COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1433-CR **Cir. Ct. No. 2006CF2259**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY LEE KEIL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Jeffrey Keil appeals from a judgment of conviction on one count of second-degree sexual assault with the use of force and from an order denying without a hearing his motion for postconviction relief. Keil asserts he received ineffective assistance of counsel because his attorney permitted

him to be sentenced almost immediately after entering a plea and because the attorney was unprepared for sentencing. We conclude that Keil has not shown he is entitled to relief and, accordingly, we affirm the judgment and order.

BACKGROUND

¶2 Keil was charged with two counts each of misdemeanor battery and second-degree sexual assault with the use or threat of force, all as a habitual criminal. The charges stem from allegations that Keil had repeatedly hit, slapped, or otherwise physically and sexually assaulted his girlfriend in 2004 and 2006.

¶3 Trial was scheduled in front of the Honorable Patricia McMahon, but she was ill on the day of trial and Keil's case was transferred to the Honorable Dominic Amato. After the parties addressed various pretrial motions, the State informed the court that Keil had presented a "counter proposal" just before the parties had entered the courtroom. The court adjourned to give the parties an opportunity to resolve the case.[1]

---

[1] In his brief, Keil notes that the parties addressed the various pretrial motions, then cites the following admonition from the court:

> If I handle the case, I'm handling sentencing, disposition, post conviction motions, if he's found guilty after a fair and impartial trial.
>
> … If it's resolved, I'll take the plea this morning but I'll set it for a sentencing hearing before Judge McMahon.
>
> If you're going to resolve this, [trial counsel], you've got seven minutes.

The implication in the brief is that the court gave Keil a mere seven minutes to figure out a plea. It ignores, however, the apparent reality that plea negotiations had begun the preceding week and that Keil was the last party to make an offer.

¶4 After the recess, Keil informed the court that he would enter a guilty plea to one of the sexual assault counts, absent the habitual criminal enhancer. In exchange, the State would move to dismiss the other counts and would recommend ten years' imprisonment, consisting of four years' initial confinement and six years' extended supervision. The court conducted a plea colloquy and accepted the plea.

¶5 The court advised Keil that he had the right "to have the same judge who you had the case tried before or you plead out before, to do the sentencing" and inquired whether Keil wanted it to continue with sentencing or wanted the case returned to Judge McMahon. The State interrupted and said that it was prepared to proceed to sentencing right then. Defense counsel agreed, offering to go forward if it was "all right" with the court. The court asked Keil if he wanted to keep it as the sentencing court, and Keil responded, "Yeah." The court then adjourned the hearing for approximately fifteen minutes to permit the parties "to get set up for sentencing."

¶6 At sentencing, the State addressed the court, advising it of Keil's criminal history, his habit of disappearing from his agent while on supervision, the facts surrounding the charge, and other background information. It made the sentence recommendation as agreed and explained why it thought ten years' imprisonment was proper.[2] The victim and her daughter both addressed the court.

[2] Keil complains that the State advised the court it was planning to file a WIS. STAT. Ch. 980 (2007-08) commitment petition. However, the court specifically disavowed such information, advising the parties that a Ch. 980 petition was a separate hearing that it would not consider.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

The victim testified about living in fear of Keil, and her daughter testified that she feared for the community.

¶7 Defense counsel joined the State's sentence recommendation and made a few brief statements. The court sentenced Keil to forty years' imprisonment. That sentence exceeded the statutory maximum and was later reduced to thirty-five years' imprisonment, consisting of twenty years' initial confinement and fifteen years' extended supervision.

¶8 Keil moved for resentencing and a ***Machner*** hearing, alleging ineffective assistance of trial counsel.[3] He complained counsel had failed to inform him that the court "has a long record of imposing stiff sentences in sexual assault cases," and failed to have family members available "which could have provided the Court with some understanding as to Mr. Keil[']s] conduct with this victim." Keil also alleged the court abused its sentencing discretion.[4]

¶9 The court rejected the motion without a hearing. It concluded that Keil had failed to show any prejudice. The court rejected Keil's insinuation that it had any set sentencing policy. It noted that mitigation evidence from Keil's family was unnecessary because his actions "didn't need any explanation in this case; they were outrageous." The court stated it did not erroneously exercise its discretion but, instead, considered the relevant sentencing factors and stated it was entirely speculative that another judge would have given a different sentence,

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App 1979).

[4] We no longer speak of a court's "abuse" of discretion but of an "erroneous exercise" of discretion. ***City of Brookfield v. Milwaukee Metro. Sewerage Dist.***, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

particularly in light of Keil's "extensive criminal history, the nature of the acts committed on the victim, the unbelievable degree of violence involved, the horrendous impact on the victim, and the absolute need for protection in the community."

DISCUSSION

¶10 On appeal, we note that Keil concedes the plea negotiation was fair and admits it was probably wise to accept the State's offer. His primary complaint is that counsel was not prepared for sentencing in that he failed to realize the court was putting him "on notice" that it disapproved of the plea and did not have family members available to present mitigating circumstances to the court.

¶11 "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must include facts that allow the reviewing court to meaningfully assess the defendant's claim. ***Id.***, ¶21. The mere assertion of ineffective assistance of counsel is insufficient. *See* ***id.***, ¶14.

