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May 26, 2021

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

2020AP1230-CR

State of Wisconsin v. Jeffery H. Parkans (L.C. #2012CF102)

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

Jeffery H. Parkans appeals from a judgment and an order of the circuit court. Upon reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

Parkans pled guilty to first-degree sexual assault—use of a dangerous weapon, false imprisonment, criminal damage to property—domestic abuse, and disorderly conduct—domestic abuse. *See* WIS. STAT. §§ 940.225(1)(b), 940.30, 943.01(1), 947.01(1). The charges stemmed from an incident in which Parkans, having learned that his ex-fiance would be taking a vacation with another man, pulled out a knife, repeatedly threatened to kill her, stabbed her bed, and sexually assaulted her. Parkans was sentenced on October 29, 2012, but subsequently filed motions for resentencing and to vacate repeat enhancers. The circuit court granted the motion and ordered a resentencing. Parkans was resentenced on February 11, 2015. On July 9, 2018, Parkans filed a motion for postconviction relief asserting ineffective assistance of counsel, additional sentence credit, and that the circuit court used inaccurate information at resentencing. The circuit court vacated his sentence for a second time and ordered the record be sealed for the purposes of the third sentencing. At the third sentencing hearing on September 4, 2019, the court sentenced Parkans to thirty-five years of initial confinement and ten years of extended supervision. On June 1, 2020, Parkans filed a postconviction motion for resentencing and a motion for corrected judgment of conviction. Following a hearing, the circuit court denied the motion for a resentencing.

¹ All references to the Wisconsin Statutes are to the 2019-20 version.

On appeal, Parkans raises two arguments. First, Parkans alleges ineffective assistance of trial counsel at sentencing. He argues that counsel's performance was deficient because counsel did not discuss the specifics of his Borderline Personality Disorder (BPD). Parkans further argues that there is a reasonable probability that his sentence would have been lower had counsel done so. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Sixth Amendment to the United States Constitution (applied to states by the Fourteenth Amendment) and Article I, Section 7 of the Wisconsin Constitution guarantee a criminal defendant the right to effective assistance of counsel. *State v. Dillard*, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44. To establish an ineffective assistance of counsel claim, “the defendant must demonstrate that: (1) defense counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed to the defendant by the Sixth Amendment; and (2) this deficient performance prejudiced the defense so seriously as to deprive the defendant of a fair trial, a trial whose result is reliable.” *State v. Schaefer*, 2008 WI 25, ¶87, 308 Wis. 2d 279, 746 N.W.2d 457 (citation omitted). Our review presents a mixed question of fact and law. *State v. Harbor*, 2011 WI 28, ¶34, 333 Wis. 2d 53, 797 N.W.2d 828. “We will not disturb the circuit court’s findings of fact unless they are clearly erroneous, but the ultimate determinations of whether an attorney’s performance fell below constitutional standards and whether the defendant was prejudiced as a result are questions of law.” *Id.*

During the June 26, 2020 resentencing hearing, the circuit court assumed that counsel’s performance was deficient and analyzed the prejudice prong independently. This was a valid exercise of judicial discretion. *See Strickland*, 466 U.S. at 697. This court approaches the ineffective assistance of counsel claim from the same posture.

Assuming that counsel's performance at sentencing was deficient, we conclude that it was not prejudicial. For counsel's performance to be prejudicial, there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Harbor*, 333 Wis. 2d 53, ¶72. Parkans claims that there is a reasonable probability that the result of the sentencing would have been different because his BPD relates to each of the *McCleary* sentencing standards and failing to discuss his mental illness affected the court's consideration of those standards. See *McCleary v. State*, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). Yet, Parkans' BPD was discussed at such length during the resentencing hearing that the result would have been the same even if counsel had argued it.

Nearly five months prior to sentencing, the circuit court ordered a psychological evaluation of Parkans by Dr. Robert Rawski. According to Rawski, Parkans "suffers from Persistent Depressive Disorder ... and Borderline Personality Disorder (BPD) with narcissistic traits." In his report, Rawski thoroughly discusses BPD, including its origins, symptomology, relation to Parkans' offenses, and potentiality for treatment. It is clear from the transcript that the court, Parkans' counsel, and the State had read Rawski's evaluation prior to the hearing and understood the meaningful role it would play in sentencing. During the hearing, the circuit court and the parties discussed the report repeatedly. At one point, the court concluded that although Parkans' mental illness could be treated, it "provides some cause for concern," given that Parkans' BPD may have led him to act violently in his intimate relationships. The court also considered the relationship between Parkans' mental illness and his offenses, stating, "I don't doubt that the borderline personality disorder contributed to what he did, and I think Dr. Rawski found the same thing. But he knew what he was doing, and he knew it was wrong." Parkans' mental illness was discussed consistently from the outset of the hearing until its conclusion.

In addition to the substantial discussion of Parkans' BPD, the circuit court considered the *McCleary* factors—protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant—and did so specifically in relation to Parkans' mental illness. *See id.* Regarding protection of the public, the court noted, "I have very real concerns that if Mr. Parkans is in the public again and he slips up on treating his mental illness, what will happen if he ever finds himself in another position where he thinks he has nothing left to lose again?"

The court also considered the gravity of the offense:

So I think it's an extremely serious offense. The fact it was done with a child in the house I think is an aggravating factor. Mr. Parkans admitted that night that he knew exactly what he was doing and he knew it was wrong. I don't doubt that the borderline personality disorder contributed to what he did, and I think Dr. Rawski found the same thing. But he knew what he was doing, and he knew it was wrong.

