OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

December 4, 2019

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Michael D. Graveley
District Attorney
912 56th Street
Kenosha, WI 53140-3747

John W. Kellis
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Mark S. Rosen
Rosen and Holzman
400 W. Moreland Blvd. Ste. C
Waukesha, WI 53188

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

2019AP313-CR State of Wisconsin v. Timothy E. Smith (L.C. #2017CF242)

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).

Timothy E. Smith appeals from a judgment convicting him of theft of movable property as party to a crime (PTAC) and from an order denying his motion for postconviction relief.

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 (2017-18).[1] We affirm.

Smith drove the getaway car in a bank robbery. He was charged with PTAC robbery of a financial institution by use of a dangerous weapon and theft of over $10,000. Before trial, he pled guilty to the theft charge. He was found not guilty of the bank robbery at a bench trial.

At sentencing, defense counsel argued that forty-two-year-old Smith's childhood diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) contributed to his involvement in the offense because ADHD sometimes involves the "impulsive and compulsive type of behaviors" Smith displayed over the years, such that he probably had not learned appropriate ways to deal with what "we commonly refer to as criminal thinking." The sentencing court called Smith's ADHD a "whiny excuse" for his lengthy criminal history:

> I think your ADHD, that doesn't—I hear about ADHD every day. You know what? I never heard about ADHD until the 1970s or 1980s. Last night I was watching … [a] series about the Vietnam War … I certainly knew many guys that were over there…. In fact, your lawyer … had valued and fantastic service to our country during that war. A lot of people did, and 56,000 of them didn't come back, and they didn't turn away and flee in the face of the enemy …. They did their duty, and 56,000 of them, it meant that they lost their lives.
>
> I didn't hear any ADHD then. We didn't hear any ADHD in the … Civil War … when ghastly losses were occurring and half a million people lost their lives. You had a duty to do and you did it. So coming in here with this whiny excuse about ADHD doesn't do anything for me at all.

The court sentenced him to nine years' imprisonment, consecutive to prior sentences.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Postconviction, Smith sought a new sentencing hearing. He argued that the trial court improperly minimized his ADHD and relied on an irrelevant factor by comparing his mental health issue to those suffered by persons involved in armed conflict. He also contended defense counsel should have objected to the court's comments and requested an evidentiary hearing to determine trial counsel's ineffectiveness.

The court denied the motion without a hearing. It explained in its written ruling that, while it "regret[ted] using the pejorative modifier, 'whiny,'" ADHD sometimes is offered as "a universal excuse for all manner[] of socially unacceptable behavior," and its comments about military service were "purely illustrative, to suggest that people are responsible for their conduct and ordinarily act accordingly when required to do so, even in the face of danger and risk." Smith appeals.

Smith contends the circuit court erred in denying him a hearing on his ineffective-assistance-of-counsel claim. A hearing is required only when the motion states sufficient material facts that, if true, would entitle the movant to relief. ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If it does, the court must hold a hearing. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If it does not or it presents only conclusory allegations, or if the record conclusively demonstrates that the movant is not entitled to relief, the court has the discretion to deny a hearing. ***Id.*** We review de novo whether the motion on its face alleges sufficient material facts that, if true, would warrant the requested relief. ***Id.***

Wisconsin applies the two-part ***Strickland v. Washington***, 466 U.S. 668 (1984), test for evaluating claims of ineffective assistance of counsel. ***State v. Roberson***, 2006 WI 80, ¶28, 292 Wis. 2d 280, 717 N.W.2d 111. To prevail, the defendant must prove both that counsel's

performance was deficient and that the deficient performance was prejudicial. ***Id.*** Courts may decide ineffective assistance claims based on prejudice without considering whether counsel's performance was deficient. ***Strickland***, 466 U.S. at 697. To establish constitutional prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

Sentencing is a discretionary decision. ***State v. Dalton***, 2018 WI 85, ¶36, 383 Wis. 2d 147, 914 N.W.2d 120. "On appeal, review is limited to determining if discretion was erroneously exercised." ***Id.*** The court must specify on the record the objectives of the sentence, such as protection of the community, punishment and rehabilitation of the defendant, and deterrence to others, and various other factors. ***State v. Gallion***, 2004 WI 42, ¶¶40-41, 43 n.11, 270 Wis. 2d 535, 678 N.W. 2d 197. "A circuit court erroneously exercises its sentencing discretion when it 'actually relies on clearly irrelevant or improper factors.'" ***Dalton***, 383 Wis. 2d 147, ¶36 (citation omitted). Determining whether a factor is aggravating or mitigating under the particular circumstances of the case is within the court's discretion. ***State v. Thompson***, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992).

The court considered the public need to be protected from individuals like Smith, a serial criminal who did not take advantage of numerous opportunities to change course and, in fact, continued to commit crimes while on supervision. It addressed Smith's character, noting his "reprehensible" failure to support his children despite being able-bodied with a capacity to work, that his conduct on supervision revealed no significant effort to alter his criminal behavior, and that his claims of remorse seemed insincere. It also considered that Smith needed to be punished to impress on him that society is "sick and tired" of his continued criminality.

Nonetheless, Smith argues that his history of ADHD should have been given positive weight and that his sentence was rendered illegal by the court's impermissible "reliance" on irrelevant anecdotes about others' service in this country's wars and military events.

In its memorandum denying Smith's postconviction motion, the court amplified why it did not view Smith's ADHD as a mitigating factor. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (circuit court has additional opportunity to explain its sentencing rationale in postconviction proceedings). The court wrote:

> Only briefly discussed in the presentence report, Mr. Smith's ADHD diagnosis does not seem to have been a big issue for him in his lifetime. Indeed, when his plea was taken, I inquired of him whether he had ever been treated for a mental or emotional disorder and his answer was "no." When interviewed by the agent [for the PSI], he could not recall when the diagnosis was made, except that it was prior to his teen years, and reported that he took the prescribed medication only briefly before throwing it away. He informed the agent that he is now "able to concentrate fine" and sees no need for current medication.
>
> [Inspite] of this emotional condition which is the nucleus of his motion, he has been able to graduate from high school on time, with but one suspension for skipping and no expulsions. He was not placed in special education and maintained a B/C average. Contemporaneously, he was earning an Auto Mechanics certification. He has enjoyed regular employment and at the time of the robbery … he had been working more than 45 hours weekly at a job he had held for more than two years.
>
> He has a criminal history which could be compatible with either ADHD or its absence, consisting of Theft, Burglary, Theft, Burglary, Criminal Mischief, Theft, Domestic Battery, Intentional Child Abuse, Negligent Child Abuse (Intentional Dismissed & Read In), Domestic Battery, Felony Bail Jumping as well as some forfeiture arrests. He has brought five children into the world and abandoned them after drunkenly beating two of them. He has been an absconder from supervision and has reportedly, after already having been convicted of two counts of child abuse, left his youngest child, one month old, home alone. The last time he was released from ES he was back in jail after involvement in an altercation with the mother of his youngest. He built a massive child support arrearage for his five children. He told the writer of

> his presentence that alcohol was a significant factor in all of his prior crimes.

The court's remarks at sentencing and in its denial of Smith's postconviction motion satisfy us that it appropriately exercised its discretion in not according Smith's ADHD the mitigating weight he would have preferred. That the court may have waxed on a bit about others' military sacrifices does not change our conclusion that the sentence overall was rooted in appropriate considerations. As the record conclusively demonstrates that Smith is not entitled to relief, the court properly denied his motion for an evidentiary hearing. *See* ***Allen***, 274 Wis. 2d 568, ¶9. We are fully satisfied that even if defense counsel had objected, it is not reasonably likely the objection would have been sustained and resulted in a different sentence. *See* ***State v. Toliver***, 187 Wis. 2d 346, 359, 523 N.W.2d 113 (Ct. App. 1994) (counsel not ineffective for failing to make meritless arguments).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and 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