COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2000-CR **Cir. Ct. No. 2008CF527**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES M. WAPPLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. James Wappler appeals from a judgment sentencing him to life in prison as a result of his no contest plea to repeated sexual assault of the same child as a persistent repeater. He also appeals from the order

denying his postconviction motion to withdraw his plea. On appeal, Wappler argues that the circuit court should have permitted him to withdraw his plea because he did not understand that he faced life in prison if he pled no contest. The record confirms that Wappler knowingly, voluntarily and intelligently entered his no contest plea and his trial counsel was not ineffective. We affirm.

¶2 Wappler was charged with repeated sexual assault of a child as a persistent repeater. As a persistent repeater, Wappler faced a penalty enhancer: a mandatory sentence of life in prison without the possibility of release. WIS. STAT. § 939.62(2m)(b)2. and (c) (2009-10).[1]

¶3 The following exchange occurred at the plea hearing:

> Mr. Seymour [Wappler's counsel]: My client will be entering a plea to the charge as it currently stands, which does carry with it the potential two strikes life imprisonment sentence as well as a potential minimum period of incarceration of 25 years as part of a bifurcated sentence under the—under the statues.
>
> I have had a number of discussions with my client to make sure he understands that the State has made absolutely no commitment to dropping the two strikes life imprisonment sentence, even if the [psycho-sexual] evaluation would come back positive in terms of—for him, I guess.
>
> And, that it's probably highly unlikely that the State is going to be willing to drop that sentence, however, again, he would still like to have the evaluation done to allow the State and the Court to have those results to see if it would make any difference in terms of the sentencing.
>
> The Court: Mr. Wappler, did you understand all that Attorney Seymour stated?
>
> Mr. Wappler: Yes.

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

¶4 The court advised Wappler of the maximum penalties he faced and stated that because Wappler had been convicted of a previous child sex offense, "the Court shall sentence the defendant to life imprisonment without the possibility of parole." The court noted the possibility of a minimum twenty-five-year term, but reiterated that this penalty was subject to any applicable penalty enhancement. The court then asked Wappler whether he understood "at the present time you're facing life imprisonment?" Wappler responded "yes." The court informed Wappler that the State was not under any "obligation to recommend anything to the Court inconsistent with the present penalty provisions," and the State could disregard the information set out in a psycho-sexual evaluation. Wappler indicated that he understood, that no promises had been made to him and that he did not have any questions about the maximum penalty. Seymour stated that he had carefully reviewed the matter with Wappler, and Wappler did not want to go to trial.

¶5 Wappler had new counsel for his sentencing hearing. At sentencing, new counsel explained that he had reviewed with Wappler the potential for a life sentence. Wappler affirmed that he wanted to proceed to sentencing. The court again confirmed that Wappler understood he faced a life sentence. The court acknowledged Wappler's unsuccessful strategy to use a psycho-sexual evaluation to persuade the State to abandon the persistent repeater allegation, thereby rendering Wappler eligible for the twenty-five year minimum sentence. The court sentenced Wappler to life in prison without release.

¶6 Postconviction, Wappler moved to withdraw his no contest plea because he did not understand that the court was compelled to sentence him to life in prison. Rather, he thought the court could choose between life imprisonment and the twenty-five year minimum. As the source of his misunderstanding,

Wappler pointed to the complaint and the information which referred to WIS. STAT. § 939.62(2m)(b), lifetime imprisonment, and WIS. STAT. § 939.616(1r) and (3), confinement of at least twenty-five years. Wappler also claimed that Seymour was ineffective because he led Wappler to believe that there might be a way to avoid a life term based on the results of the psycho-sexual evaluation. The court denied the motion after an evidentiary hearing.

¶7 Whether a plea was properly entered presents a question of constitutional fact. ***State v. Van Camp***, 213 Wis. 2d 131, 140, 569 N.W.2d 577 (1997). We will not upset the circuit court's findings of historical or evidentiary facts unless they are clearly erroneous. ***Id.*** The circuit court "is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." ***State v. Peppertree Resort Villas***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. We review constitutional issues independently of the circuit court's determination. ***State v. Harvey***, 139 Wis. 2d 353, 382, 407 N.W.2d 235 (1987).

¶8 To withdraw a plea after sentencing, a defendant must show a manifest injustice necessitating plea withdrawal. ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A manifest injustice occurs when the defendant did not knowingly, intelligently and voluntarily enter the plea, ***State v. Trochinski***, 2002 WI 56, ¶15, 253 Wis. 2d 38, 644 N.W.2d 891, or was denied the effective assistance of counsel, ***State v. Rock***, 92 Wis. 2d 554, 558, 285 N.W.2d

739 (1979). The State may rely upon the entire record to show the validity of the plea.[2] ***State v. Hampton***, 2004 WI 107, ¶47, 274 Wis. 2d 379, 683 N.W.2d 14.

¶9 On appeal, Wappler reiterates that he did not understand that if he pled no contest, the court was required to sentence him to a life term. The totality of the record does not support Wappler's claim. At the plea colloquy, the court clearly informed Wappler that he would receive life in prison if he could not persuade the State to abandon the penalty enhancer. Wappler indicated that he understood he faced life imprisonment as a result of his plea. At sentencing, Wappler stated: "I understand that you may not have no choice but to sentence me to life, but I feel that I'd be discriminated against based on unfair application of the two strike law [because others have not been subject to the two strike law]."

¶10 At the postconviction motion hearing, Wappler conceded that he understood that he faced a mandatory life sentence, but he "didn't believe it." Wappler admitted that Seymour told him that if the State did not drop the persistent repeater enhancer, he faced a mandatory life sentence. Wappler affirmed for the circuit court that when he stated at the plea hearing that he understood he faced life in prison, he understood the concept. Wappler also understood the strategy: have a psycho-sexual evaluation "to possibly see if the State could drop the enhancer charge." Seymour testified that he and Wappler had discussed the plea and sentence multiple times, and Wappler understood the

[2] In this case, reference to the totality of the record was appropriate because the circuit court and the parties agreed that the plea colloquy was deficient in an area unrelated to Wappler's claims on appeal. The burden then shifted to the State to demonstrate that the plea was properly entered. *See* ***State v. Brown***, 2006 WI 100, ¶40, 293 Wis. 2d 594, 716 N.W.2d 906.

consequences of entering a plea, including mandatory life imprisonment. The circuit court properly denied Wappler's plea withdrawal motion.

¶11 We turn to Wappler's ineffective assistance of counsel claim, which the circuit court rejected. "To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance." ***State v. Kimbrough***, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752.

¶12 Wappler told Seymour that he did not want to put the victim through a trial. Wappler and his counsel had a strategy to seek a psycho-sexual evaluation in an attempt to persuade the State to abandon the persistent repeater enhancer. These findings by the circuit court regarding counsel's conduct and the defense strategy are not clearly erroneous. *See* ***State v. DeLain***, 2004 WI App 79, ¶15, 272 Wis. 2d 356, 679 N.W.2d 562, *aff'd*, 2005 WI 52, 280 Wis. 2d 51, 695 N.W.2d 484. As the circuit court observed, Seymour did not have much to work with: a client who wanted to avoid a trial but was exposed to a life term by virtue of his prior conviction. Wappler did not establish his ineffective assistance claim.

¶13 Finally, Wappler argues that his motion to withdraw his plea did not waive his attorney-client privilege with the lawyer who represented him after the plea hearing. We do not reach this issue because we have decided Wappler's claims based on the plea colloquy and the postconviction testimony of Wappler and Seymour.

By the Court.—Judgment and order affirmed.

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