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November 17, 2017

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

2017AP232-CR

State of Wisconsin v. Ashley L. Croft (L.C. # 2015CF120)

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Ashley Croft appeals a judgment of conviction and sentence for retail theft and an order denying her postconviction motion for resentencing. Croft contends that she was denied her right to the effective assistance of counsel 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 (2015-16).¹ We summarily affirm.

Croft pled guilty to felony retail theft, and defense counsel requested a presentence investigation report (PSI). At sentencing, defense counsel informed the circuit court that counsel had reviewed the PSI with Croft, and that Croft had numerous factual disputes with the PSI, including the following. Croft did not recall being placed on “formal” probation and having that probation revoked three times, as stated in the PSI. Rather, Croft recalled being placed on probation “formally” one time and having that probation revoked, and that the other two probations were “informal.” Croft had been placed on juvenile probation for truancy, rather than assault as stated in the PSI. Croft explained that her conviction for operating a motor vehicle without the owner’s consent resulted from an incident in which the owner’s insurance would not cover damages that occurred unless the owner said that Croft did not have permission to drive the vehicle. Croft disputed all statements by Croft’s mother to the PSI agent, including that Croft ran away from home when she was thirteen years old, that Croft is a habitual liar and that stealing is a rush for her, and that Croft lost her parental rights because she failed to cooperate with the department of human services. Instead, Croft’s mother kicked Croft out of the family home when Croft was thirteen, and Croft voluntarily terminated her parental rights to her own children because she thought it was the best thing to do for her children.

The circuit court noted the factual disputes and stated that “[n]one of them are what I would describe as first tier sentencing considerations.” The court noted that “one of the ...

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

themes of the presentence investigation is Ms. Croft's refusal to accept responsibility for anything. And so I find myself in a quandary about how to assess those factual distinctions." The court stated that "it may matter whether these things are in fact true according to the PSI writer, or true according to Ms. Croft's version of events." The court stated that it could "safely disregard" most of Croft's mother's statements, but that some of the mother's statements were beneficial to Croft in that they "describe[] a chaotic childhood that leads to where we find Ms. Croft today."

The circuit court sentenced Croft to one year of initial confinement and two years of extended supervision. The court explained that, while Croft made encouraging statements in her allocution, the court was skeptical of Croft's honesty based on Croft's criminal history. Specifically, the court noted that Croft had "a whole series of thefts in her record," and that Croft was on probation at the time of her current theft offense. The court also noted that Croft had some violent history. The court stated that Croft's "explanation of her record, an attempt to explain it away, may be the worst part of all." The court stated that, even if some of Croft's convictions could be explained as someone else's fault, that could not explain all of the convictions in Croft's record. The court also noted that Croft's explanation of her operating a motor vehicle without owner's consent conviction "hardly helps," in that it was "out and out, absolute, undeniable, incontrovertible insurance fraud." The court noted that there was little objective evidence that Croft was going to improve her behavior, and that Croft had no structure and very few positive associations in her life. The court stated that Croft's past jail sentences failed to disrupt her criminal behavior, and that it intended its sentence "[t]o create a significant disruption in her life pattern."

Croft moved for resentencing on grounds that her counsel was ineffective based on counsel's handling of the PSI. The circuit court held a hearing and heard argument from the parties, and denied relief on grounds that Croft had not made sufficient factual allegations to warrant an evidentiary hearing.

A claim of ineffective assistance of counsel must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, the defendant must establish that counsel's representation fell below objective standards of reasonableness. *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To show prejudice, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A defendant must prove both deficient performance and prejudice, and thus a failure to prove either one defeats the claim. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). A defendant is entitled to an evidentiary hearing on a postconviction motion if the motion alleges sufficient facts that, if true, would warrant the relief sought. See *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

Croft contends that her trial counsel was ineffective by failing to investigate and advise Croft in connection with the PSI. Croft argues that her counsel should have discovered that Croft had recently used marijuana, had been in numerous fights in school as a juvenile, had been truant, and had been frequently kicked out of her home by her mother, that her boyfriend was in jail for possession of a firearm, and that Croft had lied about operating a motor vehicle without consent as part of an insurance scheme. Croft contends that her counsel should have advised her not to disclose those facts to the PSI agent. Croft also contends that her counsel failed to consult

with Croft as to the contents of the report until right before the sentencing hearing, and then told Croft that they would have to proceed with sentencing despite Croft's factual disputes because it would not be possible to get a continuance. Croft argues that her counsel should have asked for a continuance and then conducted an independent investigation of the disputed contents of the PSI, and should have then advised Croft not to raise disputes that were unfounded. Croft argues that her counsel was not adequately prepared to address the PSI at sentencing, and made an ineffective presentation of the factual disputes that led the court to view Croft as not credible. Croft contends that her counsel's errors prejudiced her by causing the circuit court to impose a longer sentence than it otherwise would have. We are not persuaded.

The circuit court explained at the postconviction motion hearing that it denied Croft's claim because, even if the facts Croft asserted were true, trial counsel's performance at sentencing did not prejudice Croft. The court found that, had defense counsel independently investigated Croft's factual disputes with the PSI, advised Croft not to dispute matters that were not disputable, and demonstrated to the court how Croft was correct as to some disputes, the sentence would have been the same. The court explained that the factual disputes as to the PSI were not what drove the court's sentence. Rather, the court explained, two factors drove the court's sentencing decision: first, that Croft was on probation at the time of the present offense; and second, that Croft had been revoked from probation three times in the past. The court noted that those facts were not in dispute, and also that the court accepted the legitimacy of most of Croft's factual disputes with the PSI. The court also recognized that it had emphasized at sentencing that it was not impressed with Croft's explanation of her operating a motor vehicle without consent conviction, but that the operating a motor vehicle without consent was just one in a long series of criminal convictions. The court reiterated that its sentencing intent was to

disrupt the pattern of Croft's behavior, which the court viewed as a result of Croft's life having been chaotic up to that point. The court stated that the court would not have come to a different conclusion absent counsel's challenged conduct.

A circuit court is given an additional opportunity to explain its sentence when challenged by postconviction motion. See *State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). Here, the court explained at the motion hearing that it based its sentencing decision on the undisputed facts that Croft was on probation at the time of the present offense and had been revoked from probation three times in the past. The court explained that it viewed Croft's life as chaotic up to that point, which had resulted in her pattern of criminal behavior, and that it imposed a prison sentence to disrupt that pattern of behavior.² Thus, we are not persuaded that the sentence would have been more favorable to Croft had counsel advised Croft to conceal any negative information during the PSI interview and independently investigated Croft's disputes with the PSI.

The circuit court explained why defense counsel's performance at sentencing was not prejudicial. The court explicitly found that none of Croft's challenges to her counsel's representation at sentencing would have changed the outcome of the court's sentence. Because

² Croft asserts in her reply brief that she disputes that her life has been chaotic, and that the circuit court's erroneous impression that Croft's life was chaotic was based on defense counsel's failure to adequately prepare as to the PSI. However, Croft does not provide any explanation for her dispute of the circuit court's assessment of Croft's life as chaotic, nor does she cite anything in the record to support it. We note that the discussion at sentencing, including Croft's own account that she was kicked out of her mother's home at thirteen and her numerous convictions at a young age, supports the circuit court's assessment.

Croft has not established prejudice, she cannot prevail on an ineffective assistance claim. *See Strickland*, 466 U.S. at 687.

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals