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 IV

December 20, 2019

To:

Hon. Josann M. Reynolds
Circuit Court Judge
215 S. Hamilton St.
Madison, WI 53703

Matthew Moeser
Deputy District Attorney
215 S. Hamilton St., Rm. 3000
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Anne Christenson Murphy
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Alisha Lenae McKay
612 Russet Lake Dr.
Hoover, AL 35244

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

2018AP2262-CR State of Wisconsin v. Jacob M. Buchino (L.C. # 2016CF134)

Before Fitzpatrick, P.J., Blanchard and Kloppenburg, 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).

Jacob Buchino appeals a judgment of the circuit court convicting him of possession of child pornography, contrary to WIS. STAT. § 948.12(1m) (2017-18),[1] and from the order denying 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. We affirm.

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

Following Buchino's plea of guilty to a single count of possession of child pornography (involving an identified victim who was known to Buchino), the circuit court sentenced him to a probationary term of 3 years, with 6 months of jail time as a condition of probation, but staying the jail time for 4 months. Buchino did not immediately pursue an appeal from the June 1, 2017 judgment of conviction. In January 2018, the Wisconsin Department of Corrections notified the court that it had revoked Buchino's probation. In February 2018 the court sentenced him after revocation to a prison term.

In September 2018, Buchino filed a post-conviction motion for plea withdrawal, alleging that his trial counsel had provided ineffective assistance in connection with the plea negotiations. Specifically, Buchino contended that trial counsel had performed deficiently by advising Buchino that there was "no risk" that the State would withdraw its first offer. Buchino did not accept the first offer before the State withdrew it and the State made a second, somewhat less favorable offer. Buchino argued that he was prejudiced because, after he passed on the first offer (based on the "no risk" advice), he was stuck having to accept the second, less favorable offer, after which the circuit court gave him a sentence that was less favorable than the one he would have received if he had taken the first offer. The court denied the post-conviction motion without holding a hearing.

In this appeal, Buchino asks us to "reverse the denial of [his] postconviction [motion] for plea withdrawal and re-extension of the original plea offer," or in the alternative "reversal of the circuit court's postconviction decision and … resentencing."

Putting aside all other potential issues raised by either side on appeal, we affirm on the ground that Buchino fails to make a required showing, namely, prejudice resulting from the

alleged deficient performance of trial counsel. More specifically he fails to show a reasonable probability that his conviction or sentence would have been more favorable to him than the ones he received, but for his attorney's alleged deficient performance. *See* ***Lafler v. Cooper***, 566 U.S. 156, 164 (2012).

The parties agree, we think correctly, that Buchino cannot obtain any relief in this appeal unless he can show that, but for the alleged "no risk" advice of trial counsel, there is a reasonable probability that his conviction or sentence would have been more favorable to him if he had accepted the original offer. Bearing that in mind, we agree with the State's contention that Buchino does not make this showing.

Regarding the probability of a different conviction, as Buchino acknowledges, the conviction would have been the same under either offer. Under the terms of both, he was to enter a plea to the same offense, possession of child pornography.

Regarding the reasonable probability of a more favorable sentence, we explain why we reject Buchino's argument, beginning with two background points regarding the pre-trial negotiations and sentencing that are important to our analysis.

First, there was only a small difference between the State's proposed sentence recommendation in the first offer and its proposed recommendation in the second, and also a small difference between the State's recommendation in the first offer and the State's actual recommendation at sentencing: (1) the first offer was to recommend two years of probation, with no request for conditional jail time; (2) the second offer was still to recommend some amount of probation, still no recommendation of prison time, but the State could recommend

some amount of jail time; (3) the State's actual recommendation at sentencing, pursuant to the accepted second offer, was for three years of probation, with six months of conditional jail time.

Second, it appears likely that one factor before the sentencing court would have played a more significant potential role in the thinking of the sentencing court than small potential variations in the State's sentencing recommendations—a factor that would have been the same at a sentencing hearing following a plea on either the first or the second offer. This significant factor was the very vocal requests of the victim and her family for significant confinement. As Buchino acknowledges, at sentencing the victim and her family "provided powerful and emotional victim impact statements" seeking "the maximum possible prison sentence." This is not to say that the experienced circuit court judge would have been compelled to impose confinement time based on these requests, or that strongly expressed statements would necessarily have outsized influence. The court was obligated to exercise its neutral judgment based on all pertinent considerations. However, the victim statements were an important consideration that would have been before the court even if Buchino had accepted the first offer, and the statements gave the court a strong basis to give Buchino a less favorable sentence than any iteration of the State's offered sentencing recommendations.[2]

[2] We do not understand Buchino to suggest that his hypothetical acceptance of the first offer would have resulted in a combined plea and sentencing hearing that occurred before the victims could be notified and be given an opportunity to present victim impact statements. This would assume clear violations of victim rights under various provisions of WIS. STAT. § 950.04, not caught by any staff of the prosecutor's office nor by any court staff, including the circuit court judge. There is a suggestion in the record that victim rights were at least initially overlooked by the prosecutor during the period of initial plea negotiations. But it is not reasonable to assume that the circuit court would have gotten through a plea and sentencing hearing in a case of this type without the topic of victim rights coming up and the victims being given a chance to address the court.

With this background, we reject Buchino's limited argument on the prejudice issue. He contends that the sentencing court "largely adopted the state's sentencing recommendation," which shows "a reasonable probability exists that the court would have accepted the original offer." However, in staying four months of the six-month-conditional jail time, the court in fact diverged from the State's recommendation and, in not imposing prison time, the court also diverged from the recommendation of the victims. It is true that the sentence was much closer to the State's recommendation than to that of the victims, but Buchino's suggestion of lock-step agreement with the State's recommendation is not supported by the record.

More generally, a circuit court can place greater, lesser, or no weight on the recommendations from anyone who is entitled to address the court at a sentencing hearing. And here, Buchino provides no reason for us to conclude that the circuit court was not accurate in stating, in the course of resolving the post-conviction motion, that in fashioning a sentence the court "believed [it] to be the proper disposition … without adopting the recommendation of either the State or that of defense counsel." Buchino points only to reasons to think that the sentencing court could *possibly* have settled on a lesser sentence if the State had made the same recommendation as it proposed in the first offer, but Buchino points to no reasons to think that this would have been a *reasonable probability*.

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* 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