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DISTRICT II

March 7, 2018

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

2017AP1257-CR State of Wisconsin v. Robert E. Burnette (L.C. #2012CF214)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Robert E. Burnette appeals from a judgment of conviction and an order denying his postconviction motion. He seeks resentencing on several grounds. 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 affirm the judgment and order of the circuit court.

Burnette was convicted following an ***Alford*** plea[2] to second-degree sexual assault of a child. The charge stemmed from allegations that he repeatedly sexually assaulted his young nephew over a two-year period. The circuit court sentenced Burnette to eleven years of initial confinement and nine years of extended supervision.

Burnette filed a postconviction motion challenging his sentence on multiple grounds. After a hearing on the matter, the circuit court denied the motion. This appeal follows.

On appeal, Burnette first contends that the circuit court erroneously exercised its discretion at sentencing.[3] He maintains that the sentence imposed was unreasonable under the facts of the case.

Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. ***State v. Gallion,*** 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We afford a strong presumption of reasonability to the circuit court's sentencing determination because that court is best suited to consider the

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

[2] An ***Alford*** plea is a guilty plea where a defendant pleads guilty to a charge but either protests his or her innocence or does not admit to having committed the crime. *See* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). The plea derives its name from the United States Supreme Court case of ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[3] Although Burnette forfeited this particular argument by failing to raise it in the circuit court, we choose to address it nonetheless.

relevant factors and demeanor of the defendant. ***State v. Ziegler,*** 2006 WI App 49, ¶22, 289 Wis. 2d 594, 712 N.W.2d 76.

"[T]o 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. "The primary sentencing factors which a court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public." ***Ziegler***, 289 Wis. 2d 594, ¶23. The weight to be given to each sentencing factor is within the discretion of the court. ***Id.***

Here, the record reveals that the circuit court's sentencing decision had a rational and explainable basis. The court discussed the primary sentencing factors and explained why, in light of the seriousness of the offense and the need to protect the public, a lengthy prison sentence was warranted. Although Burnette may believe that the court relied too heavily upon such factors, it was up to the court, not him, to determine how much weight to give. We perceive no erroneous exercise of discretion.

Burnette next contends that the circuit court relied upon inaccurate information at sentencing. He appears to take issue with statements made by the court concerning his failure to accept responsibility.[4]

[4] At sentencing, the circuit court made two statements concerning Burnette's failure to accept responsibility. It noted that Burnette entered a plea "where he's not really acknowledging his guilt but conceding that there is sufficient information to convict him." It later stated that "in terms of remorse … there's never been an admission in this particular case that he did anything wrong …."

"A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant who seeks relief because the circuit court used inaccurate information must show that the information was inaccurate and that the court actually relied upon the inaccurate information at sentencing. ***Id.***, ¶26. Whether a defendant has been denied this due process right is a question of law that we review de novo. ***Id.***, ¶9.

We are not persuaded that Burnette has shown that the circuit court relied upon inaccurate information at sentencing. At that time, Burnette had not admitted to sexually assaulting his nephew. Indeed, the very purpose of his ***Alford*** plea was to accept punishment without having to accept responsibility. The fact that Burnette later admitted to wrongdoing while in prison does not make the court's statements at sentencing inaccurate.

Finally, Burnette contends that his trial counsel was ineffective for advising him not to discuss the offense with the presentence investigation (PSI) writer due to his ***Alford*** plea. He suggests that his failure to do so adversely impacted his sentence.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law that we review de novo. *See* ***id.*** at 634.

Again, we are not convinced that Burnette has proven his claim. At the postconviction motion hearing, trial counsel provided a reasonable explanation for his advice to Burnette: counsel was concerned that if Burnette talked to the PSI writer, he would dwell on his innocence and create an aggravating factor at sentencing. Counsel's testimony, which the circuit court accepted as credible, shows a valid strategy behind his action. Accordingly, we cannot say that his performance was deficient. *See* ***State v. Libecki***, 2013 WI App 49, ¶25, 347 Wis. 2d 511, 830 N.W.2d 271 (a valid strategy is not deficient performance).[5]

Upon the foregoing reasons,

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

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

Sheila T. Reiff
Clerk of Court of Appeals

[5] To the extent we have not addressed an argument raised by Burnette on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").