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May 16, 2018

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

2017AP987 State of Wisconsin v. Donald G. Zabolski, Jr. (L.C. #2013CF244)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Donald G. Zabolski, Jr., appeals from an order denying his motion pursuant to WIS. STAT. § 974.06 (2015-16)[1] to withdraw his plea on the ground that he was denied the effective assistance of counsel. He argues that trial counsel was ineffective for not moving to dismiss

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

count three of the information as multiplicious to count two and for giving false information to Zabolski to induce him to enter into the plea agreement. 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 summarily affirm.

Zabolski was initially charged by information with two counts of first-degree sexual assault of a child under age twelve and one count of possession of child pornography. The charges were based on three separate occasions during the same weekend where Zabolski forced his ten-year-old victim to perform fellatio on him, which also involved additional sexual contact with the victim, and the discovery of "thousands" of photographs of Zabolski engaging in sexual acts with the victim on his computer. The victim alleged that Zabolski's abuse had been continuous since the time she was four years old.

After extended plea negotiations, Zabolski pled no contest to four counts of second-degree sexual assault of a child and one count of possession of child pornography. Under the terms of the plea agreement, the State agreed not to file any additional charges against Zabolski and both sides would be "free to argue" at sentencing. At sentencing, the State recommended fifty years' initial confinement (IC) followed by seventy years' extended supervision (ES), and Zabolski's counsel argued for a sentence between five and ten years. The court imposed consecutive sentences on all the charges, for an aggregate sentence of forty years' IC and twenty-five years' ES.

Postconviction, Zabolski's appellate counsel moved to withdraw from the case, and Zabolski elected to proceed pro se. Zabolski filed a motion to withdraw his plea on the ground

that one of his trial counsel, Attorney Krik Everson,[2] was ineffective for (1) allegedly informing Zabolski that the prosecutor agreed to cap his sentence recommendation at ten years' IC concurrent on all counts and (2) failing to file a motion to dismiss count three of the amended information for being multiplicitous of count two.[3] The circuit court denied Zabolski's motion, and Zabolski appeals.

A defendant who moves to withdraw a plea after sentencing "carries the heavy burden of establishing, by clear and convincing evidence, that the [circuit] court should permit the defendant to withdraw the plea to correct a 'manifest injustice.'" ***State v. Cain***, 2012 WI 68, ¶25, 342 Wis. 2d 1, 816 N.W.2d 177 (citation omitted). One way to establish a manifest injustice is by demonstrating that acceptance of the plea was caused by ineffective assistance of trial counsel, which is reviewed under a two-part test that questions whether counsel's performance was both deficient and prejudicial.[4] ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. "Disappointment in the eventual punishment does not rise to the level of

[2] Zabolski was represented by both Everson and Attorney Daniel Kaminsky throughout the trial proceedings. Zabolski does not challenge Kaminsky's performance.

[3] At the hearing on the motion, Zabolski stated on the record that he was withdrawing his claim that counsel was ineffective for telling him that the State agreed to cap its recommendation at ten years. Before waiving the argument, Zabolski confirmed that if the court were to find Everson ineffective, then the plea would be vacated as would the prior plea agreement and Zabolski would again be facing additional exposure to more charges. Zabolski claimed that he could not "take the chance of getting anymore time," and he agreed to withdraw his first argument and only argue the multiplicitous charge issue. Despite Zabolski's statements to the circuit court, he chose to bring both arguments before this court on appeal, claiming "he made an extremely bad decision" by saying that "he wish[es] to give up his right to argue this issue." Although we could decline to reach this issue, as the circuit court made a record and reached a decision on both arguments, we will address both issues in the interest of finality.

[4] To prevail on his claim, Zabolski must prove: (1) that he was denied effective assistance of counsel, (2) that the ineffectiveness of his counsel caused him to plead guilty or no contest, and (3) that at the time of the plea, he was unaware of any potential challenge to the plea due to counsel's deficient performance. *See* ***State v. Harris***, 2004 WI 64, ¶11, 272 Wis. 2d 80, 680 N.W.2d 737.

a manifest injustice." ***State v. Taylor***, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829 N.W.2d 482. The decision to permit a defendant to withdraw a plea is a matter of the circuit court's discretion, which we review for an erroneous exercise of discretion. ***Cain***, 342 Wis. 2d 1, ¶20.

