COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1505-CR **Cir. Ct. No. 2007CF389**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

HARRY THOMPSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Reversed*.

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. The State appeals an order granting Thompson a new trial after a jury found him guilty of one count of first-degree sexual assault of a child under the age of thirteen. The circuit court concluded that the failure to inform Thompson of the applicable mandatory minimum sentence prior to trial

violated Thompson's constitutional due process rights. We disagree and explain that Thompson has not otherwise provided a persuasive reason to affirm the circuit court. Accordingly, we reverse.

Background

¶2 Thompson was charged with two counts of first-degree sexual assault of a child under the age of thirteen without great bodily harm, contrary to WIS. STAT. § 948.02(1)(b) (2005-06).[1] The complaint correctly stated that each count was a "Class B Felony" subject "to a term of imprisonment not to exceed sixty (60) years." The complaint, however, did not state that each count was subject to a mandatory minimum sentence of twenty-five years.[2]

¶3 Thompson pled "not guilty" to both counts. After a jury trial, the jury returned a verdict finding Thompson guilty of one count and not guilty of the second count. Following the verdict, Thompson moved for a new trial on due process grounds, based on the fact that the complaint failed to state the applicable mandatory minimum sentence. After a hearing on the motion, the circuit court found that "it was only after the pre-sentence investigation was received, that the Court and counsel discovered … a [minimum] initial incarceration" and that "at no time was [Thompson] informed that he faced a minimum mandatory prison

[1] All further references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The State notes that there was "some confusion" about whether the mandatory minimum sentence was in fact applicable. For purposes of this appeal, however, both parties agree that the twenty-five-year mandatory minimum sentence, found in WIS. STAT. § 939.616(1) (2005-06), applied.

sentence of 25 years." Based on these facts, the court ordered a new trial on the count that had resulted in a guilty verdict. The State appeals.

Discussion

¶4 The circuit court based its order for a new trial on a "clear violation of due process." Specifically, the court stated that the omission of the mandatory minimum sentence affected Thompson's decision of whether to "throw the dice at the trial or make an intelligent decision to try to negotiate." The court noted that it did not "know whether or not offers were made, and that's beside the point."

¶5 Thompson asserts that we should affirm on this basis. Alternatively, Thompson provides two other grounds to affirm—an alleged violation of WIS. STAT. § 970.02(1)(a) and ineffective assistance of counsel. We address and reject each of these arguments.

A. Due Process

¶6 Thompson's due process argument hinges on the proposition that his lack of knowledge of the mandatory minimum sentence interfered with his ability to plea bargain. He asserts that "a new trial is necessary to afford him the opportunity to undertake informed plea negotiations with the prosecutor."

¶7 Initially before this court, Thompson took the position that he has a right to engage in plea negotiations. His position, however, has been significantly weakened by his concession, in supplemental briefing before this court, that he does not have a right, constitutional or otherwise, to engage in plea bargaining. *See* ***Weatherford v. Bursey***, 429 U.S. 545, 561 (1977) (stating that "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial"); *see also* ***State v. Tkacz***, 2002 WI App 281, ¶27, 258 Wis. 2d 611, 654

N.W.2d 37 (recognizing that "a defendant does not have a constitutional right to a plea bargain" and citing ***Weatherford***, 429 U.S. at 561). Thus, it is undisputed that, regardless what information Thompson possessed, the prosecutor in this case could have refused to engage in plea bargaining.

¶8 What remains is Thompson's assertion that he has a due process right to be fully informed of the possible penalties so that he can make an informed decision whether to *pursue* a plea agreement. But a comparable argument was rejected by the United States Supreme Court in ***Weatherford***. In that case, an undercover government agent was arrested with Bursey when the two men and others vandalized government offices. During the ensuing prosecution, the government and the agent maintained the agent's cover to enable the agent to continue his undercover work on other matters and, consequently, did not disclose to Bursey that the agent was a possible witness against him. ***Weatherford***, 429 U.S. at 547-49. By the time of trial, the agent "had lost some of his effectiveness as an agent ... because he had been seen in the company of police officers, and he was called [to testify] for the prosecution." ***Id.*** at 549. Pertinent here, the ***Weatherford*** Court rejected the proposition that the agent's "continued duplicity lost Bursey the opportunity to plea bargain." *See* ***id.*** at 560-61. Stated differently, the Court was faced with the question whether depriving Bursey of this information improperly infringed on his opportunity to pursue a plea agreement. The reasoning employed by the ***Weatherford*** Court applies with equal force here. The ***Weatherford*** Court explained:

> But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.

Id. at 561. We reject Thompson's argument for the same reason.

¶9 Thompson's unspoken assumption, like the reasoning rejected in ***Weatherford***, is that he was prejudiced by being tried, rather than having an improved opportunity to negotiate a plea agreement. Thus, Thompson leans on the same "novel" and invalid argument that he suffered a wrong because he was tried without having a fully informed opportunity to "consider whether plea bargaining might be the best course." *See* ***id.*** at 559. Accordingly, we conclude that ***Weatherford*** disposes of the proposition that Thompson had a constitutionally protected right to information that might have affected his decision to pursue a plea agreement and avoid a trial.

¶10 Before moving on, we observe that none of the authority Thompson relies on directly or indirectly supports the proposition that there is a due process right to have information that may be helpful in pursuing a plea agreement.

¶11 For example, Thompson accurately states that plea negotiations play a "significant role" in our criminal justice system, and he cites authority for that proposition. *See* ***State v. Rivest***, 106 Wis. 2d 406, 435, 316 N.W.2d 395 (1982) (Abrahamson, J., dissenting). However, the fact that plea bargaining is common does not mean that defendants have a constitutionally protected right to information that may affect their decision to pursue a plea agreement.

