**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 8, 2008**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal Nos. 2006AP2968-CR**
**2006AP2969-CR**

**Cir. Ct. Nos. 2005CF87**
**2005CF101**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSHUA M. WADE,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Judgments affirmed; order affirmed in part and reversed in part and cause remanded.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Joshua M. Wade has appealed pro se from judgments convicting him of two counts of second-degree sexual assault of a child

in violation of WIS. STAT. § 948.02(2) (2005-06),[1] and one count of child enticement in violation of WIS. STAT. § 948.07(3). Wade has also appealed from an order denying his motion for postconviction relief. We affirm in part, reverse in part, and remand the matter for further proceedings.

¶2 In January 2005, a complaint and amended complaint were filed against Wade in Waukesha County circuit court case no. 2005CF87, charging him with the repeated sexual assault of William M. (count one); making a visual representation of nudity (count two); child enticement related to William M. (count three); repeated sexual assault of Jonathon M. (count four); and child enticement related to Jonathon M. (count five). A complaint was also filed in Waukesha County circuit court case no. 2005CF101, charging Wade with the repeated sexual assault of Jonathan W. (count one); child enticement related to Jonathan W. (count two); the repeated sexual assault of Charles W. (count three); and child enticement related to Charles W. (count four). Informations reiterating these charges were filed in February 2005.

¶3 On June 6, 2005, Wade entered guilty pleas pursuant to a plea agreement in these cases. As part of the plea agreement, amended informations were filed changing counts one and four in case no. 2005CF87 to two counts of second-degree sexual assault of a child. Wade pled guilty to those two counts, and to count two (child enticement) in case no. 2005CF101. The plea agreement provided that count two in case no. 2005CF87 would be dismissed and read-in, as would count four in case no. 2005CF101. The remaining counts would be

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

dismissed outright. In addition, the prosecutor agreed to recommend no more than fifteen years of initial confinement, plus a lengthy period of extended supervision.

¶4 A sentencing hearing was held on August 2, 2005. After reiterating the terms of the parties' plea agreement, the trial court stated that it had received an additional one-count read-in list which alleged that Wade had engaged in the repeated sexual assault of Eugene S. between February 2003 and November 2004, and that Eugene's date of birth was October 19, 1990. In explaining the matter, the prosecutor stated that Eugene "came forward with his mother several months ago," and made allegations similar to those underlying the other charges against Wade. The trial court then asked Wade's counsel whether he acknowledged receipt of the read-in list and accepted it for sentencing purposes. Defense counsel replied that he did, stating:

> And basically what this represents is a—a previously reported but not previously included count; in other words, it was part of the investigation that was conducted in February and March 2005. I think it was simply an omission that it wasn't addressed at the time of the plea, but we corrected that, and we have responded to it and addressed it in this fashion, and Mr. Wade does consent to the Court using that as a read-in for another uncharged offense.
>
> I should say one thing about the State sentencing recommendation. In exchange for this, the State and the defense agreed with the State commenting that they would make an alteration to their sentencing recommendation based on this being added, and we—we essentially agreed to do that in order that it would be treated as a read-in, and that was that the State's going to recommend a term of initial confinement between fifteen and twenty years.
>
> …
>
> Previously the State had indicated they were going to recommend a period not to exceed 15 years, and they've agreed today to recommend a period not to exceed 15 to 20 years.

¶5 The trial court asked Wade whether he heard what his attorney just said and whether he understood that the trial court would consider the read-in and that the prosecutor's recommendation was changed. Wade stated that he understood. In his sentencing argument, the prosecutor subsequently recommended initial confinement of fifteen to twenty years. The trial court ultimately sentenced Wade to concurrent prison terms of forty years for the two second-degree sexual assault convictions, consisting of twenty-five years of initial confinement and fifteen years of extended supervision. It sentenced him to a concurrent term of thirty years for the child enticement conviction, consisting of twenty years of initial confinement and ten years of extended supervision.

