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**DISTRICT II**

June 23, 2021

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

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2020AP1049-CR                      State of Wisconsin v. Kristian W. White (L.C. #2018CF223)

Before Neubauer, C.J., Reilly, P.J., and Davis, 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).**

Kristian W. White appeals from a judgment convicting him of second-degree sexual assault of a fourteen-year-old child and from a circuit court order denying his postconviction motion challenging his sentence on the grounds that the circuit court considered improper factors. 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 (2019-20).<sup>1</sup> We conclude that the circuit court’s sentencing remarks were premised on White’s character and the impact on the victim of White’s crime, which were proper considerations at sentencing. We affirm.

White pled guilty to second-degree sexual assault of a child and received a ten-year term (three years of initial confinement and seven years of extended supervision). White’s victim became pregnant as a result of the sexual assault. Postconviction, White challenged as improper the following remarks the circuit court made at sentencing.

[A]nd according to what she reports, like so many other victims, she is encouraged by the offender, by the rapist, to have an abortion, and there are many people who have very strong philosophical and religious objections to that even—and, of course, there are lots of women who are not concerned with religious considerations there who still think that that concept is offensive for their own flesh and blood, but this is what is reported to me that this child was told. So not only is she victimized, but she is put in that position, and that is the kind of encouragement she is getting at age 14.

....

[I]n the era in which we live, in fact, I’ll tell you what. We get many, many cases where pregnant women are punched in their abdomen purposefully and sometimes with even—in the context where there are remarks being made about the woman being pregnant—and it’s an abusive practice, and it’s even among those who are the most ardent defenders of the practice of abortion in this country, it’s offensive, or at least it should be.

So this is what this 14-year-old girl is confronted with....

Postconviction, White argued that these remarks show that the circuit court considered impermissible matters having to do with abortion (which is a lawful activity under various circumstances) and physical abuse of pregnant persons (which White did not do and which the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

victim did not allege occurred). White further claimed that trial counsel was ineffective for failing to object to these remarks.<sup>2</sup>

In its memorandum decision denying White's postconviction motion without a hearing, the circuit court stated that its remarks about abortion and physical abuse of pregnant persons were made as part of the court's consideration of White's character. Features of White's character included his lack of remorse, his attempt to evade responsibility for the crime<sup>3</sup> and the resulting child support obligation, his continuing attempt to conceal the assault, and the impact on the victim of all of White's conduct. The court recognized that White did not punch the victim in the stomach, and the sentence was not based on conduct in which White did not engage. At sentencing, the court cited physical abuse as an example of how pregnant sexual assault victims can be further victimized by a defendant seeking to avoid the consequences of the crime, just as White sought to avoid the consequences of his crime. White appeals.

The circuit court had discretion to deny White's postconviction motion without a hearing if the motion was legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

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<sup>2</sup> When the circuit court referred to White's demand that the victim have an abortion, White's trial counsel asked the circuit court to clarify the basis for that remark. The circuit court directed counsel to a letter from the victim in which she said, "He told me there was no way I was pregnant and that I still needed to keep my mouth shut, and if there was any way that I could be pregnant, that he definitely wanted me to abort this child." Trial counsel agreed that the victim's letter contained this statement.

<sup>3</sup> During allocution, White disavowed statements he made to the presentence investigation report author in which he denied being a criminal, protested being charged with a crime for his conduct and otherwise minimized his conduct with the victim. The circuit court did not accept White's attempt to retract these statements and saw them as further evidence of White's bad character.

The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

*Id.* (footnote omitted). Here, the record conclusively demonstrates that White was not entitled to relief on his postconviction motion.

At sentencing, a circuit court may consider numerous factors including the circumstances and gravity of the offense, the defendant's remorse, culpability and character, and the impact on the victim. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76; see *State v. Jones*, 151 Wis. 2d 488, 496, 444 N.W.2d 760 (Ct. App. 1989) (victim impact considered at sentencing). Our review of the sentencing transcript confirms that the circuit court considered these factors in this case.

At sentencing, the circuit court deemed White a criminal who sexually assaulted a child and condemned White's suggestion that, because he and the child were impaired by alcohol, the child bore some responsibility for the assault. The court found that the assault had a devastating effect on the victim and that White's demand that she have an abortion further victimized her because that demand was part of White's attempt to further conceal the assault and evade responsibility for the crime. The sentencing transcript reveals and the court's postconviction memorandum confirms that the court's references to abortion and physical abuse of pregnant persons were made in the context of examining White's character and the impact on the victim of his conduct. The court did not suggest that White had physically abused the victim. Rather, the court referred to punching a pregnant person to illustrate a type of behavior serving the same

purpose as White's attempt to evade responsibility for his criminal conduct by demanding that the victim not reveal the assault and obtain an abortion.<sup>4</sup>

We conclude that the circuit court properly exercised its sentencing discretion and properly rejected White's postconviction challenge to his sentence.

In the absence of circuit court error at sentencing, White's ineffective assistance of trial counsel claim fails. Trial counsel's failure to object at sentencing was not deficient performance because the challenge would not have succeeded. See *State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis.2d 270, 647 N.W.2d 441; *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694 (to succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was deficient and prejudicial); see *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (we need not consider whether trial counsel's performance was prejudicial if we conclude that counsel's performance was not deficient).

We conclude that the record conclusively demonstrates that White was not entitled to relief from his sentence on the grounds alleged. *Allen*, 274 Wis. 2d 568, ¶12. Therefore, the circuit court did not misuse its discretion when it denied White's postconviction motion without an evidentiary hearing. *Id.*

Upon the foregoing reasons,

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<sup>4</sup> We agree with the State that the reference to physical abuse was intended as an example of the lengths to which some defendants have gone to evade responsibility for a sexual assault.

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.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*