Finally, the court considered Parkans' rehabilitative needs:

When I looked at character and rehabilitation needs, the positives that I found were that Mr. Parkans has an HSED and he's got education beyond that; actually, EMT and auto mechanics. He's got a good work history. He doesn't have any AODA issues. His record is limited and somewhat dated, although very serious.

....

The mental health issues, you know, I don't know if that's an aggravating factor or a mitigating factor. I think it's definitely a concern. I mean ... Parkans had somewhat of a dysfunctional upbringing. His mother had some issues. He didn't know his dad. He was bullied.

So his attorney pointed out in detail some of the background, and I'm sure that he was suicidal on numerous occasions. He tried to commit suicide....

....

I think the mental health history provides some cause for concern, but there is treatment for it.

The record reflects that the circuit court considered Parkans' overall mental health and his BPD specifically. Accordingly, it is not apparent that any further advocacy by Parkans' counsel would have influenced the circuit court's consideration of the *McCleary* factors or the outcome of the proceeding. Thus, trial counsel's performance at sentencing was not prejudicial.

Parkans' second argument is that the circuit court erroneously exercised its discretion by failing to adequately consider his BPD during sentencing. Specifically, he claims that the court gave no consideration to the fact that his conduct was explained by his untreated mental illness. Our review of the circuit court's sentencing decision is limited to determining if discretion was exercised erroneously. *McCleary*, 49 Wis. 2d at 278. "Sentencing decisions are afforded a presumption of reasonability consistent with Wisconsin's strong public policy against interference with a circuit court's discretion." *State v. Harris*, 2010 WI 79, ¶3, 326 Wis. 2d 685, 786 N.W.2d 409. A proper exercise of discretion "contemplates a process of reasoning" wherein the court considers the "facts that are of record or that are reasonably derived by inference from the record" and renders "a conclusion based on a logical rationale founded upon proper legal standards." *McCleary*, 49 Wis. 2d at 277.

In pleading guilty, Parkans agreed to stipulate to the facts in the criminal complaint, which are as follows. On February 15, 2012, Parkans met with his ex-fiance, "Dana." Parkans asked Dana if they could get back together, but Dana told him that she only wanted to be friends with him. Dana agreed that Parkans could spend the night at her residence, but she told him he would have to keep his clothes on. Later, at Dana's residence, the two were laying in bed when Parkans asked about an upcoming vacation Dana was taking with another man. Dana told Parkans that she did not want to discuss it with him.

Parkans then threatened Dana and pulled out a knife. Dana screamed but Parkans put his hand over her mouth. Dana managed to get out of bed; Parkans, still holding the knife, continued to ask Dana about her new boyfriend. Parkans stated at this point that “he had gone too far and could not turn back.” Parkans told Dana that if he was going to prison, he was going to have sex with her. Dana refused to have sex with Parkans. Parkans then stabbed the bed with the knife a couple of times and threatened to stab Dana if she did not take off her sweatpants. Parkans forced Dana to perform oral sex on him, at knifepoint, and sexually assaulted her with an object. Parkans then told Dana that he wanted the two to leave together. At this point, Dana managed to leave the room and wake up her daughter, who was sleeping in another room. The daughter called the police, who arrived before the couple left the residence.

In its sentencing statement, the circuit court noted,

I think it’s an extremely serious offense. The fact it was done with a child in the house I think is an aggravating factor. Mr. Parkans admitted that night that he knew exactly what he was doing and he knew it was wrong. I don’t doubt that the borderline personality disorder contributed to what he did, and I think Dr. Rawski found the same thing. But he knew what he was doing, and he knew it was wrong.

Moreover, the court found it “aggravating” that Parkans had prior convictions for crimes against his ex-wife that were “eerily similar to some of the allegations here.” The court noted that Parkans’ criminal history reflected that he reacted violently when he felt insecure in his relationship or jealous of other men, or when his romantic partner attempted to break up with him. Thus, the court found, although Parkans may or may not be “a danger to the public,” he was “[m]ost certainly” “a danger to anybody that he’s in a relationship with.” Regarding this “protection of the public” aspect of sentencing, the court was very concerned “about anybody that Mr. Parkans is in an intimate or romantic relationship with.”

On appeal, Parkans claims that the circuit court abused its discretion because it gave no consideration to the fact that the pattern of conduct was explained by Parkans' untreated BPD. Yet, the court explicitly considered the relationship between Parkans' BPD and his offenses: "Parkans admitted that night that he knew exactly what he was doing and he knew it was wrong. I don't doubt that the borderline personality disorder contributed to what he did, and I think Dr. Rawski found the same thing. But he knew what he was doing, and he knew it was wrong." The court considered the relationship between Parkans' BPD and his offenses and provided a logical rationale for the sentence it imposed.

Parkans also claims that the circuit court did not specifically consider how BPD affects his behavior, the treatment for BPD, and the prognosis for treatment, and apply those specifics to the *McCleary* sentencing criteria. Yet, *McCleary* does not require sentencing courts to relate every facet of the case to the sentencing factors. *McCleary* only requires courts to impose "the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant" and to reach sentencing decisions through "a logical rationale founded upon proper legal standards." *See id.* at 276-277 (citation omitted). The fact that the circuit court did not independently relate every aspect of Parkans' BPD to each sentencing standard is not erroneous. The circuit court properly exercised its discretion by recognizing that Parkans has BPD and considering it during its discussion of the *McCleary* sentencing standards.

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