

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2162-CR

Cir. Ct. No. 2007CF62

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRYL WAYNE PRUETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Darryl Pruett appeals a judgment of conviction for sexual assault of a child under sixteen and repeated sexual assault of a child. He also challenges an order denying postconviction relief. Pruett argues ineffectiveness of counsel for failing to evaluate or pursue a defense of not guilty

by reason of mental disease or defect. He also argues counsel was ineffective for failing to make a multiplicity objection and failing to object to a statement by the victim in the presentence investigation report. Pruett also claims that a postsentencing diagnosis of hypothyroidism was a new factor warranting resentencing. We reject Pruett's arguments and affirm.

¶2 This case stems from allegations of sexual assault involving Pruett's stepdaughter at his residence. While the case was pending, trial counsel requested a competency evaluation, but did not request an NGI evaluation or pursue such a defense. Pruett pled guilty to the charges and was sentenced to concurrent terms of nine years' initial confinement and four years' extended supervision. Pruett filed a postconviction motion seeking to withdraw his plea and claiming his trial counsel was ineffective at the sentencing hearing. In the alternative, he sought a sentence modification due to the circuit court's alleged reliance upon inaccurate information in the PSI, or the existence of a new sentencing factor. The circuit court denied the motion and this appeal follows.

¶3 To prove an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the defendant fails on one prong, the court need not address the other. *Id.* at 697.

¶4 At counsel's request, Pruett was psychologically evaluated by Dr. Erik Knudson for competence to proceed to trial. Regarding Pruett's mental status, Knudson stated:

His thoughts were based in reality. They were organized. He made logical connections between topics. He did not appear to suffer from hallucinations or delusional beliefs. He was fully alert. He was oriented to person, place, time, and the circumstances of the examination.

¶5 Knudson diagnosed Pruett with two disorders. The first disorder, “adjustment disorder with depressed mood,” is a “diagnosis ... offered when symptoms are insufficient to qualify as a mental illness.” The second disorder, “personality disorder not otherwise specified,” is “generally not considered to be [an] illness[.]” See *Simpson v. State*, 62 Wis. 2d 605, 612, 215 N.W.2d 435 (1974). Knudson also observed that Pruett’s “interactions suggest self-serving motivation.”

¶6 Knudson effectively informed trial counsel through his competency evaluation that an NGI defense would be unavailing in Pruett’s case. Knudson explicitly stated that Pruett was not suffering from a mental disease, and Pruett never suggested that he suffered from a mental defect. There was no factual basis to conclude that Pruett did not know that what he was doing was wrong or that he was unable to control his conduct. See WIS. STAT. § 971.15(1).¹

¶7 Knudson further weakened the case for an NGI defense by noting Pruett’s “self-serving motivation.” As the circuit court properly observed, based upon what he knew about Pruett’s condition from a psychiatric standpoint prior to Pruett’s plea, counsel’s choice not to request an NGI evaluation or pursue an NGI defense was appropriate and reasonable. Pruett failed to carry his burden of proving deficient performance.

¶8 Nevertheless, Pruett relies upon a forensic psychological evaluation conducted by Dr. Patricia Stanik, attached to his amended postconviction motion. Stanik diagnosed Pruett as suffering from “a mental illness, Post-Traumatic Stress

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Disorder (PTSD) and Cognitive Disorder NOS secondary to a medical condition (Hypothyroidism).” Furthermore, Pruett allegedly “was cognitively and emotionally impaired at the time of the instant offense, and could not conform his behavior to the requirements of the law because of his mental illness.”

¶9 However, Stanik’s report is internally inconsistent. Indeed, her conclusion that Pruett met the NGI standard is insufficiently supported by her own summary of the facts. Stanik fails to suggest what trauma underlies her diagnosis of PTSD, and she does not explain how this specific condition satisfies the statutory requirements. Similarly, she does not explain how the alleged cognitive disorder satisfies the statute. Stanik merely follows these diagnoses with conclusory statements that Pruett was “cognitively and emotionally impaired at the time of the instant offense, and could not conform his behavior to the requirements of the law because of his mental illness.”