¶6 Wade subsequently moved to withdraw his guilty pleas or, alternatively, requested modification of his sentences to reduce his initial confinement.[2] In his postconviction motion, Wade alleged that he was not competent to enter the guilty pleas because he was suffering from severe depression. He alleged that his trial counsel rendered ineffective assistance by failing to challenge his competency and advising him to plead guilty. Wade also alleged that his trial counsel was ineffective for failing to advise him to enter a plea of not guilty by reason of mental disease or defect (NGI plea), and for failing to inform him that he had a right to demand specific performance of the original plea agreement, or to withdraw his guilty pleas based on the prosecutor's breach of that agreement. Wade requested an evidentiary hearing on his claims, and asked the trial court to order an NGI evaluation before holding the hearing.

[2] Counsel was appointed for Wade after his convictions. Wade later elected to discharge counsel and proceed pro se.

¶7 The trial court denied the motion in its entirety without taking evidence. We conclude that the trial court properly denied relief related to Wade's competency and an NGI claims. We conclude that it properly rejected Wade's request for sentence modification. However, based upon ***State v. Scott***, 230 Wis. 2d 643, 602 N.W.2d 296 (Ct. App. 1999), and the State's concession that Wade is entitled to a ***Machner***[3] hearing on his claim that his trial counsel rendered ineffective assistance by failing to inform him that he could request specific performance of the original plea agreement, we reverse the order denying postconviction relief in part and remand the matter for an evidentiary hearing.[4]

¶8 When a defendant moves to withdraw a guilty plea after sentencing, he has the burden of establishing, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. The manifest injustice test is met if the defendant was denied effective assistance of counsel. ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The two-part test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), applies to challenges to guilty pleas alleging ineffective assistance of counsel. ***Bentley***, 201 Wis. 2d at 311-12. Under that test, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland***, 466 U.S. at 687. To prove deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. ***Hill v. Lockhart***, 474 U.S. 52, 57 (1985). The

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

[4] We recognize that this court has the responsibility to review an issue even when the State confesses error on appeal and requests reversal. *See* ***State v. Neave***, 220 Wis. 2d 786, 788, 585 N.W.2d 169 (Ct. App. 1998). We have done so, and agree with the State that reversal is appropriate.

prejudice inquiry focuses on whether counsel's performance affected the outcome of the plea process. ***Id.*** at 59. To satisfy the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. ***Bentley***, 201 Wis. 2d at 312.

¶9 Preserving the testimony of counsel on a claim of ineffective assistance of counsel is a prerequisite to raising that claim on appeal. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, before a trial court must grant a ***Machner*** hearing on an ineffective assistance of counsel claim, the defendant must allege sufficient facts to raise a question of fact for the trial court. ***State v. Washington***, 176 Wis. 2d 205, 214-15, 500 N.W.2d 331 (Ct. App. 1993). If 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 discretion, deny the motion without a hearing. ***State v. Howell***, 2007 WI 75, ¶75, 301 Wis. 2d 350, 734 N.W.2d 48.

¶10 This court determines as a matter of law whether a defendant's motion to withdraw a guilty plea alleges insufficient facts to entitle the defendant to relief or presents only conclusory allegations. ***Id.***, ¶¶78-79. Similarly, we determine as a matter of law whether the record conclusively demonstrates that the defendant is entitled to no relief. ***Id.***, ¶78. Our review determines whether the trial court erroneously exercised its discretion by denying postconviction relief without holding an evidentiary hearing. ***Id.***, ¶79.

¶11 To be sufficient, a postconviction motion must allege the five "w's" and one "h"; that is, who, what, where, when, why and how. ***State v. Allen***, 2004

WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. Wade's allegations regarding his alleged incompetency are inadequate under this standard.

¶12 In his postconviction motion, Wade alleged that he suffered from severe depression throughout the trial court proceedings, as evidenced by his suicide attempts and hospitalizations for mental health problems in January and March 2005. He also alleged that after March 2005 and while he was in jail awaiting trial, he stopped taking medication he had been prescribed for depression and obsessive-compulsive disorder (OCD). He contended that because of his untreated, severe depression, he was unable to make rational choices when he entered his guilty pleas. He contended that he was therefore incompetent to enter his guilty pleas and that his trial counsel, who was aware of his severe depression and suicide attempts, rendered ineffective assistance by advising Wade to enter the pleas and failing to seek a competency evaluation.

