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

2017AP596-CR

State of Wisconsin v. Leneral Lewis Williams
(L.C. # 2015CF3989)

Before Brennan, P.J., Brash and Dugan, 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).

Leneral Lewis Williams appeals from a judgment of conviction for five felonies and from an order denying his postconviction motion. Williams seeks resentencing. He argues that his trial counsel provided ineffective assistance at the sentencing hearing by failing to object to what Williams calls “the trial court’s reliance on a legally impermissible sentencing factor.” Implicit in Williams’s argument is his assertion that the trial court erroneously exercised its sentencing

discretion. We conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2015-16).¹ We summarily affirm.

BACKGROUND

Pursuant to a plea agreement with the State, Williams pled guilty to five felonies, including: three counts of armed robbery with threat of force, as a party to a crime; one count of robbery of a financial institution, as a party to a crime; and one count of conspiracy to commit robbery of a financial institution. *See* WIS. STAT. §§ 943.32(2), 939.05, 943.87, 939.31 (2013-14).² The maximum sentence for each crime was twenty-five years of initial confinement and fifteen years of extended supervision. All of the crimes were committed in November 2014, when Williams was fifteen years old. At the time Williams was sentenced, he was seventeen.

Consistent with the plea agreement, the State recommended a global sentence of twenty-five years of initial confinement and an unspecified period of extended supervision. Trial counsel urged the trial court to impose a shorter period of initial confinement, arguing it was unfair to sentence Williams to twenty-five years of initial confinement when his two older co-defendants received sentences of less than nine years. The trial court also heard from Williams's mother and a woman from his church, both of whom asked the trial court to show mercy. In addition, the trial court reviewed victim impact statements and heard from one victim. Finally, Williams personally apologized for his actions and said he regretted the crimes.

The trial court's sentencing comments addressed the gravity of the offenses, Williams's character (including his involvement in the juvenile justice system), and the need to protect the

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

² The plea agreement also provided that two uncharged robberies of a financial institution would be read in for sentencing purposes.

public. *See State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The trial court acknowledged that Williams had a difficult childhood but said that Williams could have made different choices. It also recognized that Williams had not responded to progressive punishment in the juvenile justice system, noting that he was ultimately placed at Lincoln Hills and, nine days after being released, committed his new crimes. Next, the trial court discussed how difficult it was to impose a significant sentence on Williams, a young man facing 125 years of initial confinement. The trial court said:

So it's really difficult to sentence you because I think no matter how I do this, I'm going to—essentially going to end up taking a good portion of your life proportional to what you lived on this earth. You're 17. So proportional to what you've been here on earth, I'm going to have to do this and, frankly, I think that there's a sort of misunderstanding that I have some greater light. I am just guided by legal principles and I'm just argued to, but it really is a hard thing to have you—to sentence you to such a high degree but you don't respond and I'm sorry to say that [because] I wish there was some light here. I wish there was something I can hang on to to say that I could give you more of a reasonable, lighter sentence in this case, but I just simply don't have it.

So I just want to be frank with you. Even as I come up to that conclusion, it's still difficult to do it because you're a baby basically. You're a reverse[-]waived baby, but you're criminally culpable. The statutes require me to punish you as if you were a complete and full adult. In fact, for purposes of today as you sit in front of me, you are an adult.

The trial court then imposed sentences for the five felonies. On count one, it sentenced Williams to ten years of initial confinement and ten years of extended supervision. On count two, it imposed a consecutive sentence of seven years of initial confinement and seven years of extended supervision. For the three remaining crimes, the trial court imposed concurrent sentences of seven years of initial confinement and seven years of extended supervision. It declared Williams eligible for the challenge incarceration program and the substance abuse program after he has served twelve years of initial confinement.

Represented by postconviction counsel, Williams filed a postconviction motion seeking resentencing based on his trial counsel's failure to object to what Williams referred to as the trial court's improper reliance on a "random sentencing factor." The motion stated in relevant part:

The trial court stated at sentencing that it was difficult to sentence Williams because of his age and his criminal culpability. The court indicated that Williams was 17 years of age and [that it] would sentence Williams to a term of imprisonment proportionate to his "time on earth." Then, without referring specifically to the seriousness of the offense, Williams's character, or [the] need to protect the community, or the other factors delineated in the seminal *Gallion* case,³ the trial [court] randomly sentenced Williams to a term of imprisonment "proportional to his time on earth," seventeen years of initial confinement.

The sentencing transcript demonstrates that the trial court erred by using Williams's age as the primary factor in deciding how much prison he should receive. To be sure, the seriousness of these offenses do merit incarceration, however, the trial court's consideration of Williams's age in giving him a specific term of confinement that was equal to his age is an improper sentencing factor. Adopting this rationale, a court could sentence [a] defendant to eighteen years in prison if he were eighteen years of age, nineteen years if he was nineteen years old, and so on. None of the parties recommended a seventeen[-]year sentence and there was no rationale given by the court of why a term of confinement should be equal to a defendant's age. The trial court's consideration and almost exclusive reliance on Williams's age in selecting an exact term of confinement is an improper sentencing factor. The trial court abused its discretion in relying on this random sentencing factor.