¶10 Stanik also states that because of his PTSD, Pruett “was not likely to fully appreciate the *consequences* of his behaviors as they occurred *impulsively* and as a reaction to his environment.” (Emphasis added.) Failing to appreciate consequences and acting impulsively does not satisfy the statutory standard, as these characteristics do not suggest that Pruett “lacked substantial capacity either to appreciate the wrongfulness of his ... conduct or conform his ... conduct to the requirements of law.” WIS. STAT. § 971.15(1).

¶11 As the circuit court concluded, “pursuit of [an NGI evaluation and defense] would [not] have mattered” because even Stanik’s report did not meet the statutory NGI standard. Stanik’s report provided no reasonable probability that a fact-finder would have found him not guilty by reason of mental disease or defect.

Accordingly, Pruett has failed to prove either deficient performance or prejudice. Trial counsel did not provide ineffective assistance.

¶12 Pruett also argues counsel was ineffective for failing to object to multiplicitous charges prior to his plea. However, read in its entirety, the complaint does not contain multiplicitous charges. According to the summary of the interview with the victim, Pruett sexually assaulted her *at least* three times beginning in the spring of 2004 and before April 2007. The complaint supports the premise that Pruett was guilty of a single act of sexual assault on or about April 22, 2007, and three separate acts of sexual assault between April 2004 and the beginning of April 2007. Thus, the complaint was not defective, and trial counsel did not perform deficiently for not raising a multiplicity objection. Furthermore, even if trial counsel had made a multiplicity objection, the State could easily have amended the complaint and/or Information to state that count two covered the time period between April 2004 and March 2007. The objection thus would have made no difference to Pruett's case.

¶13 Pruett also argues that trial counsel was ineffective for failing to object to a statement by the victim in the PSI. Pruett's PSI was sixteen pages. A summary of the victim's statement was three pages. It included two sentences in which the victim said that she thought that Pruett "might have raped me in my sleep." The circuit court stated that "as the sentencing judge I don't recall relying much on that statement." The court's recollection is borne out by the sentencing transcript which has no reference whatsoever to the victim's statement that this additional act may have happened. Moreover, when considering what an appropriate sentence would be under the sentencing guidelines, the court noted intermediate offense severity was appropriate because Pruett "did not have intercourse and also he had no prior criminal record" These facts critically

undermine Pruett's contention that the victim's statement had an impact on his sentence.

¶14 Finally, Pruett argues his postsentencing diagnosis of hypothyroidism was a new factor warranting resentencing. In order to secure sentence modification on the basis of a new factor, a defendant must show both that a new factor exists and that the new factor warrants modification of his or her sentence. *State v. Harbor*, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828.

¶15 Pruett provides little information about the hypothyroidism diagnosis. He states, "The new factor has nothing to do with a defense or causation. The hypothyroidism goes directly to sentencing consideration of Mr. Pruett's character." Pruett also contends hypothyroidism "can cause concentration and memory disturbances and and cognitive disorders," citing only the "Report of Dr. Stanik" His postconviction motion did not specify that his hypothyroidism was a new factor because it shed light on his character, and there was no reason for the circuit court to assume that was his theory. The court very understandably assumed that Pruett's theory was reduced culpability. It did not err by failing to consider a theory not presented by Pruett. *See Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476.

¶16 Stanik's report also provides little information about Pruett's condition. The report referred to self-reporting by Pruett. Stanik included among Pruett's diagnoses the unexplained "Cognitive Disorder NOS secondary to a medical condition (Hypothyroidism)." However, Stanik's report fails to state, or even suggest, how the condition manifested itself in Pruett. Stanik states that there may be "psychiatric and cognitive changes" from the disease as a general matter, but does not state whether Pruett suffered such changes from hypothyroidism. She

lists several potential effects of hypothyroidism, but does not state whether Pruett suffers from any of these effects. Because she does not state whether Pruett suffers from any of these effects, she accordingly fails to state that any given effect suffered by Pruett is causally linked to the hypothyroidism diagnosis.

¶17 Indeed, Pruett fails to explain how this minimal information about hypothyroidism constitutes a new factor warranting resentencing. The purported relationship between the hypothyroidism diagnosis and Pruett's character is unclear and Pruett fails to explain how the diagnosis is relevant to any sentencing factor. Accordingly, we conclude the circuit court did not erroneously exercise its discretion in denying Pruett's motion for sentence modification.

By the Court.—Judgment and order affirmed.

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