We conclude that the circuit court properly denied Zabolski's motion to withdraw his no contest plea as Zabolski failed to establish a manifest injustice by clear and convincing evidence. On the first issue, the record does not support that Everson perpetrated a lie on Zabolski that induced him to enter into the plea agreement. At the motion hearing, Everson testified that Zabolski was "fully aware of what the plea agreement was" and that he never told him that the State would recommend ten years on each count to be served concurrently.[5] Everson's testimony is supported by Zabolski's signature on the plea questionnaire/waiver of rights form, which indicates his consent to the terms of the agreement with the State, including that "[b]oth sides are free to argue sentencing." Further, the circuit court conducted a thorough plea hearing, where Zabolski again indicated his understanding and assent to the terms of the agreement, which were also recited on the record, and he agreed that "he was aware of the [plea] negotiations and what the proposals were." As the circuit court explained, at no time did Zabolski speak up at the plea hearing and question the agreement as being different than what was discussed with his attorney. Zabolski failed to carry his burden.

On the second issue, Zabolski argues that "the State charged him twice and punished him twice, for a single act of sexual assault" and that Everson was ineffective for not filing a motion to dismiss count three for being multiplicitous of count two. Zabolski claims the act of forcing

[5] Zabolski did not testify, but the court asked him if he were to testify would he "testify that Attorney Everson told [him] that he had reached an agreement with the State whereby the State agreed it would recommend or cap its recommendation at 10 years on each count concurrent." Zabolski agreed.

the child to perform fellatio on him in the shower and the act of Zabolski touching the child's breasts and vagina in the shower were a singular act and were not separate in time or significantly different in nature.

"Multiple punishments for the same offense violate the double jeopardy protections of the state and federal constitutions." ***State v. Koller***, 2001 WI App 253, ¶28, 248 Wis. 2d 259, 635 N.W.2d 838. To determine multiplicity, we must first consider "whether the offenses are identical in law and fact," which requires "a determination of whether the charged acts are 'separated in time or are of a significantly different nature.'"[6] ***Id.***, ¶¶29, 31 (citation omitted). Whether acts are different in nature does not require that the acts be different types of acts; acts may be of a different nature "if each requires 'a new volitional departure in the defendant's course of conduct.'" ***Id.***, ¶31 (quoting ***State v. Anderson***, 219 Wis. 2d 739, 750, 580 N.W.2d 329 (1998)). Multiplicity is a question of law that we review de novo. ***State v. Reynolds***, 206 Wis. 2d 356, 363, 557 N.W.2d 821 (Ct. App. 1996).

Clearly, the charges are identical in law as they are both brought under WIS. STAT. § 948.02(2), but we conclude that the offenses are not identical in fact. The State asserts that counts one through three of the amended information relate to three separate incidents over the course of a weekend where Zabolski forced his child victim to engage in oral intercourse with him: in the car, in the shower, and in the hallway of his home. These offenses are not identical

[6] The second prong of the test states that if the offenses are different in law or fact, then "a presumption arises that the legislature intended to permit cumulative punishments for both offenses. This presumption can only be rebutted by clear legislative intent to the contrary." ***State v. Koller***, 2001 WI App 253, ¶29, 248 Wis. 2d 259, 635 N.W.2d 838 (citation omitted). Zabolski fails to rebut this presumption by clear legislative intent as his only argument is a conclusory statement that a "clear reading of the statute" "tells anyone with common sense, that the legislatures did not intend to punish someone more than once."

in fact as they occurred at separate times and in separate locations. Even if we were to assume that Zabolski is correct and counts two and three both relate to the shower incident, we conclude that the act of oral intercourse is a separate volitional departure from touching the child's breasts and vagina in the shower. *See* ***Koller***, 248 Wis. 2d 259, ¶59 ("When a perpetrator moves from having mouth-to-vagina contact to having penis-to-vagina intercourse, he necessarily engages in a new volitional act warranting a separate charge, conviction, and punishment.").

Accordingly, we conclude that a multiplicity challenge would be frivolous. Trial counsel is not ineffective for failing or refusing to pursue futile arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Further, the State amended Zabolski's charges as part of a plea agreement. Had Everson filed a motion to dismiss count three, the State would have simply withdrawn the plea agreement, exposing Zabolski to the possibility of more incarceration. Everson was not constitutionally ineffective and Zabolski has failed to establish a manifest injustice entitling him to withdraw his plea by clear and convicting evidence.

IT IS ORDERED that the order of the circuit court is 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