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**DISTRICT IV**

February 23, 2017

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You are hereby notified that the Court has entered the following opinion and order:

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2016AP764-CR State of Wisconsin v. Zachery A. Turck (L.C. # 2014CF182)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Zachery A. Turck pled no contest to armed robbery with threat of force and delivery of heroin, second or subsequent offense. *See* WIS. STAT. §§ 943.32(2) and 961.41(1)(d)1. (2011-12).[1] The circuit court sentenced Turck to a 23-year sentence for the armed robbery, comprised of 8 years of initial confinement and 15 years of extended supervision, and to a consecutive 9-year sentence for the delivery of heroin, comprised of 4 years of initial confinement and 5 years

[1] All further references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

of extended supervision.[2] On appeal, Turck argues that his trial counsel was ineffective for not moving to suppress Turck's confession and that the circuit court considered improper factors at sentencing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

*Effectiveness of Trial Counsel*

Turck argues that his trial counsel was ineffective because counsel did not move to suppress Turck's inculpatory statement on the ground that Turck had invoked his right to remain silent. To succeed on a claim of ineffective assistance of counsel, Turck must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Turck must establish both prongs; if he fails to establish one prong, this court need not address the other prong. *See* ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990) (reviewing court may dispose of ineffective assistance claim on either ground). Deficient performance means that counsel "'made errors so serious that counsel was not functioning as the counsel guaranteed ... by the Sixth Amendment.'" ***Id.*** at 127 (quoted source and internal quotation marks omitted). There is no ineffective assistance of counsel for failing to pursue a suppression motion if the motion would have been denied. ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

The following undisputed facts are relevant to this issue.

[2] The circuit court initially imposed a 12-year sentence on the delivery of heroin count, comprised of 4 years of initial confinement and 8 years of extended supervision. After being informed by the Department of Corrections that the length of the extended supervision exceeded the allowable maximum, the court reduced the extended supervision term to the 5-year maximum. Turck does not challenge that correction on appeal.

Police interviewed Turck after his arrest. Turck waived his ***Miranda***[3] rights, and agreed to speak with the detectives. During one of the interviews, after a detective asked Turck what kind of gun he used during the robbery, the following exchange took place:

> [Turck:] Do I need a lawyer?
>
> [Detective:] That's up to you. But you gotta make … I, I – you gotta make it right one way or another. I can't tell you not to get a lawyer or anything else. I'm not sitting here. I'm not screaming at you or anything else. It's not my intention. My intention is to get this thing behind us hopefully tonight. Okay? That's your choice, that's your choice. I can't tell you not to. But I am telling you it's my decision basically ….
>
> [Turck:] Honestly I just want to go to jail and lay down. I'm about to throw up. I feel ….
>
> [Detective:] I understand. I can get you something to drink. I can get you a basket or whatever. But I can tell you that we need to resolve this thing now, man. It's not going to go away unfortunately, okay?

Shortly after that statement, Turck began crying and made incriminating statements about the robbery.

Turck's trial counsel did not move to suppress Turck's statement. On appeal, Turck argues that his statement—"Honestly I just want to go to jail and lay down. I'm about to throw up"—was a clear and unequivocal invocation of his right to end the interrogation and that trial counsel was ineffective for not filing a suppression motion.

When a suspect in custody has agreed to speak to police, he retains the right to terminate the questioning but, to do so, he must unequivocally invoke either the right to counsel or the right to remain silent. *See* ***State v. Cummings***, 2014 WI 88, ¶¶47-50, 357 Wis. 2d 1, 850

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

N.W.2d 915. If "a suspect makes … an ambiguous or equivocal statement, 'police are not required to end the interrogation … or ask questions to clarify whether the accused wants to invoke his or her ***Miranda*** rights.'" ***Id.***, ¶51 (quoted source omitted). The test is whether a reasonable officer would regard the individual's statements and non-verbal cues to be an unequivocal invocation of the right to remain silent; this is an objective test. *See* ***State v. Ross***, 203 Wis. 2d 66, 78, 552 N.W.2d 428 (Ct. App. 1996). If an individual's statement is susceptible to reasonable competing inferences as to its meaning, then the individual did not sufficiently invoke his right to remain silent. *See* ***State v. Markwardt***, 2007 WI App 242, ¶36, 306 Wis. 2d 420, 742 N.W.2d 546. We decide as a matter of law whether a suspect's statements are equivocal. *See* ***id.***, ¶36.

Turck relies on ***State v. Goetsch***, 186 Wis. 2d 1, 519 N.W.2d 634 (Ct. App. 1994). In ***Goetsch***, the defendant's comments were held to be an unequivocal invocation of the right to stop questioning. Turck argues that Goetsch's statement, "[t]hrow me in jail, I don't want to think about this," is similar to Turck's statement, "[h]onestly I just want to go to jail." *See* ***id.*** at 7. Whatever merit that comparison might have, the problem with Turck's argument is that he fails to mention that Goetsch also told police, "I don't want to talk about this anymore. I've told you, I've told you everything I can tell you." *See* ***id.*** That statement was highlighted by this court, and formed the basis for our conclusion that Goetsch had invoked the right to remain silent. *See* ***id.*** at 6, 7-9.

In this case, Turck did not say that he did not want to talk with the detective. Turck merely said he felt sick. Turck's subsequent crying does not transform that comment into an unequivocal invocation of the right to remain silent. A reasonable officer could interpret Turck's comment and conduct as a manifestation of physical illness, not an invocation of the right to

remain silent. Therefore, "reasonable competing inferences" exist, and Turck did not invoke his right to remain silent. *See* ***Markwardt***, 306 Wis. 2d 420, ¶36. Because a suppression motion on this issue would have been denied, trial counsel's performance was not deficient. *See* ***Simpson***, 185 Wis. 2d at 784 (failure to file a suppression motion that would have been denied is not deficient performance).

*Sentence*

Turck next contends that the circuit court considered improper factors when the court discussed its belief that the "entertainment industry[']s] … portray[al of] substance abuse as normalized behavior" has contributed to the high rate of heroin and opiate abuse.

On appeal, our review of a sentence is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.*** When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the circuit court in passing sentence. "'[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***Id.***, ¶18 (quoted source omitted). 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.'" ***Id.***, ¶23 (quoted source omitted).

To properly exercise its discretion, a circuit 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. "Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. Also, under truth-in-sentencing, the legislature has mandated that the court shall consider the protection of the public, the gravity of the offense, the rehabilitative needs of the defendant, and other aggravating or mitigating factors. ***Id.***, ¶40 n.10. The weight to be given each sentencing factor remains within the wide discretion of the circuit court. ***Stenzel***, 276 Wis. 2d 224, ¶9.

In this case, the circuit court considered the appropriate factors. The court addressed Turck's character at length, particularly his long history of drug usage and failure to avail himself of treatment options offered to him. The court discussed the seriousness of the crimes, especially the armed robbery, which terrorized the victim. The court stated that delivery of heroin was also serious because it "spread[] the misery" of addiction to others. The court identified the need to protect the public as a "very, very important factor," stating the public's right to be protected from the threat of armed robbery and from people willing to sell drugs. The impact of heroin use on Turck and the community at large was properly considered. The court's comments linking increased drug use to popular culture do not invalidate the sentence. The court properly exercised its discretion under ***Gallion***, and Turck's challenge to the sentence fails.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*