¶13 WISCONSIN STAT. § 971.14(1) requires a trial court to conduct competency proceedings if there is "reason to doubt" that the defendant is competent to proceed. ***State v. Byrge***, 2000 WI 101, ¶29, 237 Wis. 2d 197, 614 N.W.2d 477. Defense counsel renders deficient performance if he has reason to doubt the competency of his client and fails to raise the issue with the trial court. ***State v. Johnson***, 133 Wis. 2d 207, 220, 395 N.W.2d 176 (1986).

¶14 A defendant is incompetent when he lacks substantial mental capacity to understand the proceedings or assist in his own defense. WIS. STAT. § 971.13(1). More specifically, a defendant is incompetent if he lacks the capacity to understand the nature and object of the proceedings, to consult with his attorney, and to assist in the preparation of his defense. ***Byrge***, 237 Wis. 2d 197, ¶27. A reason to doubt competency can arise from the defendant's demeanor in

the courtroom, his colloquies with the trial court judge, or by motion from either party. ***Id.***, ¶29.

¶15 Nothing in Wade's postconviction motion or the record provides a reason to doubt his competency at the time he entered his guilty pleas. No basis therefore exists to conclude that trial counsel rendered deficient performance by failing to seek a competency evaluation prior to entry of the guilty pleas.

¶16 Determining competency to stand trial is a judicial determination, not a medical one. ***Id.***, ¶31. A history of psychiatric problems and a clinical diagnosis of mental illness does not necessarily mean that a defendant is incompetent. ***Id.***, ¶¶31, 48-49. Similarly, being suicidal or depressed does not necessarily affect legal competency. *See* ***id.***, ¶¶51-53. The pertinent determination is the defendant's mental capacity to understand the proceedings and assist defense counsel with a reasonable degree of rational understanding at the time of the proceedings. ***Id.***, ¶31.

¶17 Although Wade's postconviction motion and the record support his claim that he suffered from severe depression, was suicidal, and stopped taking medication while these proceedings were ongoing, nothing in the motion or record provides a reason to doubt Wade's ability to understand the proceedings and assist in his defense. A review of the plea hearing reveals that Wade gave appropriate, reasoned answers to the trial court's questions during the plea colloquy. His answers and statements reflected an understanding of the proceedings and indicated that he had consulted with his trial counsel regarding his waiver of his rights, his withdrawal of previously-filed motions, and the entry of his guilty pleas to the reduced charges. Nothing in the plea proceedings, the mental health records and other attachments filed as part of his postconviction motion, or the remainder

of the record provides any basis to conclude that Wade could not and did not understand the proceedings and assist his trial counsel with a reasonable degree of rational understanding at the time of the proceedings. Because neither Wade's motion nor the record provide a reason to doubt his competency at the time of the guilty pleas, or demonstrate "how" or "why" his mental health problems rendered him incompetent to enter his guilty pleas, the trial court properly denied this portion of his postconviction motion without an evidentiary hearing and without ordering a competency evaluation.

¶18 In his postconviction motion, Wade also alleged that his trial counsel rendered ineffective assistance by failing to advise him that an NGI plea was potentially viable based on his documented history of OCD, and failing to investigate an NGI defense. When a defendant alleges a failure to investigate on the part of his counsel, he must allege with specificity what the investigation would have revealed and how it would have altered the outcome of his case. ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). A defendant must base a challenge to his representation on more than speculation. ***Id.***

¶19 In support of his claim that his trial counsel was ineffective for failing to investigate and raise an NGI defense, Wade alleged that he was diagnosed with OCD in 1998, but that he was not taking medication or receiving treatment at the time of these offenses. He alleged that his OCD caused him to have obsessive sexual thoughts that he could not control, mostly about children. He alleged that if he had known of the potential applicability of an NGI plea, he would not have pled guilty.