¶12 Whether the postconviction motion alleges sufficient facts is a question of law. ***Id.***, ¶9. However, if the motion does not raise sufficient facts entitling the defendant to relief, or if the motion presents only conclusory allegations, the circuit court has the discretion to grant or deny a hearing. ***Id.***

¶13 Keil's motion for relief is grounded in an ineffective assistance of counsel claim, which is subject to a two-pronged test. ***Id.***, ¶26 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). A defendant must show counsel was both deficient and prejudicial. *See* ***id.*** A deficiency exists if counsel made errors

"so serious that counsel was not functioning as the 'counsel' guaranteed" by the Sixth Amendment." ***Allen***, 274 Wis. 2d 568, ¶26 (citation omitted). To show prejudice, the defendant must demonstrate that there is "a reasonable probability that, but for counsel's error, the rest of the proceeding would have been different." *See* ***State v. Guerard***, 2004 WI 85, ¶43, 273 Wis. 2d 250, 682 N.W.2d 12 (citation omitted).

¶14 Keil's ineffective assistance claim ultimately fails because he has not alleged sufficient facts to show he would be entitled to relief. As a general proposition, we note first that there is no outright bar to an immediate or same-day sentencing. Adjournment to a later sentencing hearing was not required.

¶15 Keil complains that counsel failed to pick up on hints that the count was not going to honor the bargained-for sentence recommendation. He relies on the fact that during the sentencing hearing, the court interrupted to remind Keil it was not bound by the plea. As the State was recounting the facts of the case, the court interjected and the following exchange occurred:

> THE COURT: Let me just interrupt you. Something occurred; I just realized it.
>
> Did you make -- In your plea negotiation that you set forth on the record, you didn't talk about any recommendation as to sentencing disposition that all counts were dismissed except Count 2.
>
> [THE STATE]: I said four and six. Four and six ES.
>
> ….
>
> THE COURT: Did you understand that to be the negotiated plea disposition, Defense Counsel? Mr. Johnson, did you understand that to be part of the plea bargain?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Do you recall that, sir?

> [KEIL]: Yes.
>
> THE COURT: You understand, like I said before, I don't have to follow that recommendation?
>
> [KEIL]: Yes.
>
> ….
>
> THE COURT: We went through everything. Your plea would still be guilty to this, sir?
>
> [KEIL]: Yes.

¶16 We decline to interpret the court's interjection as "notice" that it was not planning to follow the parties' sentencing recommendation. Rather, it appears the court was asking to have its memory refreshed on the terms of the plea bargain, then ensuring that the parties did, in fact, agree on its terms. The court is, of course, required to advise the defendant it is not bound by the terms of a plea bargain. *See* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. Thus, in context of having the plea agreement restated, it was not inappropriate for the court to remind the parties it did not have to follow the agreement, and we do not perceive such a reminder to be imbued with hidden meaning.

¶17 Keil's primary complaint, however, is that because sentencing was immediate, counsel did not invite Keil's family members to testify on his behalf and offer information that would have provided "a more rounded and complete understanding of this sad relationship" between Keil and his victim. However, Keil does not identify, even on appeal, what specific information his family would have to offer. At best, he suggests the information would show that his victim was involved with drugs and alcohol and that she "was by her choice a part of Mr. Keil's life for many years." This is insufficient to show that Keil is entitled to relief, because it does not allege what the evidence was or how it was relevant:

neither the victim's drug use nor her decision to permit Keil back into her home, if true, mitigate sexual or physical assault.[5] Unless Keil identifies the counsel's specific omissions or failures, he cannot demonstrate counsel was ineffective.

¶18 Further, we agree with the circuit court that it is purely speculative that Keil would have received a lighter sentence from another court even if his family had been called. Keil had thirteen prior convictions, one of which was for false imprisonment of the victim in this case.[6] Keil repeatedly disappeared from his supervising agent while on release. Further, as the circuit court noted, the facts in this case are particularly brutal: in the incident to which Keil pled, the criminal complaint alleged that Keil forced his victim to perform oral sex on him "or she would be sorry." He then "told her to get on the bed and he then inserted his penis into her vagina … then pushed her onto her stomach and turned her onto her back and again inserted his penis into her vagina."

¶19 The battery charges involved multiple actions, including hitting the victim's head and arms with his open hand and fist and threatening to kill her.[7] The dismissed sexual assault charge also involved forced intercourse, after which Keil took the victim into the bathroom, where he "took a bar of soap and shoved it into her vagina" repeatedly and after which he stated, "Now there is no evidence" and "You're not gonna turn me in for this again."

---

[5] These attempts to shift blame to the victim contradict Keil's assertion that he accepts responsibility for his crimes.

[6] He had also been charged with sexual assault at that time as well, but the victim asked the State to drop the charges.

[7] The court was permitted to consider these offenses as part of Keil's overall character and behavior pattern. *See* ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341.

¶20 Ultimately, the court utilized the sentencing guidelines and considered the required factors, specifically citing Keil's repeated abandonment of his extended supervision programs and an absolute need to protect the public when it imposed the maximum sentence. We discern no erroneous exercise of discretion, and Keil has not alleged sufficient facts to show counsel was either deficient or prejudicial.[8]

By the Court.—Judgment and order affirmed.

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

[8] Keil also complains his attorney offered no evidence of his mental health or medication status but, again, never alleged that he had any sort of mental impairment that counsel should have presented. Further, although Keil complains that counsel did not give a particularly long argument at sentencing, he does not show what else counsel should have said. After all, he wanted the court to adopt the State's sentencing recommendation, and the State gave a thorough argument supporting its position. It is not clear what Keil expects his attorney to have added.