction motion or on appeal any explanation why his confirmation of his understanding of the plea and its consequences was to be disbelieved or inadequate. Indeed, as we have seen, there is no dispute but that Fuerst admitted to his postconviction lawyer that he answered the circuit court's questions at the plea hearing truthfully. *See* ***State v. Basley***, 2006 WI App 253, ¶18, 298 Wis. 2d 232, 244, 726 N.W.2d 671, 677 (defendant must be given evidentiary hearing when defendant asserts responses during plea colloquy were

false and gives non-conclusory information plausibly explaining why answers were false).

¶12 In his main brief on appeal, Fuerst also contends that his guilty plea was not knowingly, intelligently, and voluntarily entered because he was emotionally vulnerable. Fuerst did not raise this claim in his postconviction motion. The only reference to his emotional state is in Fuerst's affidavit where Fuerst alleged that: "I was very distraught over my choices and I was taken to meet with jail staff who asked if I wanted some medication to help with my nerves." This is hardly a unique response to being held accountable for a serious crime. Moreover, by not sufficiently presenting this matter to the circuit court, Fuerst did not give the circuit court a chance to properly assess it. We do not expect circuit courts to decide issues that are not sufficiently developed. *See* ***Barakat v. Department of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (we do not review arguments that are "amorphous and insufficiently developed"); *see also* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145 (1980) (generally, an appellate court will not review an issue raised for the first time on appeal).

B. *Sentencing.*

¶13 Fuerst contends that his sentence is harsh and excessive because, he contends, the circuit court: (1) rejected the prosecutor's sentencing recommendation without adequate explanation; and (2) did not consider allegedly positive factors, including that Fuerst: admitted his guilt, behaved lawfully while on parole for a prior crime, and would have received treatment for his conceded alcoholism if placed on parole for the current crime. We disagree.

¶14 Sentencing is within the discretion of the circuit court, and our review is limited to determining whether the circuit court erroneously exercised that discretion. ***McCleary v. State***, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512, 519–520 (1971); *see also* ***State v. Gallion***, 2004 WI 42, ¶68, 270 Wis. 2d 535, 569, 678 N.W.2d 197, 212 ("circuit court possesses wide discretion in determining what factors are relevant to its sentencing decision"). 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." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

¶15 The three primary factors 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). The court may also consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id., 119 Wis. 2d at 623–624, 350 N.W.2d at 639 (quoted source omitted); *see also* ***Gallion***, 2004 WI 42, ¶¶59–62, 270 Wis. 2d at 565–566, 678 N.W.2d at 211 (applying the main ***McCleary*** factors—the seriousness of the crime, the defendant's character, and the need to protect the public—to Gallion's

sentencing). The weight given to each of these factors is also within the circuit court's discretion. ***Ocanas***, 70 Wis. 2d at 185, 233 N.W.2d at 461.

¶16 The circuit court considered the appropriate factors. It considered the gravity of the crime, noting that Fuerst had committed a "very serious offense" that had greatly impacted the victim, her family, and Fuerst's family. The circuit court also considered Fuerst's character, including his prior convictions for carrying a concealed weapon, disorderly conduct, and first-degree sexual assault. The circuit court noted that Fuerst's conduct while in prison for the sexual-assault was good and that he had complied with the conditions of his probation, but that Fuerst's "rehabilitative experience was completely unsuccessful":

> There's indications that while he went through some of the program that he was just going through the motions, was not really making any lifestyle change, not interriorizing [*sic*] any of the programming that he was being given. He had an opportunity to work on his rehabilitation and he obviously has not been rehabilitated, as the re-offending would indicate.

The circuit court also considered Fuerst's upbringing, family, alcohol abuse, sexual history, health, education, and employment.

¶17 Finally, the circuit court considered the need to protect the community, commenting that "the public has an absolute right to be protected from the conduct of the defendant. Little girls in this community, in this state, have a right to be protected from the defendant's conduct." The circuit court stated that it was not imposing the maximum sentence because, by pleading guilty, Fuerst had spared the victim from further testimony and the prosecutor had recommended "far less" than the maximum sentence. The circuit court fully explained Fuerst's sentence and the reasons for it.

¶18 Fuerst also claims that the circuit court erroneously exercised its discretion because it rejected without adequate explanation the private presentence investigation report's recommendation that Fuerst be placed on probation. This claim is belied by the Record. At the sentencing hearing, the circuit court specifically explained why probation was not appropriate:

> At this point with now the second offense that Mr. Fuerst has had and the offense that occurs within just a few years of being out of prison from the first offense, I think that Mr. Fuerst is a very dangerous person. *I think that to use probation would seriously depreciate this offense.* I think that confinement is necessary to protect the public from further criminal activity of the defendant. I think that that requires a lengthy confinement. I also think that correctional treatment that's going to be of any use to Mr. Fuerst and therefore to the community is going to be only through a confined setting. He's had opportunities outside of confinement. He's even had an opportunity previously in confinement and that has not been successful. The defendant is dangerous to the community and I think the community is entitled to be protected.

(Emphasis added.) The circuit court properly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.