¶20 A person is not responsible for his criminal conduct if at the time of the offense as a result of mental disease or defect he lacked substantial capacity

either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. WIS. STAT. § 971.15(1). Wade contends that his statements to the police regarding his inability to control his urges and his history of mental health issues and incarceration should have prompted his trial counsel to investigate an NGI defense and obtain an NGI evaluation.

¶21 Nothing in Wade's postconviction motion or the record provides a basis to conclude that a viable an NGI defense existed. An NGI defense is an affirmative defense that must be established by the defendant to a reasonable certainty by the greater weight of the credible evidence. WIS. STAT. § 971.15(3). Nothing in Wade's motion indicates that he did not appreciate the wrongfulness of his conduct. Moreover, while he alleges that his OCD caused him to have obsessive sexual thoughts about children that he could not control, his allegations are purely conclusory. Nothing in his motion or the record provides a basis to conclude that his OCD was a mental disease or defect that deprived him of the substantial capacity to conform his conduct to the requirements of the law, including the substantial capacity to refrain from sexually assaulting children or enticing children for purposes of sexual gratification.[5] Wade's motion therefore fails to provide a basis for concluding that his trial counsel rendered ineffective assistance by failing to investigate or raise an NGI defense. The trial court

[5] Wade's citation to ***Wal-Mart Stores, Inc. v. LIRC***, 2000 WI App 272, 240 Wis. 2d 209, 621 N.W.2d 633, does not help his argument. In ***Wal-Mart***, this court held that even though it was undisputed that an employee suffered from OCD, it could not be inferred from general medical information about OCD that the employee's outburst at work was caused by his OCD, nor could the commission rely on the employee's lay opinion that a causal connection existed. ***Id.***, ¶¶20-22. Similarly, Wade's OCD diagnosis and statements regarding his inability to control himself around children are insufficient to permit the inference that he was unable to conform his conduct to the requirements of the law because of a mental disease or defect.

therefore properly denied this portion of Wade's motion without an evidentiary hearing.[6]

¶22 In his postconviction motion, Wade also alleged that the prosecutor materially and substantially breached the terms of the plea agreement when he recommended fifteen to twenty years of initial confinement at the sentencing hearing. He contends that his trial counsel rendered ineffective assistance when he failed to object to the breach and advised Wade to acquiesce in the change and go ahead with sentencing without advising Wade of his right to demand specific performance of the plea agreement by the State. In an affidavit in support of his motion, Wade attested that if he had known of this right, he would have told his attorney that he wanted to withdraw his pleas if the prosecutor would not abide by the plea agreement.

¶23 As conceded by the State, Wade is entitled to a ***Machner*** hearing on this issue. As set forth above, at sentencing the prosecutor added an uncharged offense to the list of read-ins that had been agreed to in the plea agreement. He also recommended initial confinement of fifteen to twenty years, rather than fifteen years as set forth in the original plea agreement.

[6] In reaching this conclusion, we reject Wade's claim that he was entitled to an NGI evaluation under WIS. STAT. § 971.16 before the trial court addressed his motion for postconviction relief. WISCONSIN STAT. § 971.16 provides for an evaluation when a defendant has entered a plea of not guilty by reason of mental disease or defect, or the issue otherwise arises prior to trial, which is not the situation here. Moreover, as discussed above, nothing in the record or Wade's postconviction motion provided a basis for the trial court to conclude that Wade was not guilty of second-degree sexual assault or child enticement by reason of a mental disease or defect within the meaning of WIS. STAT. § 971.15(1). Consequently, even accepting Wade's argument that the trial court has discretion to order a postconviction evaluation, no basis exists to disturb the trial court's decision refusing to do so before addressing the postconviction motion.

¶24 While Wade acknowledged at the sentencing hearing that he understood these changes, he is entitled to a ***Machner*** hearing on his claim that his trial counsel advised him to acquiesce in the change and go ahead with sentencing without advising him of his right to demand specific performance of the original plea agreement by the State. When a guilty plea is entered pursuant to a negotiated plea agreement, a defendant has a constitutional right to enforcement of the plea agreement. ***Scott***, 230 Wis. 2d at 651-52. When the prosecutor induces entry of a plea pursuant to a plea agreement, the prosecutor is required to carry out his part of the bargain based on principles of due process. ***Id.*** at 652.

¶25 After the defendant enters a guilty plea pursuant to the plea agreement, neither party has the right to renege on the agreement, and the defendant has the prerogative, in the event of a breach, to seek specific performance of the agreement. ***Id.*** at 656. When a defendant does nothing to breach the agreement and enters a guilty plea pursuant to it, his trial counsel renders ineffective assistance if he neglects to inform the defendant of his right to specific performance of the agreement. ***Id.*** at 659, 664.

¶26 As conceded by the State, Wade was entitled to a ***Machner*** hearing to determine whether his trial counsel rendered ineffective assistance by failing to advise him of his right to specific performance of the plea agreement. We therefore reverse the portion of the trial court's order denying postconviction relief on this ground. We remand the matter for an evidentiary hearing to determine whether Wade's trial counsel informed him of his right to specific performance of the original plea agreement.

¶27 Wade's final argument is that he is entitled to sentence modification because, in addressing the need for the protection of the public, the trial court

failed to adequately consider that he will be eligible for commitment under WIS. STAT. ch. 980. This argument is unavailing.

¶28 Sentencing is left to the discretion of the trial 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, this court follows a strong and consistent policy of refraining from interference with the trial court's decision. ***State v. Ziegler***, 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

¶29 To properly exercise its discretion, a trial court must provide a rational and explainable basis for the sentence. ***State v. Stenzel***, 2004 WI App 181, ¶8, 276 Wis. 2d 224, 688 N.W.2d 20. It must specify the objectives of the sentence on the record, which include, but are not limited to, protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. ***Id.*** The primary sentencing factors that a trial court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***Ziegler***, 289 Wis. 2d 594, ¶23. Other factors which may be relevant include, but are not limited to, the defendant's past record or history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation report (PSI); the vicious or aggravated nature of the crime; the degree of the defendant's culpability; the defendant's demeanor before the court; the defendant's age, educational background and employment history; the defendant's remorse, repentance and cooperation; the defendant's need for close rehabilitative control; the rights of the public; recommendations of counsel; and any applicable sentencing guidelines. ***Id.***, ¶¶23-24. The trial court need not discuss all of the secondary sentencing factors, but rather only those

relevant to the particular case. ***Id.***, ¶23. The weight to be given each of the sentencing factors remains within the wide discretion of the trial court. ***Stenzel***, 276 Wis. 2d 224, ¶9.

¶30 The "sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Gallion***, 270 Wis. 2d 535, ¶23. However, in imposing the minimum amount of custody consistent with the appropriate sentencing factors, "minimum" does not mean "exiguously minimal," or insufficient to accomplish the goals of the criminal justice system. ***State v. Ramuta***, 2003 WI App 80, ¶25, 261 Wis. 2d 784, 661 N.W.2d 483.

¶31 At sentencing, Wade's trial counsel argued that the public would be adequately protected by initial confinement of five to eight years because, if Wade failed to satisfactorily complete sex offender treatment, he would be subject to commitment proceedings under WIS. STAT. ch. 980. The trial court was therefore clearly aware of Wade's contention. However, it was not required to accept this argument, or expressly discuss it in imposing sentence.

¶32 In sentencing Wade, the trial court stated that it had considered the recommendations of the parties. It also detailed the other relevant factors considered by it, analyzing them to determine "what is the least restrictive amount of incarceration consistent with the need to protect the public and consistent with not unduly depreciating the seriousness of these offenses." Because the trial court considered proper sentencing factors, and because nothing in the law required it to expressly address the possibility of a future civil commitment of Wade or to

conclude that this factor rendered concurrent maximum periods of initial confinement inappropriate, no basis for sentence modification has been shown.

*By the Court.*—Judgments affirmed; order affirmed in part and reversed in part and cause remanded.

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