¶12 Thompson's reliance on cases addressing rights associated with *entering* a plea, *e.g.*, ***State v. Stynes***, 2003 WI 65, ¶31, 262 Wis. 2d 335, 665 N.W.2d 115 (noting that repeater status notice requirements "satisfy due process by assuring that the defendant knows the extent of the potential punishment at the time of the plea"), and the *enforcement* of plea agreements, *e.g.*, ***State v. Roou***, 2007 WI App 193, ¶25, 305 Wis. 2d 164, 738 N.W.2d 173 (acknowledging "a constitutional right to the enforcement of a negotiated plea agreement"), is

similarly unavailing. Both lines of cases address plea rights at a separate phase of the process. They do not address any right to engage in plea bargaining, much less a right to information that may affect a decision to pursue plea bargaining.

¶13 Accordingly, we reject Thompson's due process argument because he fails to demonstrate that he has a plea-bargain-related due process right that was violated here.

B. Alternative Grounds

1. WIS. STAT. § 970.02(1)

¶14 Thompson contends that, under WIS. STAT. § 970.02(1)(a), the complaint in this case was defective because it did not state the applicable mandatory minimum sentence.[3] We understand Thompson to argue that this defect independently supports the granting of a new trial. As the following explains, we conclude that any defect in the complaint was not prejudicial to Thompson and, therefore, does not merit a new trial.

¶15 WISCONSIN STAT. § 970.02 describes a judge's duties at an initial appearance. Pertinent here, § 970.02(1)(a) states that the judge "shall furnish the defendant with a copy of the complaint which *shall contain the possible penalties* for the offenses set forth therein" (emphasis added). Thompson asserts that the term "shall" makes the furnishing of penalty information mandatory and that the

[3] Thompson also asserts that WIS. STAT. § 970.02(1)(a) required the judge to inform him of the mandatory minimum sentence at his initial appearance. *See* § 970.02(1)(a) ("In the case of a felony, the judge shall also inform the defendant of the penalties for the felony with which the defendant is charged."). Thompson states that this "reiterates the importance of the legislature's mandate," but he does not otherwise develop a separate argument about this portion of the statute.

"possible penalties" language necessarily includes a mandatory minimum sentence. We will assume without deciding that Thompson's interpretation of the statute is correct. Nonetheless, we conclude that he is not entitled to a new trial.

¶16 WISCONSIN STAT. § 971.26 states: "No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." Applying this statute here, we discern no resulting prejudice.

¶17 Thompson's prejudice argument is that, although some plea negotiations apparently took place, "more extensive plea negotiations could have taken place." He seems to suggest that, if he had been informed of the mandatory minimum sentence, he might have pursued negotiations more aggressively and, thereby, obtained a shorter sentence.

¶18 Thompson's prejudice argument is devoid of specifics and, instead, hinges on generalized speculation. For example, Thompson did not, in postconviction proceedings, make a record of the plea negotiations that took place. He also has not suggested any reason why his knowledge of the mandatory minimum sentence would have resulted in more negotiations leading, in turn, to a plea agreement and a shorter sentence. We note there is no reason to suppose that such knowledge on Thompson's part would have led the prosecutor to make a more favorable offer. Common sense suggests that awareness of a mandatory minimum sentence favors the bargaining power of the prosecutor, not of Thompson. And, there is no reason to believe that Thompson passed up an offer that he might have accepted if only he had known of the mandatory minimum.

¶19 In sum, the notion that Thompson suffered prejudice because the complaint did not include the mandatory minimum sentence is too speculative to support the conclusion that Thompson suffered prejudice. We therefore conclude that, even assuming a defect under WIS. STAT. § 970.02(1), Thompson is not entitled to a new trial because there was no prejudice within the meaning of WIS. STAT. § 971.26.

2. Ineffective Assistance Of Counsel

¶20 Thompson contends that his counsel rendered ineffective assistance by failing to inform him of the mandatory minimum. We conclude that Thompson's ineffective assistance argument fails for reasons we have already discussed.

¶21 To prevail on an ineffective assistance of counsel claim, Thompson must prove both deficient performance and that the deficiency prejudiced him. ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111. We may decide the claim "based on prejudice without considering whether the counsel's performance was deficient." ***Id.*** Further, the defendant bears the burden of proving prejudice, and we "'review de novo the legal questions of whether deficient performance has been established and whether it led to prejudice.'" ***Id.***, ¶24 (citation omitted).

¶22 As we have already explained, there is no reason to suppose that Thompson was prejudiced by a lack of knowledge of the mandatory minimum sentence. We need not repeat that discussion here.

¶23 We note that Thompson suggests that "arguably" he does not need to show prejudice to be entitled to a new trial. For support, however, he again cites

to cases addressing rights in the context of withdrawing a guilty or no contest plea that was not knowing, voluntary, and intelligent. *E.g.*, ***State v. Bartelt***, 112 Wis. 2d 467, 482-83, 334 N.W.2d 91 (1983) (addressing a challenge to "the validity of [a guilty] plea because of lack of knowledge of consequences of the plea" and stating that "if a plea is not understandingly made, it must be permitted to be withdrawn"). As we have already explained in our due process discussion, such cases do not address the plea bargaining phase.

Conclusion

¶24 For the reasons stated above, we reverse the circuit court's order granting Thompson a new trial.

By the Court.—Order reversed.

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