Nonetheless, in the present case, trial defense counsel never objected to the court's clear reliance on this improper factor in determining the specific amount of Williams's prison sentence. As a consequence thereof, trial counsel's conduct was prejudicially ineffective. Had trial counsel spoken up, there was a reasonable probability that the court would have relied on permissible factors as stated in *Gallion* and the outcome of the proceeding would have been different.

(Underlining omitted; bolding and italics added; Williams's name used in place of "defendant.")

³ See *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197.

The trial court denied the postconviction motion without a hearing. In its written decision, the trial court discussed how its comments at the sentencing hearing addressed the seriousness of the offense, Williams's character, and the need for public protection. The trial court also disputed Williams's interpretation of its sentencing hearing comments about the difficult decision it had to make. The decision stated:

Postconviction counsel appears to misunderstand the court's comment here. The court was not stating that it was giving the defendant a 17[-]year sentence because he was 17 years old. The court was merely discussing—appropriately—how difficult it was to sentence such a young man to a term of incarceration that might be equal to or greater than the amount of time he had been alive. The court delivered a comprehensive sentencing in this case that considered all of the statements of the parties, the seriousness nature of the offenses, the impact on the victims, the degree of the defendant's culpability in handling the gun, the presentence investigation report, the defendant's criminal history, the defendant's character and the need to protect the public. To be sure, the court also considered the defendant's young age, as is permissible under [case law]. However, the court ultimately gave the defendant 17 years of initial confinement because that is what the facts of this case demanded. It was not an arbitrary number nor was it used simply because the defendant happened to be 17 years of age at the time of sentencing. Had trial counsel objected on these grounds, the objection would have been overruled.

(Case citations omitted.) This appeal follows.

LEGAL STANDARDS

Resolution of this case requires us to consider the trial court's comments at the sentencing hearing. At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, *State v. Gallion*, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of

the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. *Odom*, 294 Wis.2d 844, ¶7. The weight to be given to each factor is committed to the trial court’s discretion. See *Gallion*, 270 Wis.2d 535, ¶¶41-43. “When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion.” *Id.*, ¶17.

In his postconviction motion, Williams asserted that the trial court imposed “a specific term of confinement that was equal to [Williams’s] age” and that trial counsel’s failure to object was ineffective assistance. To establish constitutionally ineffective assistance, Williams must show: (1) deficient performance; and (2) prejudice. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.” *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A trial court has the discretion to deny a postconviction motion without granting a *Machner* hearing “if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.” See *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. On appeal, we consider *de novo* whether the motion raised sufficient facts to require a hearing. See *id.*

DISCUSSION

Williams asserts that “the trial court considered and relied upon its conclusion that [he] should receive a term of imprisonment equal to [his] age” and that “[t]he record of the sentencing hearing clearly supports such a conclusion.” Further, Williams disputes the explanation of the sentencing comments that the trial court offered in its decision denying the postconviction motion. Williams argues:

The trial court states that, in context, its sentence of ... seventeen years [of] initial confinement was simply sentencing [Williams] to a lot of time proportional to his age. Unfortunately, the court record does not support this “after the fact” interpretation. In its sentence of defendant to a term of confinement equal to his age, the court specifically stated that its sentence was made “proportional to what you’ve been here on earth.” The court’s after the fact interpretation of these comments does not mitigate their original intent—a seventeen[-]year[-]old who committed serious offenses should receive seventeen years in prison. The court relied upon defendant’s years on earth in imposing the exact term of his imprisonment. This is an impermissible sentencing factor and the court erroneously exercised its discretion in its reliance on it.

Further, based upon relevant and applicable case law, trial counsel’s actions in failing to object to the court’s reliance on this impermissible sentencing factor, constituted prejudicial ineffectiveness. [Williams] is entitled to a new sentencing hearing.

Like the trial court, we are not persuaded by Williams’s arguments. Having reviewed the entire sentencing transcript and considered the trial court’s comments in context, we disagree that the trial court suggested it was specifically sentencing Williams to a total of seventeen years of initial confinement simply because he was seventeen years old. Rather, we read the trial court’s comments as expressing that it was difficult to contemplate sentencing a seventeen-year-old to a long term in prison, as the State had recommended. Our interpretation of the trial court’s comments is consistent with its own explanation in the postconviction order. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (The trial court has another opportunity to explain its sentence when challenged by postconviction motion.).

Because we are not persuaded that the trial court imposed a sentence designed to match Williams’s age, we are not persuaded that trial counsel performed deficiently by failing to object to the trial court’s comments. Moreover, such an objection would have been overruled, as the trial court explicitly found in its postconviction decision. Williams has not shown that he is entitled to an evidentiary hearing or relief; his ineffective assistance claim fails. *See Allen*, 274 Wis. 2d 568, ¶9. Finally, to the extent Williams’s appeal also challenges his sentence outside the

ineffective assistance context, we conclude that he has not shown that the trial court erroneously exercised its sentencing discretion by considering improper factors. *See Gallion*, 270 Wis. 2d 535, ¶17.

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

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

Diane M. Fremgen
Acting Clerk of Court of Appeals